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TRANSCRIPT OF RECORD

(Pages 1 to 444)

Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DuP. BAYARD, RECEIVER, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN AND J. S. FARLEE & CO., INC., PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 150—PETITION FOR CERTIORARI FILED JUNE 23, 1952
No. 160—PETITION FOR CERTIORARI FILED JUNE 26, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAIROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Transcript of Record
In Five Volumes

Volume I
(Pages 1 to 444)

**Appeals from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of Julius Levy 283

Argument on Motion for Rearrangement and to Amend Findings of Fact and Conclusions of Law Appearing in the Court's Opinion Filed Sept. 6, 1949, and Argument on Motion of Plaintiff to Join Receiver as Party Plaintiff Under Rule 25 (c) R.C.P. 417

Amended Judgment 324

Answer and Counterclaim of Defendants 11

Answer of Defendant The Western Realty Company 117

Answer of Defendant The Western Realty Co. to Complaint in Intervention 158

Answer of Defendant The Western Realty Company 232

Exhibit 1—Letter Dated May 19, 1947 238

Answer of Defendants The Western Pacific Railroad Co., et al, to Plaintiff's Supplemental Bill of Complaint 240

Exhibit 1—Letter Dated May 19, 1947 251

INDEX PAGE

Answer of The Western Pacific Railroad Corporation to Complaint in Intervention..... 156

Answer of The Western Pacific Railroad Co., et al, to Complaint in Intervention..... 176

Appeal:

Certificate of Clerk to Record on.....2162

Designation by Appellees of Additional Portions of the Record, Proceedings and Evidence to Be Contained in the Record on 328

Notice of.....326, 327

Statement by Appellants The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, of Points on Which They Intend to Rely on.....2168

Bill of Complaint for Equitable Relief..... 6

Certificate of Clerk to Record on Appeal.....2162

Civil Docket..... 330

Complaint in Intervention..... 123

Defendants' Objections to Findings and Conclusions Proposed by Plaintiff..... 305

Designation by Appellee's of Additional Portions of the Record, Proceedings and Evidence to Be Contained in the Record on Appeal 328

INDEX PAGE

Exhibits, Defendants':

No. 1 —Notice Filed Feb. 4, 1949.....1830

2 —Memorandum Entry.....1830

3 —Letters—Statements—Memorandums 1831

4A—Memorandum 1854

4B—Letter Dated January 14, 1941..1856

4C—Letter Dated August 7, 1941....1859

5A—Letter Dated May 20, 1943.....1861

5B—Letters 1862

5C—Letters 1876

6 —Telegram Dated March 2, 1943..1881

7 —Letter Dated March 15, 1943.....1882

8 —Telegram Dated May 7, 1943....1883

9 —Letter Dated May 21, 1943.....1884

10 —Letter Dated March 9, 1944.....1891

11 —Letter Dated April 1, 1943.....1893

12 —Order Authorizing Establishment of a Reserve Fund for Contingent Tax Liabilities.....1895

13 —Letter Dated May 19, 1944.....1897

INDEX PAGE

Exhibits, Defendants'—(Continued):

No. 14 —Letter Dated September 12, 1944. 1899

15 —Letter Dated September 14, 1944. 1903

17 —Schedule of Preferred Stock of Western Pacific Railroad Corporation Owned as at April 1, 1948, Showing Date of Purchase and Cost of Each Certificate 1904

18 —Summary Schedule of All Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock..... 1905

19 —Schedule of All Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock 1907

20 —Order 1908

21 —Order Appointing Trustees..... 1916

22 —Opinion and Order Confirming the Appointment of Trustees as Appointed by the Court and Ratified by the Interstate Commerce Commission..... 1923

INDEX PAGE

Exhibits, Defendants'—(Continued):

No. 23 —Order Authorizing and Directing Transfer of Preferred and Common Stock of the Debtor to the Reorganization Committee and Approving Action of the Committee in Joining in a Contract for Securing Control of Such Stock and Acts of the Committee in Connection With Such Contract 1930

24A—Order Approving Designations by the Reorganization Committee Under the Plan of Reorganization of the Debtor, of the Trustees, Transfer Agents, Registrars, Scrip Agent and Engraver and Printer of Securities for Purposes of the Plan of Reorganization and Authorizing Agreements or Arrangements Proposed by Said Committee for Their Compensation and Expenses .. 1930

INDEX PAGE

Exhibits, Defendants'—(Continued):

No. 24B—Order Making an Allowance to Be Paid Out of the Debtor's Estate for Certain Expenses Incurred and to Be Incurred in Connection With the Proceedings and Plan of Reorganization by the Reorganization Committee 1939

25 —Ninth and Final Report and Accounting by the Trustees of the Property of the Debtor, and Petition for Approval of Their Acts and Accounts, for Their Discharge as Trustees and for the Exoneration of Their Bonds 1944

26 —Order Approving and Confirming Ninth and Final Report and Accounting by the Trustees of the Property of the Debtor, Approving and Confirming Their Acts and Accounts, Discharging Them as Trustees and Exonerating Their Bonds..... 1986

28 —Order Providing for Hearing Upon Petition for Authority to Establish Reserve Fund for Contingent Tax Liabilities... 1991

INDEX PAGE

Exhibits, Defendants'—(Continued):

No. 29 —Order Granting Petition of Intervention of the Western Pacific Railroad Corporation....1994

30 —Petition of Reorganization Committee for Approval of Their Expenses and for a Final Order Discharging the Committee and Terminating the Proceedings.....1996

31 —Order Providing for Hearing Upon Petition of Reorganization Committee for Approval of Their Expenses and for a Final Order Discharging the Committee and Terminating the Proceedings.....2010

32 —Final Order.....2013

33 —Reorganization Plan of The Western Pacific Railroad Co..2021

34 —Memorandum for Mr. Matthew From Mr. Enersen.....2023

35A—Telegram.....2027

35B—Letter Dated January 26, 1944..2027

37A—Letter Dated September 27, 1946.2028

37B—Letter From M. J. Curry.....2030

INDEX PAGE

Exhibits, Defendants'—(Continued):

No. 37C—Letter Dated October 4, 1946....2031

41 —Computation of Federal Income and Excess Profits Taxes....2032

43 —Computation of Federal Income and Excess Profits Taxes....2034

44 —Computation of Federal Income and Excess Profits Taxes....2036

45 —Computation of Federal Income Taxes 2038

46 —Computation of Federal Income Taxes 2040

47 —Computation of Federal Income Taxes 2041

49B—Record of Weekly Sales of Preferred and Common Shares of The Western Pacific Railroad Co. on New York Stock Exchange Jan. 1, 1945 to Oct. 31, 1946, as Published in "The Commercial and Financial Chronicle" of New York....2042

50 —Letter Dated Dec. 9, 1947.....2045

51 —Redistribution of the Debits to Freight Revenue.....2050

53 —Letter Dated November 28, 1923.2051

INDEX PAGE

Exhibits, Defendants'—(Continued):

No. 54 —Letters 2053

55 —Letters 2070

56 —Letters 2087

57 —Letters 2093

58 Letter Dated September 17, 1945..2098

59 —Schedule of All Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock 2102

Exhibits, Interveners':

No. 3 —Extract From Weekly Information Letter No. 504, Dated March 13, 1943, From Association of American Railroads, Washington, D. C.....2111

4 —Letter Dated March 17, 1943...2112

5 —Letter Dated February 21, 1945.2125

6 —Letter Dated May 31, 1944.....2127

7 —Letter Dated June 14, 1944.....2128

8 —Letter Dated March 27, 1943....2130

9 —Letter Dated December 11, 1946.2133

10 —Letter Dated February 11, 1947.2135

11 —Letter Dated February 24, 1948.2136

INDEX PAGE

Exhibits, Interveners'—(Continued):

No. 14 —Letters Dated February 11, 1947.2142

15 —Letter Dated June 5, 1943.....2145

16 —Letter Dated June 26, 1943.....2148

17 —Letter Dated June 8, 1945.....2150

18A—Telegram Dated January 28, 1944 2151

18B—Telegram Dated January 28, 1944 2152

18C—Letter Dated January 25, 1944...2153

19 —Letter—Petition for Authority to Establish a Reserve Fund for Contingent Tax Liability and for Postwar Modernization and Improvement—Order Authorizing Establishment of a Reserve Fund for Contingent Tax Liability and for Postwar Modernization and Improvement 2155

Exhibits, Plaintiff's:

No. 6 —Claim 1654

7 —Stipulation and Agreement Between Plaintiff and Defendants Relating to Agreement With the Bureau of Internal Revenue 1658

INDEX PAGE

Exhibits, Plaintiff's—(Continued):

No. 8 —Order Approving Plan of Reorganization for Debtor.....1666

10 —Order Confirming Plan of Reorganization 1674

11 —Agreement 1679

12 —Petition of Reorganization Committee for and Order Approving Use of the Debtor Co. in Carrying Out and Making Effective the Plan, Approving Proposed Amendments to the Articles of Incorporation and Proposed New By-Laws of Debtor Co. and Approving Forms of Preferred and Common Stock Certificates and Directing Action With Respect Thereto 1699

13 —Order Approving Use of the Debtor Co. in Carrying Out and Making Effective the Plan, Approving Proposed Amendments to the Articles of Incorporation and Proposed New By-Laws of Debtor Co. and Approving Forms of Preferred and Common Stock Certificates and Directing Action With Respect Thereto.....1706

INDEX PAGE

Exhibits, Plaintiff's—(Continued):

No. 14 —Identical With Exhibits Attached to the Answer and Counterclaim Pages 36 to 108, Volume 1.....1711

15 —Agreement.....1711

17 —Schedule of Preferred and Common Stockholders of Record September 11, 1935-September 16, 1947.....1717

18 —Securities of Western Pacific Railroad Company.....1718

21 —Schedule of Officers.....1719

22 —Schedule of Directors.....1720

23 —The Western Pacific Railroad Corporation Schedule of Payments Made to Officers, Counsel and Employees.....1721

24 —Schedule of Payments Made to Pierce and Greer, or H. Brua Campbell.....1723

25 —List of Corporate Officers and Terms Thereof, January 1, 1935, to February 12, 1948...1724

26 —Ballot.....1725

27 —Statements.....1729

INDEX PAGE

Exhibits, Plaintiff's—(Continued):

No. 28 —Memorandum for File.....1735

29 —Letter Dated January 27, 1943..1737

30 —Memorandum of Conference June 2, 1943.....1738

31 —Letter Dated November 9, 1943..1742

32A—Letter Dated April 21, 1945.....1743

39E—Letter Dated April 8, 1943.....1746

39F—Letter Dated April 20, 1943....1748

42 —Statement Dated November 15, 1948—Letters to Mr. Elsey...1749

43 —Letter Dated July 25, 1944—Letter Dated July 26, 1944.....1753

50 —Letter Dated May 20, 1943.....1757

51 —Memo—June 26, 1943.....1764

52 —Letter Dated May 26, 1943.....1765

53 —Memorandum.....1769

58 —Petition for Authority to Establish a Reserve Fund for Contingent Tax Liabilities.....1772

63 —Memorandum for Colonel Coulson 1774

64 —Letter Dated May 31, 1946.....1779

65 —Power of Attorney.....1784

INDEX PAGE

Exhibits, Plaintiff's—(Continued):

No. 66 Telegram 1785

68 —Letters 1787

69 —Letters Dated May 5, 1947 1794

70 —Letter Dated May 6, 1947 1797

71 —Letter Dated May 19, 1947 1799

72 —Letter Dated Feb. 11, 1947—Resolution of Board of Directors. 1801

73 —Summary of Comparative Tax Computations 1804

74 —Letter Dated November 8, 1943. 1809

75 —Letter Dated November 13, 1943. 1815

76 —The Western Pacific Railroad Company Journal 1818

80 —The Western Pacific Railroad Corporation and Its Affiliates Federal Income Taxes and Excess Profits Taxes on a Separate Return Basis 1825

Final Order 108

Findings and Conclusions Proposed by Plaintiff 277

Findings of Fact and Conclusions of Law ... 319

Judgment 320

Names and Addresses of Attorneys 1

INDEX PAGE

Notice of Appeal 326, 327

Notice of Motion of Plaintiff and of Alexis I. duP. Bayard, Receiver, to Join Receiver as Party Plaintiff Under Rule 25 (c) R.C.P.... 289

Notice of Motion for Reargument and to Amend Findings of Fact and Conclusions of Law Appearing in the Court's Opinion Filed Sept. 6, 1949 280

Opinion 258

Order Authorizing Establishment of a Reserve Fund for Contingent Tax Liabilities..... 116

Order Denying Application for Temporary Restraining Order on Condition, and Pretrial Order 163

Order Directing the Revesting of Properties of the Debtor in the Debtor Company, Fixing the Date for Consummation of the Plan and Authorizing and Directing the Carrying Out of the Plan..... 36

Exhibit A—Trustees' Deed..... 62

B—Satisfaction of Mortgage..... 67

C—Satisfaction of Mortgage..... 72

D—Proposed Agreement..... 76

E—Salary Agreement..... 81

F—Letter of Instructions..... 85

INDEX PAGE

Order Dispensing With the Printing in the Record of Certain Exhibits.....2175, 2176

Order Granting Leave to Intervene..... 122

Order Granting Motion to Amend Judgment.. 323

Order Under Rule 25 (c) Directing the Joinder of Party Plaintiff 317

Pre-Trial Conference..... 399

Proceedings on Application for Temporary Restraining Order..... 334

Reply to Counterclaim of Defendants..... 120

Reporter's Transcript.....331, 334, 399, 417, 487

Statement by Appellants Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., of the Points on Which They Intend to Rely.2173

Statement by Appellants The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, of Points on Which They Intend to Rely on Appeal.....2168

Stipulation and Agreement Between Plaintiff and Defendants Relating to Agreement With the Bureau of Internal Revenue..... 168

Exhibit A—Copies of Proposal and Acceptances 171

Stipulation for Substitution of Meredith H. Metzger, Formerly Meredith H. Van Kirk, as a Plaintiff in Intervention..... 253

Order Re..... 257

INDEX PAGE

Supplemental Bill of Complaint..... 208

Witnesses, Defendants':

Cockburn, James L. Jr.

—direct.....1501, 1538

—cross.....1566

—redirect.....1583

Coulson, Robert E.

—direct.....1478

Droit, Clarence L.

—direct.....1577

Ehrman, Sidney M.

—direct.....1222

—cross.....1245

Elsey, Charles

—direct.....1249, 1307

—cross.....1326, 1334

—redirect.....1359

—recross.....1361

INDEX PAGE

Witnesses, Defendants'—(Continued):

Grady, Paul
—direct 1363

Levy, William G.
—direct 1614

Mintzer, Lucio M.
—direct 1579

Nicodemus, Frank C. Jr.
—direct 1029, 1112
—cross 1115

Osborn, Alexander Perry
—direct 988
—cross 1022, 1025
—redirect 1028

Polk, James K.
—direct 1396
—cross 1438, 1462
—redirect 1469

Sutherland, William A.
—direct 1586

INDEX PAGE

Witnesses, Plaintiff's:

Buchanan, Robert

—direct 911

—cross 924

Curry, Michael J.

—direct 636, 649, 684, 711, 748

—cross 719, 789, 889

Sloss, Marcus C. (Deposition)

—direct 1599

—examination by Mr. Adams...1605, 1610

—re-examination by Mr. Clark.....1608

Wood, Willis D.

—(deposition) 1121

Supplemental transcript of record from U.S.D.C. for the Northern District of California, Southern Division 2179

Exhibit No. 23-A—Petition of reorganization committee for an order approving and authorizing, etc. 2179

Exhibit No. 23-B—Order approving and authorizing mortgage indentures, etc. 2198

Proceedings in U.S.C.A. for the Ninth Circuit 2211

Order of submission 2211

PAGE

Order directing filing of opinions and filing and recording of judgment 2212

Opinion, Byrne, J. 2213

Dissenting opinion, Fee, J. 2239

Judgment 2255

Application of interveners and appellants, Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., for extension of time within which to file petition for rehearing and for stay of issuance of mandate 2256

Application of appellants, the Western Pacific Railroad Corporation and Alexis I. duP. Bayard, receiver, for extension of time within which to file petition for rehearing and for stay of issuance of mandate in the meanwhile 2257

Order denying petitions for rehearing, etc. 2259

Per curiam on appellants' petitions for rehearing 2260

Dissenting opinion, Fee, J. 2261

Petition for leave to file a motion to vacate order striking appellant's petition for rehearing en banc and reinstating such petition 2263

Appendix I—Per curiam on appellants' petitions for rehearing 2278

Appendix II—Dissenting opinion, Fee, J. 2278

Appendix III—Motion to vacate order striking petition for rehearing en banc and reinstating said petition, and petition for rehearing en banc 2280

Praecipe for record 2282

PAGE

Clerk's certificate 2285

Supplemental transcript of record in U.S.C.A. for the Ninth Circuit 2287

Order directing filing of opinions on motion to vacate order, etc., and denying said motion 2287

Opinion, Healy, J. 2288

Supplemental praecipe for record 2308

Clerk's certificate 2311

Second supplemental transcript of record in U.S.C.A. for the Ninth Circuit 2313

Supplement to dissenting opinion, Denman, J. 2313

Clerk's certificate 2317

Orders extending time to file petition for writ of certiorari 2319

Orders allowing certiorari 2323

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In the District Court of the United States, for the Northern District of California, Southern Division

26508G

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, THE WESTERN PACIFIC RAILROAD CORPORATION,

Plaintiff,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Defendants.

BILL OF COMPLAINT FOR EQUITABLE RELIEF

The Western Pacific Railroad Corporation, plaintiff herein, complaining of the above-named defendants, respectfully shows:

I.

That the plaintiff is a domestic corporation created and existing under the laws of the State of Delaware.

II.

That each of the defendants is a domestic corporation created under the laws of the State of California except that The Western Realty Company and the Deep Creek Railroad Company are respectively domestic corporations of the States of Colorado and Utah.

III.

That this is a civil action in equity between citizens of different states; that the amount in controversy exceeds the sum of $5,000; and to the extent that it relates to or may affect obligations and liabilities of the Trustees in the proceeding No. 26591-S assumed by the defendant, The Western Pacific Railroad Company, and to the res transferred to it by said Trustees it is an ancillary dependent suit within the jurisdiction reserved by this Court under its Order dated March 28, 1946.

IV.

That during the years 1942 and 1943 and the year 1944 or some part thereof the plaintiff and the defendants were an affiliated group of corporations within the meaning of Section 141 of the Internal Revenue Code and plaintiff on behalf of itself and of the defendants filed Income and Excess Profits Tax Returns on a consolidated basis

as the result of which there may be tax liabilities asserted or tax refunds recognized or inter-corporate adjustments required, the amount of which cannot be determined and equitably charged against or credited to one or more of the members of the affiliated group without an accounting and a judicial determination of their rights and liabilities inter sese and without the intervention of a Court of Equity. That for the year 1942 a Return was filed showing tax liabilities for the affiliated group which were paid by the then Trustees of the Estate of The Western Pacific Railroad Company out of funds in their custody derived from trusteeship operations that for the year 1943 and part of the year 1944 Consolidated Income Tax Returns were filed by the plaintiff for itself and its affiliates which reported a deductible loss by the plaintiff in an amount sufficient to eliminate all taxable income for the group as a whole for 1943 and to provide unused credit balances to carry back to 1942 and carry forward to 1944 sufficient to eliminate taxable income for the affiliated group for the period to which such Returns relate, and that in 1945 the plaintiff for itself and its affiliates as their rights may appear filed with the Collector of Customs in the City and State of New York a claim for a refund of the taxes paid by the Trustees of the estate of The Western Pacific Railroad Company for 1942—said claim being in the amount of $4,201,821.54.

V.

That there is no statutory rule or regulation for the apportionment of tax liabilities or tax benefits among members of an affiliated group of corporations within the scope of said Section 141 of the Internal Revenue Code and their rights and liabilities inter sese growing out of what is done by one member on behalf of all rest upon the established principles of equity and are only cognizable in a Court of Equity which through its flexible action of accounting may render its decree in favor of any one or more of the parties and against any one or more of the other parties and may apportion among the parties any fund or funds in respect of which one or more parties may interplead.

VI.

That by the terms of the Revenue Code and the Regulations of the Treasury thereunder the fund of $4,201,821.54 in respect of which the plaintiff has filed a refund claim on behalf of itself and the other members of the affiliated group as their interests may appear is payable to the plaintiff and the plaintiff itself claims to be the beneficial owner of the claim but to the end that the ownership of the fund and any rights of other members of the group thereagainst may be judicially determined the plaintiff hereby brings said fund together with any deductions therefrom or accretions thereto into the Court and interpleads against the other members of the group in respect thereof in order that the right of

all members of the affiliated group therein may be fixed and determined.

VII.

That by reason of the Returns filed by the plaintiff on behalf of itself and other members of the affiliated group and the deductible losses shown thereby or reflected therein certain tax benefits have accrued in respect of which reserves have been set up by one or more members of the affiliated group in amounts aggregating approximately $10,100,000 which belong to the members of the affiliated group as their rights may appear, and the plaintiff itself claims to be the beneficial owner of said reserves but to the end that the ownership of the said reserves and any rights of members of the group thereagainst may be judicially determined the plaintiff brings this proceeding to place said reserve fund in judicial custody or subject to the jurisdiction and supervisory power of this Court in order that the rights of all members of the affiliated group therein may be fixed and determined.

For as much, therefore, and the plaintiff and the defendants are remediless at law for the determination of their rights inter sese and the respective interest of each thereof, if any, in the several funds referred to in this Bill of Complaint and can obtain appropriate relief in a Court of Equity where matters of account as well as matters of equitable adjustment are peculiarly cognizable, the plaintiff files this Bill of Complaint and prays equitable relief as follows:

1. That this Court place in judicial custody all moneys in or coming into the hands of the parties to this proceeding representing refund claims or reserves in respect of taxes paid or withheld from payment under or in respect of Federal Income taxes and Excess Profits taxes, either or both for the years 1942, 1943 and 1944 or any part thereof.

2. That the respective rights and interests of the plaintiff and the defendants and each thereof in and to said funds be fixed and determined or in lieu thereof or in addition thereto that the beneficial interest of the plaintiff and the defendants in any tax saving resulting from the contribution of income by one or more members of the affiliated group to which they belong and the contribution of offsetting deductible losses by one or more other members of the same group be fixed and determined by this Court in accordance with the principles of equity and good conscience.

3. That an account be stated in accordance with respective rights and interests of the plaintiff and the defendants in and to said funds and tax savings showing the amounts due each in respect thereof.

4. That a decree be rendered conforming to such stated account and directing that the plaintiff and the defendants recover the amounts shown to be due them thereunder.

5. That the parties hereto be enjoined and restrained from disbursing any funds in or coming into their custody or possession and constituting

the refunds and reserves referred to in this Bill of Complaint except upon the Order of this Court.

6. That the plaintiff have such other and further relief by way of declaratory decree or judgment or otherwise as it may be advised and to the Court shall seem meet.

Dated: Oct. 10, 1946.

THE WESTERN PACIFIC RAILROAD CORPORATION,

By /s/ LeROY R. GOODRICH,
Its Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ A. PERRY OSBORNE,
Of Counsel.

[Endorsed]: Filed Oct. 10, 1946.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM OF DEFENDANTS THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY COMPANY, DELTA FINANCE CO., LTD., AND STANDARD REALTY AND DEVELOPMENT COMPANY

Come now defendants The Western Pacific Railroad Company, Sacramento Northern Railway,

Tidewater Southern Railway Company (sued herein as Tidewater Southern Railway), Delta Finance Co., Ltd., and Standard Realty and Development Company, and answering the complaint of plaintiff herein and by way of counter claim, admit, deny and allege as follows:

I.

Admit paragraphs I and II of the complaint, except the allegation that Deep Creek Railroad Company is a domestic corporation, and allege in that respect that Deep Creek Railroad Company was formerly a Utah corporation, and that all of its stock was owned at all times herein mentioned by defendant The Western Pacific Railroad Company, and that said Deep Creek Railroad Company was in process of liquidation in the years 1942, 1943 and 1944 and was finally dissolved in the year 1944.

II.

Answering paragraph III of the complaint, admit that this is a civil action between citizens of different states and that the amount in controversy exceeds the sum of $5,000 exclusive of interest and costs; deny all the averments contained in paragraph III of the complaint except those hereinbefore expressly admitted.

III.

Answering paragraph IV of the complaint, admit, deny and allege as follows: During the years 1942 and 1943 and the first four calendar months of the year 1944, the plaintiff and the defendants, including

the defendant Deep Creek Railroad Company, which was in the process of liquidation in the years 1943 and 1944, were an affiliated group of corporations within the meaning of the Internal Revenue Code. Plaintiff was at all said times the parent corporation of said group and filed income and excess profits tax returns on a consolidated basis for said group for the said years 1942 and 1943. In the year 1945 plaintiff filed an income and excess profits tax return for the year 1944 and included in said return the income of the other members of said affiliated group for the first four months of 1944. The said consolidated return for the year 1942 reported income and excess profits tax payable by the affiliated group in the sum of $4,201,821.54, and the aforesaid returns for the years 1943 and 1944 reported no taxable income. On March 9, 1945, the plaintiff filed with the Federal Collector of Internal Revenue in the Second District of New York a claim for refund of the sum of $4,201,821.54 theretofore paid as income and excess profits taxes for 1942, together with the interest thereon. The whole of said last mentioned amount of tax was paid in 1943 by plaintiff with funds supplied to plaintiff for that purpose by the Reorganization Trustees of defendant The Western Pacific Railroad Company. Thereafter and in the year 1943 certain of the defendants herein paid or credited to said Reorganization Trustees their respective portions of said tax, so that the net amounts of said tax borne and paid by the parties to this suit were as follows:

Plaintiff	$ 00.00
Defendant The Western Pacific Railroad Company	4,144,828.87
Defendant Sacramento Northern Railway	2,847.58
Defendant Tidewater Southern Railway Company	53,608.94
Defendant The Western Realty Company	00.00
Defendant Deep Creek Railroad Co.	00.00
Defendant Standard Realty and Develoment Company	00.00
Defendant Delta Finance Co., Ltd.	536.15
Total	$4,201,821.54

The defendant The Western Pacific Railroad Company is entitled to the whole of said sum when refund thereof is made, together with all interest thereon, and to the whole amount refunded, and will upon receipt of said refund credit or pay to the defendants Sacramento Northern Railway, Tidewater Southern Railway Company, and Delta Finance Co., Ltd., their respective proportions thereof, and said three last named defendants will look to defendant The Western Pacific Railroad Company for such credit or payment. None of the parties to the above-entitled cause, other than the defendant The Western Pacific Railroad Company and said last named three defendants, paid or contributed

any sum or thing of value to the payment of said tax or any part thereof, and none of said parties other than the defendant The Western Pacific Railroad Company has any right, title, interest or claim, at law or in equity, in or to said refund claim or the amount refundable thereunder or any part thereof. Under and by virtue of the Internal Revenue Code and the regulations thereunder providing for and relating to consolidated returns for affiliated corporations, the tax liability of said affiliated group for Federal income and excess profits taxes was required to be, and was, determined upon the basis of the taxable net income of the said group as a unit. Provision for the allocation to the respective members of such group of their proportion of the tax so determined to be payable was lawful and proper, and the whole of said tax for 1942 was allocated to the defendant The Western Pacific Railroad Company and the three other defendants aforesaid, as above set forth, but no right, title, interest or claim was created or arose, or could be created or arise, on the part of any member of said affiliated group against any other member thereof, by virtue of said consolidated returns or any thereof, or by virtue of the individual deductible losses or taxable gains of such members, or otherwise, for any sum in excess of the portion of the tax actually paid or payable by the member making such claim. In the year 1943 plaintiff and other members of said group incurred deductible losses in the total amount sufficient to eliminate all taxable income for the affili-

ated group for 1943 and to provide unused credit balances to carry back to 1942 and carry forward to 1944 sufficient to establish no taxable income for the years 1942 and 1944, and in said federal tax returns for 1943 and 1944 plaintiff reported said losses and said carry-back and carry-forward portions thereof, and the aforesaid claim for refund of the 1942 taxes referred to the said carry-back. The major portion of the aforesaid deductible losses incurred in the year 1943 was the loss of plaintiff arising from the fact that the stock of the defendant The Western Pacific Railroad Company held by plaintiff became worthless in said year. In and by reporting said loss in said returns for 1943 and 1944, and in and by referring to same in filing said claim for refund, plaintiff suffered no detriment, loss, cost or expense and furnished no legal or equitable consideration or contribution to the members of the affiliated group or to any of them. These answering defendants deny all the averments contained in paragraph IV of the complaint except those hereinabove expressly admitted.

IV.

Deny the averments contained in paragraph V of the complaint.

V.

Answering paragraph VI of the complaint, admit, deny and allege as follows: By the terms of the Internal Revenue Code and the regulations thereunder, the amount refundable under said refund claim is payable by the United States to the plaintiff

as collecting agent for the member of said group, namely, defendant The Western Pacific Railroad Company, which originally provided the moneys for payment of the tax. Said claim was filed and is made for the use and benefit of said defendant as the member of said affiliated group which provided the moneys for payment of the entire tax for the group. The other defendants which contributed to the payment of said tax, namely, Sacramento Northern Railway, Tidewater-Southern Railway Company, and Delta Finance Co., Ltd., will look to defendant The Western Pacific Railroad Company for credit or payment of their proportions of said refund. Plaintiff is not entitled beneficially to the refund of the same or any part thereof or any interest thereon. Neither said claim for refund nor the moneys that are refundable thereunder constitute or are a fund of said affiliated group, or a fund in respect whereof the members of said group may interplead or be interpleaded, but on the contrary said claim is the exclusive right and property of defendant The Western Pacific Railroad Company and said defendant is entitled to the whole sum refundable thereunder.

VI.

Answering paragraph VII of the complaint, admit, deny and allege as follows: Defendant The Western Pacific Railroad Company has a reserve fund for contingent tax liabilities in the sum $10,100,000, invested in United States Government Securities, for the purpose of discharging the liability

of said defendant for such federal income and excess profits taxes, if any, as may be imposed upon said defendant for the years 1943 and 1944. Neither the plaintiff nor any member of said affiliated group other than the defendant The Western Pacific Railroad Company furnished or contributed any money or other thing of value to said fund. Said fund and the securities comprising the same are the exclusive property of the defendant The Western Pacific Railroad Company and the said fund is held by said defendant to provide for the payment of its own taxes, if any are payable by it, and not for the benefit, advantage, use or behoof of plaintiff or any other member of said group. Neither said fund nor any part thereof is a fund of said affiliated group, or a fund in respect whereof the members of said group may interplead or be interpleaded, and neither plaintiff nor any member of said affiliated group other than the defendant The Western Pacific Railroad Company has any right, title, interest or claim in or to said fund, or in or to any part thereof, at law or in equity. Deny all the averments contained in paragraph VII of the complaint except those hereinbefore expressly admitted.

VII.

It was plaintiff's duty under the Internal Revenue Code and regulations to make and file income and excess profits tax returns for the years 1942, 1943 and 1944. In and by making and filing said income and excess profits tax returns for the years 1942, and 1943 and 1944 plaintiff performed its said duty

in accordance with the requirements of the Code and regulations. Plaintiff as a separate corporation had no income or excess profits tax liability on either a separate or consolidated basis for 1942, 1943 and 1944 and paid no tax for any of said years. In and by filing said returns plaintiff furnished no consideration or contribution whatsoever to other members of said affiliated group, or any of them, and suffered no detriment, loss, cost or expense for itself or for said members or any of them, in that its action in filing said returns was performed under a duty imposed by law.

VIII.

In and by filing the said returns for the years 1942, 1943 and 1944, and in and by filing said refund claims, plaintiff acted as the agent and representative of the affiliated group to file such returns and claim for refund, but plaintiff did not therein or thereby gain or acquire any right or claim as against any other member of said group to be paid any sum or sums or receive anything of value for or on account of filing said returns or claim, or for or on account of theoretical taxes not paid or payable by said group or any member thereof, and on the contrary the exaction or receipt by plaintiff from the members of said group or any thereof, of any sum or other thing of value, for or on account of so-called tax savings, to wit, moneys not paid or payable as taxes, by any other member or members of said group, resulting from the filing of consolidated returns, would have been and was and is

inequitable, unjust, and unconscionable, and the claims made by plaintiff in this cause to payment or other compensation for or on account of such tax savings, were and are inequitable, unjust, and unconscionable, in that the plaintiff was an agent and fiduciary for the members of said affiliated group in making said returns, and may not lawfully or equitably use or avail of its said agency to obtain or secure a profit or advantage for itself at the expense of other members of said group for whom it was such agent.

IX.

In and by filing the said returns and filing said refund claim, plaintiff acted as the agent and representative designated by the Internal Revenue Code and the regulations thereunder relating to consolidated returns for affiliated groups, but plaintiff did not therein or thereby gain or acquire any right or claim as against any other member or members of said group to be paid any sum or sums or receive anything of value for or on account of filing said returns or claim, or for or on account of taxes not paid or payable by said group or any member thereof, and on the contrary the exaction or receipt by plaintiff from the members of said group or any thereof, of any sum or other thing of value, for or on account of such filing or said taxes not paid or payable, would have been and was and is illegal, unjust and inequitable, and contrary to the intent and purposes of the Internal Revenue Code and the regulations thereunder, and plaintiff's claims in this

cause are illegal, unjust and inequitable, and contrary to the intent and purposes of the Code and said regulations, in that such exaction or receipt and the claims made by plaintiff in this cause would constitute and be a purchase and sale of deductible tax losses, or exaction of compensation therefor, and a sale of the privilege of filing consolidated returns, contrary to the intent and purpose of the said statutes, and the regulations thereunder.

X.

At the time plaintiff filed said consolidated returns for the year 1943, to wit, July 15, 1944, wherein plaintiff reported its said large deductible loss of 1943, plaintiff had an interest in the said affiliated group, in that plaintiff was then entitled, under certain contingencies, to regain the ownership of all the stock of the defendant, The Western Pacific Railroad Company, and plaintiff's act and decision in filing the same was done and taken for the advantage and benefit of plaintiff in that plaintiff's said contingent interest in the stock of said defendant gave to plaintiff an interest in the effect upon the tax liability of said defendant of filing said consolidated returns. In and by reporting said deductible loss in said consolidated return, plaintiff elected to, and became bound to, apply the carry-back portion thereof to the year 1942, and to file a refund claim on account of such carry-back and the aforesaid refund claim was thereafter filed by plaintiff in pursuance of its said election and obligation so to do.

XI.

Ever since the year 1918 and until April 30, 1944, plaintiff was the parent corporation of and controlled the members of an affiliated group of corporations and determined whether or not consolidated returns should be filed for said group, including itself, and therein and thereby exercised for itself and said group and in the common interests of the members of the group and the interest of the plaintiff as the sole owner of the ultimate equity in the group the statutory privilege extended by the applicable provisions of The Revenue Acts and Section 141 of the Internal Revenue Code of filing or not filing consolidated returns and elected continuously in favor of consolidated returns and therein and thereby plaintiff elected for itself and the other members of said group and from time to time committed the group for future years to file such consolidated returns. The defendants The Western Pacific Railroad Company and Deep Creek Railroad Company were members of said affiliated group at all of said times and the other defendants herein were members of said group at various times. In and by its said control and elections from time to time plaintiff derived many advantages and benefits in the manner and to the extent intended by the said statutes and regulations, including, among others, the future consequences of such elections, as well as the results and effects in the years of filing the returns, and the various members of said group, including plaintiff, had variously individual incomes and deductible losses

taken up in said consolidated returns from year to year. At all said times plaintiff controlled the allocation of the taxes as between the members of said group, and continuously and consistently allocated the group tax for each year between the members of said group, including itself, who had individual taxable incomes in such year, in the proportions that their individual incomes bore to the total of such incomes, ignoring losses of other members of the group, but plaintiff never charged itself nor claimed credit for itself or charged or claimed credit for any member of said group for or on account of theoretical taxes not payable by the group in consequence of deductible losses suffered or incurred by one or more of its members in years when other members had taxable gains. Plaintiff never made any claim of that nature against or in favor of any member of the group until the making of the claims stated in its complaint herein, which said claims were not made until long after the said affiliation had been severed and were made at a time when plaintiff had no ownership of or interest in said group or any member thereof. Plaintiff and all other members of said group became bound by, and agreed to, the said long continued custom and practice of allocating between the members of said group the actual group tax, and no more, and therein and thereby plaintiff waived and relinquished whatsoever right it might otherwise have had to claim as against any member of said group, any other or further allocation, adjustment or claim arising out of the filing of such consolidated returns

or the individual taxable gains and deductible losses of the members of said group. By reason of said custom, practice and agreement and by reason of the advantages and benefits received by plaintiff from the said exercise of its privilege of filing consolidated returns for said group for all said years, plaintiff's claims in this suit are unjust, inequitable and unconscionable.

XII.

At all times mentioned herein to and including April 30, 1944, plaintiff was the owner and holder of all of the capital stock of defendant The Western Pacific Railroad Company. From August 2, 1935, to December 29, 1944, defendant The Western Pacific Railroad Company was a railroad corporation in reorganization under the provisions of Section 77 of the Bankruptcy Act, in that certain proceeding in the United States District Court for the Northern District of California, Southern Division, entitled "In the Matter of The Western Pacific Railroad Company," No. 26591 S in the files of said Court, and the title to and possession of all of its properties were at all times from September 23, 1935, to December 29, 1944, held by T. M. Schumacher and Sidney M. Ehrman, as the Reorganization Trustees appointed by said court. Said defendant The Western Pacific Railroad Company was reorganized in said proceeding under a Plan of Reorganization filed by the Interstate Commerce Commission June 21, 1939, which said Plan of Reorganization was finally confirmed by said Court by

its order in said proceeding made October 11, 1943. In and by said Plan of Reorganization as finally confirmed October 11, 1943, it was determined that the stock of said defendant held by plaintiff herein, being all of the preferred and common capital stock of said defendant, was without equity or value. Under and pursuant to said Plan of Reorganization and the order of said Court in said proceeding made November 27, 1944, and at 12:01 a.m., on December 29, 1944, said Trustees returned and transferred to the said reorganized corporation, defendant The Western Pacific Railroad Company, all the business, assets and property, of every kind and description held by said Trustees in said bankruptcy proceeding, free and clear of all claims other than such claims as were preserved under the said Plan of Reorganization and were not limited or discharged by the orders of said Court. A copy of said Order of November 27, 1944, is hereunto annexed, marked Exhibit 1.

XIII.

In and by its claims against the defendant The Western Pacific Railroad Company and against and in respect of the said reserve and the said refund claim belonging to the defendant The Western Pacific Railroad Company, plaintiff seeks to establish and enforce liens senior to the liens of those claimants in said reorganization proceeding whose liens were found to have equity and value and were preserved and provided for in the said Plan of Reorganization, and plaintiff seeks thereby to gain

a preference over such claimants. The entire business, assets and properties of said reorganized company were returned and transferred to it by said Trustees pursuant to said Plan and the orders of said Court, subject only to the claims so preserved. In and by said Plan of Reorganization all claims junior to the claims of First Mortgage Bondholders and General and Refunding Mortgage Bondholders of said defendant The Western Pacific Railroad Company were found and determined to be without equity or value, and the claims of said bondholders were preserved, and were paid and discharged under said Plan in common stock, and other securities, of the said reorganized company, so that the said bondholders became the owners of the entire common stock of the reorganized company. Plaintiff's aforesaid claims in this cause and each of them are unjust, inequitable and unconscionable in this, that the aforesaid deductible loss incurred by plaintiff, and the filing of said federal tax returns and refund claim reporting said loss, furnish no just or equitable ground or reason for giving or granting to plaintiff a preference over said prior claimants, to wit, said bondholders, as to all or any part of said reserve fund or said refund claim or any other assets or property of said reorganized company, but said claims of plaintiff cannot now be recognized or allowed in any manner or to any extent without thereby granting such inequitable preference.

XIV.

Each and all the claims of plaintiff in and to said reserve fund, or any portion thereof, and in and to said refund claim, or the amount refundable thereunder, are unjust, inequitable, and unconscionable in all the respects hereinafter in this paragraph XIV averred or mentioned. Said claims and each of them arose and could have been presented to the said Bankruptcy Court more than two years before the commencement of this action. Plaintiff was a party to said reorganization proceeding and had personal notice of all of the proceedings in the Bankruptcy Court and before the Interstate Commerce Commission in respect of the business, assets and properties of the defendant The Western Pacific Railroad Company and the Plan of Reorganization thereof, and stood by and wholly failed and neglected to present said claims, or any thereof, to the said Court or to said Commission or to the said Reorganization Trustees or to the defendant The Western Pacific Railroad Company, and wholly failed to notify the said Court, Commission, Trustees or defendant company thereof prior to the effectuation and consummation of said Plan of Reorganization, and permitted the said Plan to be effectuated and consummated without presenting or giving notice of said claims to said Court, Commission, Trustees or defendant company so that said Plan of Reorganization was effectuated and consummated by said Trustees pursuant to said Plan and the orders of said Court and Commission, and all parties in interest under said Plan accepted

and received the new securities and the other provisions made for them under said Plan, without notice of plaintiff's said claims, or any thereof. Plaintiff further stood by and wholly failed and neglected to present its said claims, or any thereof, to the said Court, Trustees and defendant company, or any thereof, and wholly failed to notify them or any of them of such claims or any thereof, prior to the final settlement of the accounts of said Trustees by said Court, and prior to the termination of said reorganization proceedings, and permitted said accounts to be settled and said proceedings to be terminated without giving notice of said claims or any thereof, or presenting the same or any thereof, and all parties in interest participated in the said proceedings, and said accounts were settled and allowed, and said proceedings were terminated, without any party to said proceedings having notice of said claims or any thereof. In and by the neglect and conduct of plaintiff aforesaid plaintiff was guilty of laches and the said claims and each and all thereof became and are stale and inequitable, and barred by the said laches and inequitable conduct and neglect of plaintiff. These defendants refer to the averments of paragraphs I to XIII of this answer in connection with and as stating further grounds for their defense that plaintiff's claims are stale and barred by plaintiff's laches.

XV.

The rights of action set forth in the complaint in respect of, or pertaining to, that portion of the

reserve fund created by said court order, to wit, $7,100,000 did not accrue within two years next before the commencement of this action. The rights of action set forth in the complaint in respect of the remainder of said reserve fund, to wit, $3,000,000 and in respect of the said refund claim, to wit, the claim for refund of $4,201,821.54 taxes paid for the year 1942, did not accrue within two years next before the commencement of this action.

XVI.

Said Bankruptcy Court on March 28, 1946, made its Final Order in said reorganization proceeding terminating said proceeding, subject only to the reservations of jurisdiction made and referred to in said order, and in and by said order said Court permanently restrained and enjoined all persons from instituting, prosecuting or pursuing claims against said defendant The Western Pacific Railroad Company; or against any of the assets or property of said defendant, on account of any right, claim or interest which such person might have had in, to or against said defendant, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of said Court). A copy of said Final Order is hereunto annexed, marked Exhibit 2. In and by said Final Order plaintiff was and is forever restrained and enjoined from instituting or prosecuting this cause as against the defendant The Western Pacific Railroad Company and from instituting or prosecuting any action or

proceeding to establish or enforce the claims and each thereof against said defendant which are set forth in its complaint herein.

XVII.

In and by said Plan of Reorganization and the said Orders of said Court, Exhibits 1 and 2 to this answer, and each of them, plaintiff was and is forever barred and foreclosed from claiming as against the defendant The Western Pacific Railroad Company all or any part of the aforesaid claim for refund of taxes paid by said Trustees in the sum of $4,201,821.54, and forever barred and foreclosed from claiming all or any part of the said refund, when made; and the whole sum payable upon said refund claim, including interest thereon, became and was and is the property and asset of defendant The Western Pacific Railroad Company, free and clear of all claims and demands of plaintiff.

XVIII.

In and by said Plan of Reorganization and the said Orders of said Court, Exhibits 1 and 2 to this answer, and each of them, plaintiff and all parties to this action other than defendant The Western Pacific Railroad Company were and are forever barred and foreclosed from claiming all or any part of said reserve fund of $10,100,000 and forever barred and foreclosed from claiming against said defendant any suin or contribution whatsoever, on account of the so-called tax savings, to wit, the non-existence of taxable net income, reported by the

said returns filed for the years 1943 and 1944, and the entire business, assets and property returned and transferred by said Reorganization Trustees to said defendant were in and by said Plan and Orders returned and transferred to said defendant free and clear of all such claims of plaintiff and the other members of said affiliated group or any of them. In and by said Orders of said Court and the said Plan of Reorganization and each of them, each and every, all and singular, the claims of plaintiff in this cause against the defendant The Western Pacific Railroad Company were and are forever barred and foreclosed.

XIX.

Said Bankruptcy Court on March 3, 1944, made its order authorizing and directing the said Trustees to establish a reserve fund for contingent tax liabilities in the amount of $7,100,000, for the sole and exclusive purpose of providing for the payment of federal income and excess profits taxes for the year 1943 in the event the same should become payable by said Trustees or by the reorganized company, defendant The Western Pacific Railroad Company. A copy of said Order is hereto annexed marked Exhibit 3. In and by said Order, said reserve fund became and was, and is, a fund belonging exclusively to the reorganized company, defendant The Western Pacific Railroad Company, and may not be subjected to the claims of the other members of the said affiliated group or any of them. Said

reserve fund created by said Court order is a part of the reserve fund of $10,100,000 mentioned in plaintiff's complaint. The remainder of said reserve fund, to wit, $3,000,000, was created by resolution of the Board of Directors of the reorganized company The Western Pacific Railroad Company adopted March 26, 1945, for increasing said reserve fund held for said purposes, exclusively, to the sum of $10,100,000. Neither plaintiff, nor any other member of the affiliated group, other than defendant, The Western Pacific Railroad Company, has ever contributed anything to said reserve fund and neither plaintiff nor any of the said other members of said group have any right, title, interest or claim in or to said reserve fund, or in or to any portion thereof at law or in equity.

XX.

Plaintiff's complaint fails to state a claim upon which relief can be granted to plaintiff against defendants or any of them.

Counterclaim

For a counterclaim of the answering defendants herein, said defendants aver as follows:

I.

Defendants refer to and by such reference incorporate in this counterclaim all and singular the averments, admissions and denials in their foregoing answer.

II.

Defendant, The Western Pacific Railroad Company, is the owner of said fund and said refund claim and is entitled to the moneys refundable under said claim, and plaintiff has no right, title, or interest, at law or in equity, in or to said fund or the said refund claim or the taxes refundable thereunder.

III.

A controversy exists between plaintiff on the one part, and these defendants on the other part, regarding the rights of the parties arising out of, or in respect to, the said reserve fund and refund claim, and regarding the rights and obligations of the plaintiff and the defendants as members of the aforesaid affiliated group to pay or contribute or receive inter sese any sum or sums of money or other thing of value on account of federal income and excess profits taxes not paid or payable by said parties for the years 1942 and 1943 and 1944, or any portion thereof. Plaintiff contends that certain sums are payable by members of said group and are receivable by other members of said group on account of such taxes not paid or payable, in consequence of the fact that losses of some members and gains of other members were included in determining that there was no such tax liability for said years, and these defendants contend on the contrary that no rights or obligations to receive or pay any sum or sums arose or were created as between the members of said group by reason of such

taxes not being paid or payable, either in consequence of such gains or losses of members of the group, or otherwise.

IV.

All the parties necessary to the determination of said controversy are parties to the above-entitled cause.

V.

Plaintiff threatens to, and will, unless restrained and enjoined by this Honorable Court, collect and receive for itself, and apply to its own use and benefit, the sums to be refunded under said refund claim, to the great and irreparable loss of the defendant, The Western Pacific Railroad Company.

Wherefore, defendants pray for the order, judgment, and decree of this Honorable Court:

1. Forever restraining and enjoining plaintiff from receiving for itself, or applying to its own use or benefit, all or any part of the moneys refundable under said claim for refund.

2. Ordering and directing plaintiff by the mandatory order and injunction of this Court to endorse and deliver to the defendant, The Western Pacific Railroad Company, each and all checks, drafts or other commercial or Treasury paper received by plaintiff representing said refund or any part thereof.

3. Declaring and determining that defendant, The Western Pacific Railroad Company, is the sole

owner of and is exclusively entitled to said reserve fund and said refund claim and all sums refundable thereunder, and quieting the right and title of said defendant therein and thereto against the claims of plaintiff and all other parties to this cause, and restraining and enjoining plaintiff and all other parties to this suit other than defendant, The Western Pacific Railroad Company, from instituting or prosecuting claims thereto.

4. Declaring and determining that plaintiff has no rights or claims against these answering defendants or any of them for on or account of any matter or thing averred in plaintiff's complaint herein.

5. For defendants' costs of suit herein, and all such other and further relief as may be meet and equitable in the premises.

Dated: December 3, 1946.

THE WESTERN PACIFIC RAILROAD CO.,
SACRAMENTO NORTHERN RAILWAY,
TIDEWATER SOUTHERN RAILWAY CO.,
DELTA FINANCE CO., LTD.,
STANDARD REALTY AND DEVELOPMENT CO.,

By /s/ ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,
Their Attorneys.

Receipts of copy acknowledged.

EXHIBIT 1

Original Filed Nov. 27, 1944, with Clerk, U. S. Dist. Court, San Francisco.

Pillsbury, Madison & Sutro,
Standard Oil Building,
San Francisco, California.

Whitman, Ransom, Coulson & Goetz,
40 Wall Street,
New York 5, N. Y.

In the District Court of the United States for the Northern District of California, Southern Division

No. 26591-S

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER DIRECTING THE REVESTING OF PROPERTIES OF THE DEBTOR IN THE DEBTOR COMPANY, FIXING THE DATE FOR CONSUMMATION OF THE PLAN AND AUTHORIZING AND DIRECTING THE CARRYING OUT OF THE PLAN

The petition filed November 8, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization

of the debtor above named, for an order directing the revesting of properties of the debtor in the debtor company, fixing the date for consummation of the plan, approving forms of deeds and agreements and authorizing and directing the carrying out of the plan of reorganization, came on duly to be heard on November 27, 1944, and was heard and has been submitted.

The Court being fully advised in the premises, finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed November 8, 1944, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) Pursuant to the order of this Court entered September 25, 1944, approving the proposed Certificate of Amendment to the Articles of Incorporation and proposed amended By-Laws for the debtor company, the stockholders and Board of Directors of The Western Pacific Railroad Company have approved and adopted said Certificate of Amendment and said amended By-Laws and have authorized the necessary filing of said Certificate of Amendment; and upon such filing of said Certificate of Amendment, The Western Pacific Railroad Company will be a proper corporate instrumentality for putting into effect and carrying out the plan of reorganization;

(b) The stockholders of The Western Pacific Railroad Company have consented in writing to the execution and delivery of the Indenture relat-

ing to the First Mortgage Bonds and the creation by The Western Pacific Railroad Company of the bonded indebtedness as provided therein, and have consented in writing to the execution and delivery of the Indenture relating to the General Mortgage Income Bonds and the creation by The Western Pacific Railroad Company of the bonded indebtedness as provided therein and have authorized the assumption by said Railroad Company of certain obligations of the debtor company and its estate as contemplated by the plan of reorganization and have authorized the Board of Directors to issue shares of preferred and common stock, subject to the provisions of said Articles of Incorporation as so amended, and have authorized and directed the Board of Directors to do all other acts and things that may be necessary or appropriate in carrying out and making effective said plan of reorganization;

(c) The Board of Directors of The Western Pacific Railroad Company has approved the form of Indenture relating to the First Mortgage Bonds contemplated by the plan, the form of Indenture relating to the General Mortgage Income Bonds contemplated by the plan, the form of Scrip Agreement relating to the issuance of scrip in respect of fractional General Mortgage 4½% Income Bonds, Series A, shares of Preferred Stock, Series A, and shares of common stock; has approved the bond, scrip and other forms included in said Indentures and Scrip Agreement, and the forms of

certificates for shares of Preferred Stock, Series A, and shares of common stock, and determined the manner of executing the same; has approved mortgaging and pledging the properties and franchises of said Railroad Company, as contemplated in the Indentures mentioned above; has authorized and directed the execution and acknowledgment, and delivery, on or before the date fixed by the Court for the consummation of the plan of reorganization, of said Indentures and the necessary filing and recording thereof, the issue on said date of $10,000,000 aggregate principal amount of First Mortgage 4% Bonds, Series A, $21,219,000 aggregate principal amount of General Mortgage 4½% Income Bonds, Series A, 318,502 shares of the authorized Preferred Stock, Series A, not more than 319,032.767 shares of the common stock and the required scrip certificates, and the assumption of obligations by said Railroad Company, all as contemplated by said plan of reorganization and authorized and directed by the orders of the Court herein;

(d) The proposed deed from the debtor's Trustees to The Western Pacific Railroad Company, the proposed deed of release and satisfaction of mortgage from Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the debtor's First Mortgage dated June 26, 1916, and the proposed deed of release and satisfaction of mortgage from Irving Trust Company, as Trustee under the debtor's General and Refunding Mortgage, executed February 29, 1932, as of

January 1, 1932 (annexed to this order as Exhibits "A," "B" and "C," respectively), are in proper form and sufficient when properly executed, acknowledged and delivered, to release, transfer to and revest in said Railroad Company all right, title and interest of the debtor's Trustees and of said Trustees under the debtor's said mortgages, in and to all of the business, assets and property dealt with by the plan of reorganization, free from any title or lien of the debtor's Trustees and said mortgages, are consistent with and conform to the provisions of the plan of reorganization, are necessary and appropriate to the putting into effect and carrying out the plan, and should be approved;

(e) The proposed agreement, attached to this order as "Exhibit D," provides for the assumption of obligations, liabilities, contracts, agreements and leases which are to be assumed by the reorganized company, pursuant to the plan of reorganization, is consistent with and conforms to the plan of reorganization, and should be approved;

(f) The Interstate Commerce Commission, by its order dated October 24, 1944, in Finance Docket #10913, has authorized the revesting in The Western Pacific Railroad Company of the business, assets and property constituting the estate of the debtor and the issue of securities and the assumption of obligations by The Western Pacific Railroad Company to the extent contemplated by the plan of reorganization and by this order; said order of the Commission also approves and authorizes the adjustment or compromise of the claims of the

Reconstruction Finance Corporation against the debtor and its estate, pursuant to the applicable provisions of the Reconstruction Finance Corporation Act and said plan; said order of the Commission authorizes the issue of said securities as subject to Section 77(f) of the Bankruptcy Act, Section 20a of the Interstate Commerce Act and the applicable provisions of the Reconstruction Finance Corporation Act; said securities and the issue thereof are specifically exempt from the provisions of the Securities Act of 1933, under the terms of Section 3(a)(6) of said act and subsection (f) of Section 77 of the Bankruptcy Act and are specifically exempt from the provisions of the Trust Indenture Act of 1939, under the terms of Section 304(a)(4) of said act, and said action by the Commission satisfies the statutory requirements for such issue and no other or further authorization of any other governmental commission, agency or body, federal or state, is necessary or required;

(g) The issuance, transfer and exchange of the securities and the making, delivery and filing of the instruments of transfer or conveyance issued, transferred, exchanged, made, delivered or filed, pursuant to the plan of reorganization, the order of the Commission referred to in subparagraph (f) above, or this order, are to make effective a plan of reorganization confirmed under the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, as amended.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

1. The form and provisions of each of the following instruments are hereby approved:

(a) the deed from the debtor's Trustees to The Western Pacific Railroad Company, attached to this order as "Exhibit A";

(b) the deed of release and satisfaction of mortgage from Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the debtor's First Mortgage, to The Western Pacific Railroad Company, attached to this order as "Exhibit B";

(c) the deed of release and satisfaction of mortgage from Irving Trust Company, as Trustee under the debtor's General and Refunding Mortgage, to The Western Pacific Railroad Company, attached to this order as "Exhibit C."

2. The arrangements made by the Reorganization Committee with Guaranty Trust Company of New York for the services of said Company as depositary and exchange agent and the proposed letter of instructions to said Company relating to the deposit and exchange of securities (submitted at the hearing upon said petition and attached to this order as Exhibit "F"), are approved.

3. The Western Pacific Railroad Company is hereby authorized and directed to file or cause to be filed, on or before December 28, 1944, the Cer-

tificate of Amendment to its Articles of Incorporation, heretofore approved by order of this Court entered September 25, 1944, with the Secretary of State of California and, in due course, to file copies thereof, as may be required by law, with the Secretaries of State of Nevada and Utah and in the several counties of the States of California, Nevada and Utah in which the railroad and properties of the debtor are located.

4. T. M. Schumacher and Sidney M. Ehrman, Trustees herein, are hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed, substantially in the form attached to this order as "Exhibit A" and approved herein, releasing and transferring to The Western Pacific Railroad Company, as of 12:01 a.m., Pacific War Time, on December 29, 1944, title to all property, rights and interests of every kind and description held by them as such Trustees, and are further authorized and directed thereafter to execute, acknowledge and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper to release, convey, assign or transfer to said Railroad Company, their entire right, title and interest in and to all of the business, assets and property of said Railroad Company.

5. Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under

the First Mortgage dated June 26, 1916, executed by the debtor to First Federal Trust Company and Henry E. Cooper, Trustees (Crocker First National Bank of San Francisco and Samuel Armstrong, successor Trustees), are hereby authorized and directed to execute, acknowledge and deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed releasing and satisfying, as of 12:01 a.m., Pacific War Time, on December 29, 1944, said First Mortgage of the debtor and all instruments supplemental or amendatory thereto, substantially in the form attached to this order as "Exhibit B" and approved herein, to transfer, convey and deliver to said Railroad Company, all moneys, credits, securities, evidences of indebtedness, choses in action, shares of stock, and all other property, rights and interest of every kind and description held by them as Trustees under said Mortgage and instruments supplemental or amendatory thereto, and to execute and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper for these purposes.

6. Irving Trust Company of New York, as Trustee under the debtor's General and Refunding Mortgage executed February 29, 1932, as of January 1, 1932, by the debtor to The Chase National Bank of the City of New York, Trustee (Irving Trust Company, successor Trustee), is hereby authorized and directed to execute, acknowledge and

deliver to The Western Pacific Railroad Company, on or before December 28, 1944, as requested by the Reorganization Committee, a deed releasing and satisfying, as of 12:01 a.m., Pacific War Time, on December 29, 1944, said General and Refunding Mortgage of the debtor and all instruments supplemental or amendatory thereto, substantially in the form attached to this order as "Exhibit C" and approved herein, to transfer, convey and deliver to said Railroad Company all moneys, credits, securities, evidences of indebtedness, choses in action, shares of stock, and all other property, rights and interests of every kind and description held by it as Trustee under said Mortgage and instruments supplemental or amendatory thereto, and to execute and deliver all such other conveyances, bills of sale, assignments and other instruments as may be necessary or proper for these purposes.

7. Whether executed before or after the date of consummation of the plan of reorganization, each of the deeds of release and satisfaction made pursuant to paragraphs "5" and "6" of this order by the trustees of the mortgages mentioned in said paragraphs, shall be effective as of the date of consummation of said plan and as of that date, each of said trustees shall be discharged and relieved of all obligations, liabilities, responsibilities and duties with respect to the particular mortgage or deed of trust and all indentures supplemental thereto, under which such trustee is acting.

8. The Western Pacific Railroad Company and

its proper officers are hereby authorized and directed to execute and deliver each and every of the following agreements and indentures, on or before December 28, 1944, as requested by the Reorganization Committee:

(a) agreement providing for the assumption of certain obligations, liabilities, contracts, agreements and leases of the debtor and the debtor's Trustees, substantially in the form attached to this order as "Exhibit D," the form and provisions of which are hereby approved;

(b) the Indenture relating to the First Mortgage Bonds, referred to in said petition, in the form submitted to this Court upon the hearing on said petition, which Indenture is found to be substantially in the form approved by order of this Court entered September 25, 1944; said Indenture to be deemed effective at 12:01 a.m., Pacific War Time, on December 29, 1944, coincident with the effective date of the deed from debtor's Trustees and the releases from existing mortgage trustees as provided in pragraphs "4," "5" and "6" of this order;

(c) the Indenture relating to the General Mortgage Income Bonds, referred to in said petition, in the form submitted to this Court upon the hearing of said petition, which Indenture is found to be substantially in the form approved by order of this Court entered September 25, 1944; said Indenture to be deemed effective at 12:01 a.m., Pacific War Time, on December 29, 1944, coincident with the effective date of the deed from debtor's Trustees

and the releases from existing mortgage trustees as provided in paragraphs "4," "5" and "6" of this order, but immediately following and subject to the taking effect of the Indenture referred to in subdivision (b) of this paragraph 8;

(d) the Scrip Agreement referred to in said petition, substantially in the form submitted to this Court upon the hearing of said petition, which Agreement is found to be substantially in the form approved by order of this Court entered October 23, 1944;

(e) the salary agreement substantially in the form attached to this order as "Exhibit E," the form and provisions of which are hereby approved.

9. The Western Pacific Railroad Company shall assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by the debtor's Trustees and remaining in effect on the date of the actual delivery of possession by said Trustees and the actual termination of the responsibility of the debtor's Trustees for the operation of the debtor's properties, as hereinafter provided in this order, and which have heretofore been assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, together with the expenses of this reorganization as allowed by the Court within the maximum fixed by the Interstate Commerce Commission. Without limitation of the generality of the duties imposed on The Western Pacific Railroad Company as above provided, it shall specifically assume and

agree to perform the obligations of the Trustees in respect of the following:

(a) $1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) $1,855,000 unpaid balance, principal amount of One and Three-Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property

of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H.P. diesel electric freight locomotives.

(c) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H.P. diesel electric freight locomotives.

And, further, without limitation of the generality of the obligations hereinabove imposed upon The Western Pacific Railroad Company, that company shall (a) specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment, being the coupons which this Court by orders of March 11, 1936, and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor, and (b) assume liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in said proceeding and without prejudice by reason of such proof not having been made. The above ordered assumption and adoption shall be evidenced by the execution by

said Railroad Company of the agreement of assumption referred to in paragraph "8(a)" above and of such other instruments of assumption as may be appropriate; and said Railroad Company shall succeed to all rights, privileges, liabilities and duties of the debtor or the debtor's Trustees under such contracts, leases and agreements; provided, however, that this order shall not be construed as a modification of any former orders of this Court barring or settling claims against the debtor or the debtor's Trustees, and said Railroad Company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this Court.

10. The Western Pacific Railroad Company shall pay, in such amounts as have heretofore been, or shall hereafter be determined by this Court, but only to the extent that the same shall not have been paid by the debtor's Trustees, all expenses and costs of administration of this proceeding, including, without limiting the generality of the foregoing, all allowances of compensation for services heretofore or hereafter rendered and reimbursement of expenses heretofore or hereafter incurred in connection with this reorganization proceeding or

the plan of reorganization, subsequent to October 31, 1939; provided, however, that said Railroad Company is authorized to pay, in its discretion, without further order of this Court and regardless of amount, all rentals, costs and expenses growing out of the joint use of the property of other carriers, and all taxes, and all other obligations (not including any such allowances of compensation for services or reimbursement of expenses) incurred subsequent to August 2, 1935, by the debtor or the debtor's Trustees in the ordinary course of business in the operation of the aforesaid business, assets or property, pursuant to the general authorizations granted by this Court.

11. The date for the consummation of the plan of reorganization, and the date upon which the first mortgage bondholders and secured creditors of the debtor shall be entitled to receive in exchange for their old securities, the new securities and adjustment payments under the plan, as heretofore approved and authorized by this Court, is hereby fixed as December 29, 1944; all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees herein, shall vest in and be and become the absolute property of The Western Pacific Railroad Company on said date, free and clear of all rights, claims, liens and interests of said Trustees, the former stockholders and creditors of the debtor, and

of all other persons, firms and corporations whatsoever, except as is otherwise provided in this order, and the said Railroad Company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided; and The Western Pacific Railroad Company shall, on said date

(a) execute, issue and deliver, or cause to be made available for delivery through said depositary and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to holders of the debtor's existing first mortgage bonds, or upon their order, upon presentation and surrender of such bonds, together with all interest coupons due after September 1, 1933 (upon which surrender said first mortgage bonds and interest coupons shall be cancelled), said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including the authorized scrip for fractional interests), and the adjustment payments heretofore ordered by this Court (for each $1,000 principal amount of existing first mortgage bonds so surrendered, $400 principal amount of General Mortgage 4½% Income Bonds, Series A; $600 face amount of Preferred Stock, Series A, 4.67 shares of common stock, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944);

(b) execute, issue and deliver, or cause to be made available for delivery through said depositary and exchange agent, to holders of scrip certificates

for the debtor's existing first mortgage bonds in the aggregate principal amount of $300, or upon their order, upon surrender of said certificates in lots of $100 principal amount or any multiple thereof, said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court upon the same basis as such securities are issuable to holders of the debtor's existing first mortgage bonds, as provided in subparagraph (a), of this paragraph 11.

(c) execute, issue and deliver, or cause to be made available for delivery through said depositary and exchange agent, to the holder or holders of ten of the debtor's existing first mortgage bonds, namely, Nos. M3595, M3596, M21612, M21613, M21614, M21615, M21616, M21618, M21619 and M21620, or upon their order, upon presentation and surrender of such bonds with coupons maturing on and after September 1, 1935, attached, notwithstanding the provisions of subparagraph (a) of this paragraph 11, only said Railroad Company's General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court, as follows for each said bond, $400 principal amount of General Mortgage 4½% Income Bonds, Series A, $600 par value of Preferred Stock, Series A, 3.356 shares of common stock and the adjustment

payments as provided in the order of this Court dated September 25, 1944; and execute, issue and deliver or cause to be made available for delivery through said depositary and exchange agent to The Western Pacific Railroad Corporation, or upon its order, in respect of coupons numbered 36 and 37 formerly attached to each of said bonds, upon presentation and surrender of such coupons, said Railroad Company's common stock (including authorized scrip for fractional interests) and the adjustment payments heretofore ordered by this Court, as follows: for each said coupon, .437 shares of common stock and the adjustment payment as provided in the order of this Court dated September 25, 1944.

(d) execute, issue and deliver, or cause to be made available for delivery through said depositary and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to Reconstruction Finance Corporation, $10,000,000 principal amount of said Railroad Company's First Mortgage 4% Bonds, Series A, bearing interest from January 1, 1945, $1,185,200 principal amount of its General Mortgage 4½% Income Bonds, Series A, $1,777,800 par value of its Preferred Stock, Series A, 15,788 shares of its common stock, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944; and Reconstruction Finance Corporation shall, on such date, surrender and pay over to said Railroad Company, all out-

standing Trustees' certificates of indebtedness heretofore at any time issued by the debtor's Trustees to Reconstruction Finance Corporation, $6,000,000 of cash collateral heretofore deposited with Reconstruction Finance Corporation by the debtor's Trustees as security for said Trustees' certificates, all notes and other evidences of indebtedness of the debtor held by Reconstruction Finance Corporation, all bonds and other obligations of the debtor held by Reconstruction Finance Corporation as collateral security for said indebtedness, and all other collateral pledged by the debtor as security for the notes held by Reconstruction Finance Corporation; and Reconstruction Finance Corporation shall, on such date, pay over to said Railroad Company the further sum of $1,075,000 in cash, less such sum as may be required for the payment of interest upon said Trustees' certificates to December 29, 1944, and the payment of an amount equal to interest on said $10,000,000 of First Mortgage 4% Bonds from said date to January 1, 1945;

(e) execute, issue and deliver, or cause to be made available for delivery through said depositary and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to The Railroad Credit Corporation, or upon its order, $154,080 principal amount of said Railroad Company's General Mortgage 4½% Income Bonds, Series A, $241,640 par value of its Preferred Stock, Series A, not more than 35,425 shares of common stock (including the authorized Scrip for fractional interests) and $72.00 in cash,

and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944, upon surrender by The Railroad Credit Corporation of all notes and other evidences of indebtedness of the debtor held by The Railroad Credit Corporation and of all bonds and other obligations of the debtor held by The Railroad Credit Corporation as collateral security for said indebtedness and all other collateral pledged by the debtor as security for the notes held by The Railroad Credit Corporation (other than the pledge of the distributive shares of the Railroad Company and its subsidiaries under the the marshalling and distributing plan of 1931); provided, however, that of the maximum amount of common stock so authorized to be issued to The Railroad Credit Corporation, only so much shall be issued as is within the limitation fixed by the order of this Court made September 14, 1944, providing for the reduction of such common stock on account of sums applied by The Railroad Credit Corporation under the marshalling and distributing plan in reduction of its claims, but in the event that said order of September 14, 1944, shall be modified or reversed upon appeal so as to entitle The Railroad Credit Corporation to receive additional common stock within the maximum limit hereinabove stated, then The Western Pacific Railroad Company shall execute, issue and deliver such additional common stock without further order of this Court and without further consideration other

than the surrender by The Railroad Credit Corporation at the time of the consummation of the plan of its secured notes of the debtor and the collateral thereto to the extent and in the manner hereinabove provided;

(f) execute, issue and deliver, or cause to be made available for delivery through said depositary and exchange agent, in accordance with the plan of reorganization and the orders of this Court herein, to A. C. James Co., or upon its order, $163,680 principal amount of said Railroad Company's General Mortgage 4½% Income Bonds, Series A, (including the authorized Scrip for fractional interests) $256,700 par value of its Preferred Stock, Series A, 37,635 shares of its common stock and $100.00 in cash, and the adjustment payments to be made at that time as provided in the order of this Court dated September 25, 1944, upon surrender of all notes and other evidences of indebtedness of the debtor to A. C. James Co., all bonds and other obligations of the debtor held as collateral security for said indebtedness, and all other collateral pledged by the debtor as security for the notes to A. C. James Co.

12. Notwithstanding the provisions of the foregoing paragraphs "4" and "11" of this order, the debtor's Trustees are authorized and directed to continue their control and operation of the debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on December 31, 1944, and until such time, to retain possession of so much of the funds and properties of the debtor as

may be necessary for the purposes of such control and operation; provided, however, that all right and duty of such Trustees to possess, control or operate said business and properties shall cease at 12:00 o'clock midnight, on December 31, 1944.

13. Any lien which may attach to the property subjected to the lien of the mortgages to be executed and delivered by The Western Pacific Railroad Company pursuant to subparagraphs (b) and (c) of Paragraph 8 of this order, during the period between the execution and delivery thereof and the completion of the recording of said mortgages, shall be subordinate to the lien of such mortgages, unless any such lien so attaching would be prior to the lien of such mortgages if the same had been recorded; and this Court reserves jurisdiction over the business, assets, franchises and property to be vested in The Western Pacific Railroad Company as provided herein, and of any claims to liens which may be asserted against the same, to the extent necessary to give effect to the provisions of this paragraph.

14. Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, as the Reorganization Committee, are hereby authorized and directed to prepare a notice to the holders of first mortgage bonds and secured notes of the debtor, in such form as the Reorganization Committee shall determine, notifying such creditors that they are entitled to present the obligations of the debtor now held by them

to the Guaranty Trust Company of New York, the depositary and exchange agent designated by the Court, and to receive, on and after December 29, 1944, for such obligations, the new securities and adjustment payments to which they are entitled under the plan; said Reorganization Committee shall publish said notice twice a week for two successive weeks prior to December 29, 1944, in one daily newspaper of general circulation in the City of San Francisco, California, and in one daily newspaper of general circulation in the City of New York, New York. Said Reorganization Committee shall also mail a copy of said notice at least ten days prior to December 29, 1944, to each of the first mortgage bondholders and secured creditors of the debtor so far as the post office addresses of such security holders are available to the Reorganization Committee.

15. Until the further order of this Court, and except as the creation of liens is specifically provided for or permitted by this Court, all persons, firms or corporations, whatsoever or wheresoever situated, located or domiciled, are hereby restrained or enjoined from interfering with, attaching, garnishing, levying upon, granting or enforcing liens against or upon, or in any manner whatsoever disturbing any part of the assets, goods, moneys, railroad, properties and premises belong to or in the possession of said Railroad Company on and after the time specified in paragraph "11" hereof, by reason of or growing out of any obligation or obli-

gations heretofore incurred by the debtor or the debtor's Trustees herein.

16. The Reorganization Committee and The Western Pacific Railroad Company shall have full power and authority to and shall put into effect and carry out the reorganization plan and the orders of this Court, including this order, relative thereto, the laws of any state or the decision or order of any state authority to the contrary notwithstanding.

17. For the purpose of the determination and application of the available net income of the reorganized company for the calendar year 1944, pursuant to subdivision "L" of the plan of reorganization, and for the determination of amounts payable as interest on the General Mortgage 4½% Income Bonds, Series A, of the reorganized company out of available net income for the calendar year 1944, and for the determination of earnings for the calendar year 1944, available for determination and payment by the directors of dividends upon the preferred and common stocks of the reorganized company, the operation by the debtor's Trustees of the properties and estate of the debtor during the calendar year 1944, shall be deemed to be for the account of the reorganized company; and the directors of the reorganized company are expressly authorized and directed to proceed with the determination of the available net income for the calendar year 1944, and the application of such

available net income in the same manner as if such operation had actually been carried on in the calendar year 1944 by the reorganized company.

18. T. M. Schumacher and Sidney M. Ehrman, Trustees herein, shall render their final account to this Court on or before May 1, 1945, and The Western Pacific Railroad Company shall pay from time to time their compensation and expenses, including compensation and disbursements of counsel acting for said trustees, as heretofore fixed by order of this Court until such date.

19. This order and all transactions pursuant hereto shall be without prejudice to any rights or claims of right of Reconstruction Finance Corporation and The Railroad Credit Corporation in and to any collateral pledged by persons other than the debtor as security for the notes of the debtor held by Reconstruction Finance Corporation and The Railroad Credit Corporation respectively, and without prejudice to any right or claim of right of The Railroad Credit Corporation under the terms of the plan of reorganization to retain distribution credits under the marshalling and refunding plan accruing to the debtor and its subsidiaries subsequent to the consummation of the plan of reorganization.

20. This Court reserves jurisdiction for all purposes necessary to put into effect and carry out this order and the plan of reorganization, including, without limiting the generality of this reservation, the right to enter, upon such notice as this Court

may direct, any further order or orders terminating the right to receive any securities or payments of cash under the plan of reorganization; and this Court expressly reserves jurisdiction to determine all costs and expenses of administration, including the amounts to be paid as compensation for services heretofore or hereafter rendered or reimbursement for expenses heretofore or hereafter incurred by the Reorganization Committee and its attorneys, or by any other person, firm or corporation, in connection with this proceeding and the plan of reorganization, and generally in connection with putting into effect and carrying out the plan of reorganization.

Dated: Nov. 27, 1944.

A. F. ST. SURE,
District Judge.

EXHIBIT "A"

Trustees' Deed

Know All Men by These Presents, that the Grantors T. M. Schumacher and Sidney M. Ehrman, as Trustees of the property of The Western Pacific Railroad Company, a railroad corporation organized and existing under the laws of the State of California (said corporation being referred to herein as the "Railroad Company"), being in possession of and operating the property of the Railroad Company, including its property in the States of California, Nevada and Utah, under the juris-

diction of the United States District Court, for the Northern District of California, Southern Division, for and in consideration of and in compliance with the orders and directions of the said Court in the reorganization proceedings mentioned below, have remised, released, transferred, conveyed and quitclaimed, and by these presents do remise, release, transfer, convey and quitclaim unto the Grantee, The Western Pacific Railroad Company, the said Railroad Company (the reorganized corporation under the Plan of Reorganization hereinafter mentioned), its successors, grantees and assigns, all of the property, real, personal and mixed, of every kind and nature of the said Railroad Company now vested in, held, possessed, used or controlled by said T. M. Schumacher and Sidney M. Ehrman, as such Trustees, and, without in anywise limiting the generality or all-inclusive scope of the foregoing description, including the following:

All of the lines of railroad heretofore owned or operated by the said Railroad Company and now vested in, held, possessed used or controlled by the Grantors, together with all of the estates, rights, powers, privileges, franchises, immunities and all other property used in connection therewith or in any way pertaining thereto.

All of the Railroad Company's estate, right, title, interest, terms and remainders of terms, franchises, privileges and rights of action of whatsoever name and nature in law or in equity in any and all trackage, terminal or operating contracts or agreements or

leases, and all extensions or renewals thereof, used or usable in connection with the aforesaid lines of railroad or appertaining thereto; all rights of way, station grounds, railroad yards, terminal grounds, and other lands, tenements and hereditaments of whatever kind or description; also all main, branch, cut-off, spur, industrial, switch, connecting, storage, yard or terminal tracks, easements estates, superstructures, roadbeds, bridges, trestles, culverts, viaducts, buildings, depots, stations, office buildings, stock yards, warehouses, elevators, car houses, engine houses, freight houses, machine shops and other shops, turntables, fuel stations, water stations, signals, interlocking plants, telegraph and telephone lines, fences, docks, structures, improvements and fixtures; and all mechanical equipment, machinery, tools, implements, furniture, supplies, materials, and other chattels, all locomotives and engines however propelled or operated, passenger, freight or other railway cars, derricks and other work equipment or cars, buses, trucks, automobiles and other automotive machines, and any and all other rolling stock and vehicles; and all other property of every kind and nature, in anywise or at any time, owned or used or useful in connection with the operation of the aforesaid lines of railroad or the carrying on of the business and affairs of the Railroad Company either by the Railroad Company or by the Grantors, as such Trustees, and now forming a part of the property and estate of the Railroad Company now held by the Grantors as such Trustees;

together with all of the rights, powers, privileges, franchises, immunities, and other property of whatsoever kind so vested, held, possessed, used or controlled either in connection with the operation of the aforesaid lines of railroad or otherwise, including all choses in action and all interests of the Grantors, as such Trustees, in all suits and proceedings wheresoever brought and by whomsoever instituted now pending or which may hereafter be commenced prior to the final discharge of the Grantors as such Trustees.

This conveyance is made by the Grantors pursuant to a Plan of Reorganization of The Western Pacific Railroad Company, confirmed by order of the District Court of the United States for the Northern District of California, Southern Division, in proceedings for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor, No. 26591-S," and in connection with and for the purpose of consummating a Plan of Reorganization in said proceedings, and pursuant to the direction, designation and authorization of the Court contained in the order entered ....., 1944, in said reorganization proceedings.

And said Grantors hereby agree that they will, on the request of The Western Pacific Railroad Company and at its expense, execute, acknowledge and deliver all and every such further instruments as may be necessary or proper to confirm and fur-

ther evidence the release, transfer and conveyance of the aforesaid property.

This instrument is executed by and shall be binding upon the Grantors as Trustees of the property of said Railroad Company for the uses and purposes above set forth and referred to, and shall be effective as of 12:01 a.m. Pacific War Time, December 29, 1944; provided, however, that the Grantors shall retain possession of so much of the property and assets hereby conveyed as may be necessary or convenient to enable the Grantors as directed by said order of ....., 1944, in the reorganization proceedings, to continue, as Trustees, to carry on and operate the railroad business of the Railroad Company until midnight December 31, 1944, at which time all right of the Grantors to retain possession or control of said property and assets shall cease and terminate.

In Testimony Whereof, the Grantors as such Trustees have executed this instrument this ..... day of December, 1944.

.....[L. S.]

.....[L. S.]

As Trustees of the Property of The Western Pacific Railroad Company.

In the presence of:

.....

[Appropriate acknowledgments to be supplied]

EXHIBIT "B"

Satisfaction of Mortgage

Whereas, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, executed and delivered a Mortgage or Deed of Trust dated June 26, 1916, to First Federal Trust Company and Henry E. Cooper, as Trustees, to secure an issue of First Mortgage bonds of The Western Pacific Railroad Company, limited to the aggregate principal amount of $50,000,000 at any one time outstanding:

Whereas, according to the records of the undersigned, said Mortgage or Deed of Trust was recorded:

on July 17, 1916, in Liber 451 of Mortgages (new series) page 1, in the office of the County Recorder of the City and County of San Francisco, State of California,

on July 17, 1916, in Liber 1124 of Mortgages, page 67, records of Alameda County, California,

on July 17, 1916, in Book B, Volume 125 of Mortgages, pages 245, San Joaquin County Records, California,

on July 17, 1916, in Book 177 of Mortgages, page 163, Sacramento County Records, California;

on July 17, 1916, in Book 35 of Mortgages, page 100, Sutter County Records, California,

on July 17, 1916, in Volume 31 of Mortgages, page 97, Yuba County Records, California,

on July 17, 1916, in Book 80, page 1 of Mortgages, Butte County Records, California,

on July 17, 1916, in Volume 15 of Mortgages, page 395, Plumas County Records, California,

on July 17, 1916, in Book O of Mortgages, page 15 et seq., Lassen County Records, California,

on July 17, 1916, in Book 26 of Mortgages, page 293, Records of Washoe County, Nevada,

on July 18, 1916, in Book K, page 46 of Mortgages and in Book F, page 9 of Chattel Mortgages, Records of Humboldt County, Nevada,

on July 24, 1916, in Book 6 of Mortgages, page 721, and in Book 3, page 1, of Chattel Mortgages, Records of Lander County, Nevada,

on July 18, 1916, in Liber E of Mortgages, page 346, and in Liber B of chattel Mortgages, page 3, Records of Eureka County, Nevada,

on July 17, 1916, in Book 8 of Real Mortgages, page 201, and in Book 6 of Chattel Mortgages, page 290, Records of Elko County, Nevada,

on July 18, 1916, in Book J of Mortgages, page 141, Tooele County, Utah,

on July 18, 1916, in Book 7-Q of Mortgages, page 85, County of Salt Lake Records, Utah,

on July 19, 1916, in Book 5 of Mortgages, page 324, County of Box Elder Records, Utah,

on July 18, 1916, as a Chattel Mortgage, in Tooele County Records, Utah,

on July 18, 1916, as a Chattel Mortgage in Salt Lake County Records, Utah,

on July 19, 1916, as a Chattel Mortgage in Box Elder County Records, Utah,

on December 7, 1916, in Liber M of Mortgages, page 177, Records of Sierra County, California,

on November 13, 1917, in Volume 226 of Mortgages, page 383, Records of Santa Clara County, California,

on July 17, 1916, in Book 9 of Chattel Mortgages, page 1, Records of Washoe County, Nevada.

Whereas, Crocker First National Bank of San Francisco, a corporation organized and existing under the laws of the United States, and Samuel Armstrong, are now the Trustees under said Mortgage or Deed of Trust, Crocker First National Bank of San Francisco having become successor corporate Trustee on May 31, 1934, and Samuel Armstrong having become successor individual Trustee on January 28, 1935;

Whereas, the District Court of the United States for the Northern District of California, Southern Division, in proceedings for reorganization of The Western Pacific Railroad Company under Section 77 of the Bankruptcy Act, as amended, entitled "In

the Matter of The Western Pacific Railroad Company, Debtor," Docket No. 26591-S, by order entered October 11, 1943, confirmed a Plan of Reorganization of The Western Pacific Railroad Company, which Plan provides, among other things, for the issuance of new securities to the holders of bonds under said Mortgage or Deed of Trust in payment and satisfaction of their bonds, and the release and cancellation of mortgages on the property of The Western Pacific Railroad Company; and

Whereas, by order entered in said proceedings on ....., 1944, said Court directed said Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under said Mortgage or deed of Trust to execute and deliver to The Western Pacific Railroad Company, a satisfaction and release of said Mortgage or Deed of Trust;

Now, Therefore, in consideration of the premises, Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under said Mortgage or Deed of Trust, pursuant to said order dated ....., 1944, hereby certify that, effective December 29, 1944, at 12:01 a.m., Pacific War Time, said Mortgage or Deed of Trust, has been satisfied and discharged and do hereby cancel and discharge said Mortgage or Deed of Trust and consent and direct that said Mortgage or Deed of Trust be discharged of record in the states and counties in which the same has been recorded, and do hereby release, remise, quitclaim, transfer, re-

convey and reassign to The Western Pacific Railroad Company, all of the property, both real and personal, mortgaged, conveyed or pledged by said Mortgage or Deed of Trust and now held by said Trustees thereunder;

And said Crocker First National Bank of San Francisco and Samuel Armstrong as Trustees, as aforesaid, hereby agree that they will, on the request of The Western Pacific Railroad Company and at its expense, execute, acknowledge and deliver all and every such further instruments as may be necessary or proper to cancel and discharge said Mortgage or Deed of Trust, and to have the same satisfied of record.

In Witness Whereof, Crocker First National Bank of San Francisco, as such successor Trustee, by its officers hereunto duly authorized, has executed the foregoing instrument and caused its corporate seal to be hereunto affixed, and Samuel Armstrong as successor Trustee has hereunto set his hand and seal, this ..... day of December, 1944.

CROCKER FIRST NATIONAL
BANK OF SAN FRANCISCO,
as Successor Trustee.

By .....
Vice President.

Attest:

.....

.....
As Successor Trustee.

[Appropriate acknowledgments to be supplied.]

EXHIBIT "C"

Satisfaction of Mortgage

Whereas, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, executed and delivered a Mortgage or Deed of Trust dated as of January 1, 1932, to The Chase National Bank of The City of New York, as Trustee, to secure an issue of General and Refunding Mortgage Bonds of The Western Pacific Railroad Company, limited to an aggregate principal amount of $100,000,000 at any one time outstanding;

Whereas, according to the records of the undersigned, said Mortgage or Deed of Trust was recorded:

on March 12, 1932, in Volume 2353, page 17 of the official records of the City and County of San Francisco, California,

on March 12, 1932, in Volume 25, page 80 of the official records of Sutter County, California,

on March 12, 1932, in Volume 22, page 225 of Mortgages in the County of Plumas, California,

on March 14, 1932, in Volume Z, page 211 of Mortgages in the County of Lassen, California,

on March 14, 1932, in Volume 12, page 375 of the official records of Yuba County, California,

on March 14, 1932, in Volume 4, page 423 of the official records of Modoc, California,

on March 15, 1932, in Volume 2792, page 101 of the official records of Alameda County, California,

on March 15, 1932, in Volume 319, page 1 of the official records of Sacramento County, California,

on March 15, 1932, in Volume 387, page 393 of the official records of San Joaquin, California,

on March 15, 1932, in Volume 604, page 365 of the official records of the County of Santa Clara, California,

on March 15, 1932, in Volume P, page 227 of Mortgages in the County of Sierra, California,

on March 15, 1932, in Volume 37, page 175 of the official records of Siskiyou County, California,

on March 17, 1932, in Volume 85, page 57 of the official records of Butte County, California,

on March 12, 1932, in Volume 1, page 277 of Chattel Mortgages in the County of Lander, Nevada,

on March 12, 1932, in Volume 2, pages 413-471 of Mortgages in the County of Elko, Nevada,

on March 12, 1932, in Volume A, page 238 of Mortgages in the County of Eureka, Nevada,

on March 12, 1932, in Volume 1, page 415 of Mortgages in the County of Pershing, Nevada,

on March 12, 1932, in Volume 56, page 250 of Mortgages in the County of Washoe, Nevada,

on March 18, 1932, in Volume 1, Page 525 of Mortgages in the County of Humboldt, Nevada,

on March 18, 1932, in Volume 36, page 428 of the records of Box Elder County, Utah,

on March 19, 1932, in Volume 103, page 155 of the records of Salt Lake County, Utah,

on April 12, 1932, in Volume P, page 1 of the records of Tooele County, Utah.

Whereas, Irving Trust Company is now the Trustee under said Mortgage or Deed of Trust, having become successor Trustee on November 13, 1936;

Whereas, the District Court of the United States for the Northern District of California, Southern Division, instituted proceedings for the Reorganization of The Western Pacific Railroad Company under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor," Docket No. 26591-S, by order entered October 11, 1943, confirmed a Plan of Reorganization of The Western Pacific Railroad Company, which Plan, provides, among other things, for the issuance of new securities to the holders of bonds under such Mortgage or Deed of Trust in payment and satisfaction of their bonds and the release and cancellation of mortgages on the property of The Western Pacific Railroad Company; and

Whereas, by order entered in said proceedings on

....., 1944, said Court directed said Irving Trust Company, as Trustee under said Mortgage or Deed of Trust, to execute and deliver to The Western Pacific Railroad Company a satisfaction and release of said Mortgage or Deed of Trust;

Now, Therefore, in consideration of the premises Irving Trust Company, as Trustee under said Mortgage or Deed of Trust, pursuant to said order dated ....., 1944, hereby certifies that, effective December 29, 1944, at 12:01 a.m., Pacific War Time, said Mortgage or Deed of Trust, has been satisfied and discharged and does hereby cancel and discharge said Mortgage or Deed of Trust and consents and directs that said Mortgage or Deed of Trust be discharged of record in the states and counties in which the same has been recorded, and does hereby release, remise, quitclaim, transfer, reconvey and reassign to The Western Pacific Railroad Company all of the property, both real and personal, mortgaged, conveyed or pledged by said Mortgage or Deed of Trust and now held by said Trustee thereunder;

And said Irving Trust Company, as Trustee, as aforesaid, hereby agrees that it will, on the request of The Western Pacific Railroad Company and at its expense, execute, acknowledge and deliver all and every such further instruments as may be necessary or proper to cancel and discharge said Mortgage or Deed of Trust and to have the same satisfied of record.

In Witness Whereof, Irving Trust Company, as

successor Trustee, by its officers hereunto duly authorized, has executed the foregoing instrument and caused its corporate seal to be hereunto affixed this ..... day of December, 1944.

IRVING TRUST COMPANY,
as Successor Trustee.

By .....
Vice President.

Attest:

.....

[Appropriate acknowledgment to be supplied.]

EXHIBIT "D"

Whereas, heretofore in a proceeding in the United States District Court for the Northern District of California, Southern Division, for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S, a Plan of Reorganization of The Western Pacific Railroad Company was approved and confirmed, and, pursuant to the provisions of said Plan of Reorganization, an order was entered on September 25, 1944, by said Court approving the use of the said debtor company, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, as the reorganized company in carrying out said plan;

Whereas, the Interstate Commerce Commission, under date of October 24, 1944, in Docket #10913, made a report and order which, among other things,

approved and authorized the assumption by said The Western Pacific Railroad Company of obligations and liabilities as provided in said plan;

Whereas, pursuant to said Plan of Reorganization and to the order entered in said proceeding on ....., 1944, T. M. Schumacher and Sidney M. Ehrman, as Trustees of the property of said The Western Pacific Railroad Company, duly appointed in said proceedings (hereinafter called the "Trustees"), have, by deed dated December ....., 1944, remised, released, transferred, conveyed and quitclaimed to the undersigned, said The Western Pacific Railroad Company, all of the property, real, personal and mixed, of every kind and nature, vested in, held, possessed, used or controlled by said Trustees;

Now, Therefore, pursuant to the provisions of said order entered ....., 1944, and in consideration of the said release, transfer and conveyance by the Trustees, the undersigned The Western Pacific Railroad Company, for itself, its successors and assigns, makes this Agreement with said Trustees, for the benefit of said Trustees and of all other parties in interest in the above-entitled proceedings, under which agreement the undersigned does hereby:

1. Assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by said Trustees and remaining in effect on December 31, 1944, and all contracts, leases and agreements of the debtor in effect on August 2, 1935, either assumed or not dis-

affirmed by said Trustees, which remain in effect on December 31, 1944, and expenses of reorganization allowed by the Court within the maximum fixed by the Interstate Commerce Commission;

2. Assume any and all outstanding current liabilities and obligations incurred by said Trustees and without limitation thereto, any and all liabilities or obligations of the debtor in possession of said Trustees with respect to claims for personal injury or death, for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business, including liabilities and obligations hereafter arising up to midnight December 31, 1944.

3. Without limitation of the generality of the foregoing agreements in paragraphs 1 and 2 hereof, specifically undertake to defend at its own sole cost and expense all suits and proceedings, of whatsoever character, now or hereafter instituted against the Trustees, or either of them, arising out of the possession, use or operation of the debtor's properties by the Trustees or of their conduct of the debtor's business, and to assume the conduct of all suits and proceedings, of whatsoever character, heretofore or hereafter brought by the Trustees in the discharge of their duties and responsibilities as such, and, generally, to indemnify the Trustees and save them harmless against all expense, liability,

loss, judgments, claims and demands arising out of such suits or proceedings. It is the intent of the covenants in this paragraph 3 contained that The Western Pacific Railroad Company shall assume responsibility for all such suits and proceedings to which the Trustees, or either of them, are or shall become parties, to the same effect as if The Western Pacific Railroad Company instead of the Trustees had been party thereto in the first instance.

4. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to perform the obligations of the Trustees in respect of the following:

(a) $1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date, between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) $1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of

May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H. P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H. P. diesel electric freight locomotives.

5. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment; such coupons being those which the Court by orders of March 11, 1936, and March 20, 1936, authorized The Chase National Bank of the City of New York to pay from funds

which had been deposited with it by the debtor.

6. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, assume the liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in the said proceeding and without prejudice by reason of such proof not having been made.

This agreement shall become effective on December 29, 1944, at 12:01 a.m., Pacific War Time.

In Witness Whereof, the undersigned has caused this instrument to be executed in its behalf by its President and its corporate seal to be hereunto affixed this ..... day of December, 1944.

THE WESTERN PACFIC
RAILROAD COMPANY,

By .....
President.

Attest:

.....

[Appropriate acknowledgment to be supplied.]

EXHIBIT "E"

....., 1944

Reconstruction Finance Corporation
Washington, D. C.

Dear Sirs:

In consideration of the acquisition by Reconstruction Finance Corporation (hereinafter called Re-

construction) of $10,000,000 principal amount of The Western Pacific Railroad Company First Mortgage 4% Bonds, due January 1, 1974, issued or to be issued under a Mortgage, dated as of January 1, 1939, between The Western Pacific Railroad Company and Crocker First National Bank of San Francisco, Trustees, The Western Pacific Railroad Company (hereinafter called the Railroad) hereby agrees with and represents to Reconstruction as follows:

1. The term "compensation" as used in this Agreement shall include all salaries, fees, bonuses, commissions or other payments, direct or indirect, in money or otherwise, for personal services paid or to be paid by the Railroad.

2. There are attached hereto, and made a part hereof, four schedules, as follows:

(a) Schedule A, consisting of ..... sheets, setting forth the compensation (excluding directors' fees shown in Schedule C) paid or to be paid to officers, directors and employees of the Railroad at a rate of $4800 or more, per year;

(b) Schedule B, consisting of ..... sheets, setting forth the average number of employees and the total compensation paid to officers and employees of the Railroad during the year 1943, as such information is classified in Schedule 561 in form A, Annual Reports filed with the Interstate Commerce Commission;

(c) Schedule C, consisting of ..... sheets, setting forth the compensation paid or to be paid to

the Railroad's directors and members of Executive Committee in such capacities;

(d) Schedule D, consisting of ..... sheets, setting forth the compensation paid or to be paid to officers, directors or employees of the Railroad by any company or companies controlling, or affiliated with or controlled by, the Railroad.

3. So long as any of said Bonds are held by Reconstruction, the Railroad will not—

(a) increase the compensation, either directly or by promotion to any office or position, of

(1) any officer, director or employee, paid or to be paid compensation at a rate of not more than $4800 per year to a rate of more than $4800 per year; or

(2) any officer, director or employee, paid or to be paid compensation at a rate of more than $4800 per year;

(b) elect, appoint or otherwise engage or employ to or for any office or position, any person not shown in said Schedule A, to or for any office or position at a compensation at a rate of more than $4800 per year;

without, in each case, obtaining the prior written consent of Reconstruction.

4. Nothing contained in this Agreement shall be deemed to prohibit the Railroad from effecting any reduction in compensation below the respective amounts set forth in said Schedules, for any of its officers, directors or employees, or, in the case of a vacancy in any of the offices or positions shown in said Schedules from filling such vacancy through

promotion, new employment or otherwise, at the rate of compensation for such office or position set forth in said Schedules, or as requiring or permitting the Railroad to violate any of the provisions of the Railway Labor Act, or other federal act or executive order relative to compensation as defined herein, or any existing or future agreements made with labor organizations or groups of employees acting collectively, or of any judgment or decree of a court.

5. If any company, directly or indirectly, controlling or affiliated with, or controlled by, the Railroad, shall increase the compensation paid by it to any officer, director or employee of the Railroad, and if, after such increase, the aggregate annual compensation paid to such officer, director or employee by every such other company and by the Railroad would be in excess of $4800, the compensation payable by the Railroad to such officer, director or employee shall be reduced in an amount equal to the amount of such increase or the amount of such excess, whichever shall be the less. The Railroad shall give immediate written notice to Reconstruction of any such increase by any such Company of any such compensation paid or to be paid any officer, director or employee of the Railroad.

6. From time to time, upon request of Reconstruction, the Railroad shall furnish, in form attached, schedules of all the compensation currently paid to the officers, directors and employees of the Railroad.

7. This Agreement shall be binding upon the successors and assigns of the Railroad, and shall enure to the benefit of any department, branch, or agency of the Government which may be successor to or assign of Reconstruction.

Respectfully submitted,

THE WESTERN PACIFIC RAILROAD COMPANY.

By .....
President.

Attest:

.....
Secretary.

EXHIBIT "F"

The Western Pacific Railroad Company

Instructions to Guaranty Trust Company of New York, as Depositary and Exchange Agent

New York, N. Y.
December ..., 1944

Guaranty Trust Company of New York
140 Broadway
New York 15, N. Y.

Gentlemen:

The designation of Guaranty Trust Company of New York as Depositary and Exchange Agent under the Plan of Reorganization of The Western Pacific Railroad Company (hereinafter called the Railroad Company), confirmed October 11, 1943, has been approved by the District Court of the

United States for the Northern District of California, Southern Division, by Order entered October 23, 1944, in the proceedings now pending in said Court for the reorganization of the Railroad Company, and said Court has likewise approved the instructions given to you herein as such Depositary and Exchange Agent.

The maximum amount of securities to be issued under the Plan and delivered by you as Depositary and Exchange Agent are as follows:

First Mortgage 4% Bonds, Series A, due January 1, 1974.....$10,000,000

General Mortgage 4½% Income Bonds, Series A, due January 1, 2014.....$21,219,000

Preferred Stock, Series A ($100 par value).....$31,850,200

Common Stock, no par value....319,032.767 shares

General Mortgage Income Bonds are not issuable in denominations of less than $100 and fractional shares of stock will not be issued. These fractions are to be covered by Scrip, as hereinafter provided.

Cash payments are to be distributed with the securities to be delivered, as hereinafter provided.

The claimants entitled to receive securities and cash are (1) holders of the Railroad Company's present First Mortgage Bonds, being the Bonds issued under the Railroad Company's First Mortgage, dated the twenty-sixth day of June, 1916, due March 1, 1946, (2) Reconstruction Finance Cor-

poration, (3) The Railroad Credit Corporation, and (4) A. C. James Co.

The undersigned Reorganization Committee will, under the terms of the order of the District Court of ....., 1944, cause to be published a notice to security holders informing them that they are entitled to present to you the obligations of the Railroad Company now held by them, and to receive on and after December 29, 1944, in exchange therefor the new securities and cash to which they are entitled; in addition all known holders of First Mortgage Bonds due March 1, 1946, and other claimants mentioned above will be notified by circular or other letter giving the basis of exchange. Letters of transmittal and instructions to First Mortgage Bondholders for use in surrendering their bonds for exchange will also be sent to all known holders of such bonds and you will be furnished with an additional supply of such letters of transmittal and instructions. All First Mortgage Bonds surrendered to you should be accompanied by such letters of transmittal or by written instructions to effect the exchange thereof under the Plan of Reorganization. In case a letter of transmittal is signed by a responsible bank or broker in behalf of the owner, no evidence of authority to act as agent need be required by you. No special letters of transmittal have been prepared for claimants other than First Mortgage Bondholders.

First Mortgage 5% Series A Bonds due March 1, 1946, are outstanding in the amount of $49,290,100

including $300 of Bond Scrip Certificates. These scrip certificates (aggregating $300) shall be treated as Bonds for a like amount if surrendered to you, provided they are surrendered in principal amounts of $100 or multiples thereof.

The denominations of outstanding First Mortgage Bonds in coupon form are $100, $500 and $1,000. Except for one bond in the amount of $350,000, in the denominations of outstanding First Mortgage Bonds in fully registered form are $1,000 and $10,000. First Mortgage Bonds in registered form surrendered to you as Depositary and Exchange Agent need not be endorsed or accompanied by instruments of transfer unless the new securities are to be registered in a name other than the name in which the surrendered bonds are registered or unless the checks for the adjustment payments to accompany such new securities are to be in names other than the name in which the surrendered bonds are registered. First Mortgage Bonds in coupon form should either have March 1, 1934, and subsequent coupons attached or should be accompanied by an affidavit and indemnity agreement (without surety) on your customary form for any missing coupons. In case coupons due prior to March 1, 1934, are attached to any bonds received by you by mail, you are to detach such coupons and return the same to the party on whose behalf the bonds are presented. Certain coupons due March 1, 1934, and subsequent bear a stamp regarding the deferment of the interest represented thereby, but it is imma-

terial whether such stamp is or is not on any coupons. In the event that one or more First Mortgage Bonds shall be mutilated, destroyed, lost or stolen, you, as Depositary and Exchange Agent, are authorized upon receipt of satisfactory evidence of such destruction, loss or theft, or upon the surrender of the bond or bonds, if mutilated, and upon receipt of indemnity satisfactory to you and to the Railroad Company (subject however to the approval of the Executive Committee or Board of Directors of the Railroad Company evidenced by a general or special resolution, a certified copy of which is to be furnished to you), to deliver new securities of such nature and amount and such cash as would have been deliverable against such bond or bonds in the absence of such mutilation, destruction, loss or theft.

Of said First Mortgage Bonds ten bonds, to wit: those numbered M-3595, M-3596, M-21612, M-21613, M-21614, M-21615, M-21616, M-21618, M-21619 and M-21620 are to be presented without coupons maturing prior to September 1, 1935, and in the delivery of securities each such bond is to receive a lesser amount of common stock than the generality of such bonds; and certain common stock, as hereinafter provided, is to be delivered to The Western Pacific Railroad Corporation, a Delaware Corporation, upon surrender of coupons numbered 36 and 37 with respect to said bonds.

Treatment of First Mortgage Bondholders

Upon receipt of First Mortgage Bonds due March 1, 1946, with coupons and/or indemnity agreement as aforesaid, you as Depositary and Exchange Agent are to deliver new securities and pay cash to the persons surrendering such bonds, at the rates indicated below. The securities to be delivered are as follows:

Principal Amount of Old First Mortgage Bonds Received	New Preferred Stock of $100 par Value per Share (or Scrip) to be Delivered
$ 100.	.3/5 shares
500.	3 shares
1,000.	6 shares
10,000.	60 shares

New General Mortgage Income Bonds (or Scrip) to be Delivered	New Common Stock (or Scrip) to be Delivered
$ 40.	.467 shares
200.	2.335 shares
400.	4.67 shares
4,000.	46.7 shares

With the delivery of said securities, cash adjustment payments are to be made as follows:

(a) with each General Mortgage 4½% Income Bonds, Series A, a cash adjustment payment at the rate of $22.50 for each $100 of the principal amount thereof,

(b) with each share of Preferred Stock, Series A, a cash adjustment payment of $15.81,

(c) with each share of Common Stock, a cash adjustment payment of $9.00,

(d) with Scrip Certificates for General Mortgage 4½% Income Bonds, Series A, for Preferred Stock, and for Common Stock, proportionate cash adjustment payments based on the amount of the Scrip Certificates are to be made, that is to say, with each Scrip Certificate for General Mortgage Bonds, the amount of which Scrip Certificate is $20, a payment of $4.50; with each scrip certificate representing 1/5 of a share of preferred stock, a payment of $3.16; and with each Scrip Certificate representing a fractional amount of Common Stock, a payment of a proportionate part of $9.

The new securities to be delivered to the First Mortgage Bondholders are in settlement for their claims with respect to principal and accrued and unpaid interest to January 1, 1939. With respect to each of the aforesaid ten bonds numbered M-3595, M-3596, M-21612, M-21613, M-21614, M-21615, M-21616, M-21618, M-21619 and M-21620, the amount of Common Stock to be delivered shall be 3.356 shares instead of 4.67 shares as indicated in the foregoing schedule. Against delivery of coupons numbered 36 and 37 appurtenant to said bonds, there shall be issued and delivered to or upon the order of The Western Pacific Railroad Corporation,

a Delaware corporation, for each such coupon .437 shares of Common Stock and the cash adjustment payment with respect thereto shall be paid to said corporation or upon its order.

The adjustment payments in cash to be made as indicated above are based upon an order of the District Court of the United States for the Northern District of California, Southern Division, entered September 25, 1944, which determined the available net income of the Railroad Company for the calendar years 1939-1943, inclusive, and the allocation of such available net income, including the said adjustment payments to be made to security holders at the time of the consummation of the plan of reorganization. Such adjustment payments are, as to the General Mortgage Income Bonds at the rate of 22½% of the principal amount thereof; as to the new Preferred Stock at the rate of $15.81 per share and as to the new Common Stock at the rate of $9 per share. These adjustment payments are not made as either interest or dividends. The General Mortgage Income Bonds will draw interest from January 1, 1944, and the shares of stock to be delivered will not be entitled to dividends for any period prior to January 1, 1944.

First Mortgage Bonds of 1946, presented to you for exchange for the new securities and adjustment payments, are to be cancelled and cremated by you.

Treatment of Claim of Reconstruction Finance Corporation

Upon

(1) receipt from Reconstruction Finance Corporation of the following certificates of indebtedness issued by the Trustees:

Certificates numbered 1 to 10 both inclusive, in bearer form, dated the first day of December, 1938, originally payable December 1, 1939, bearing interest at the original rate of 3% per annum, each in the original principal amount of $1,000,000, said certificates being signed in the name of T. M. Schumacher and Sidney M. Ehrman, as Trustees, by M. J. Curry, Asst. Treasurer and countersigned by the Deputy Clerk of the District Court of the United States for the Northern District of California, Southern Division;

(2) the payment by Reconstruction Finance Corporation of $6,000,000 (being the cash collateral heretofore deposited as security for said Certificates);

(3) the surrender of the following notes of the Railroad Company aggregating $2,963,000 in principal amount, held by Reconstruction Finance Corporation:

Note dated March 1, 1932, due March 1, 1935	$ 699,000

Note dated June 29, 1932, due June 29, 1935	734,584
Note dated August 1, 1932, due August 1, 1935	136,045
Note dated August 30, 1932, due August 30, 1935	1,293,440
Note dated March 25, 1933, due March 25, 1936	99,931

(4) the surrender of the following bonds of the Railroad Company aggregating $10,750,000 in principal amount held by Reconstruction Finance Corporation as collateral for said notes:

General and Refunding Mortgage Bonds Series A issued by the Railroad Company in temporary form dated the 1st day of January, 1932, No. T-2, for the principal amount of $8,750,000.

General and Refunding Mortgage Bond Series B issued by the Railroad Company in temporary form, dated the 1st day of July, 1932, No. T-1, for the principal amount of $2,000,000 and

(5) the payment by Reconstruction Finance Corporation of $..... (being the sum of $1,075,000, less $..... interest upon said Trustees' Certificates to December 29, 1944, and less $....., being an amount equal to interest on $10,000,000 of the new First Mortgage 4% Bonds from December 29, 1944, to January 1, 1945),

you are to deliver to Reconstruction Finance Corporation:

$10,000,000 principal amount of the new First Mortgage Bonds, in temporary registered form, in one piece bearing interest from January 1, 1945,

$ 1,185,200 principal amount of the new General Mortgage 4½% Income Bonds, Series A, in temporary form, in the following denominations, to wit:
118 bonds of the denomination of $10,000
1 bond of the denomination of $5,000, and
2 bonds of the denomination of $100.

17,778 shares of the new Preferred Stock, in temporary form, in the following denominations, to wit:
177 certificates for 100 shares, and
1 certificate for 78 shares.

15,788 shares of the new Common Stock in temporary form in the following denominations, to wit:
157 certificates for 100 shares, and
1 certificate for 88 shares,

and you are to pay to Reconstruction Finance Corporation $689,832.18 in cash, being the aggregate of (a) $266,670, the cash distribution with respect to the General Mortgage Bonds so delivered, (b)

$281,070.18, the cash distribution with respect to the Preferred Stock so delivered and (c) $142,092, the cash distribution with respect to the Common Stock to be delivered.

Treatment of Claim of The Railroad Credit Corporation

Upon

(1) surrender to you of the following notes of the Railroad Company held by The Railroad Credit Corporation:

Note dated June 29, 1932, due February 28, 1934, for the principal sum of $1,303,000

Note dated March 25, 1933, due March 24, 1935, for the principal sum of $1,293,439

and (2) the surrender of the following bonds of the Railroad Company held as security for said notes:

General and Refunding Mortgage Bond, Series A, No. T-5, dated the first day of January, 1932, in the principal amount of $2,000,000;

General and Refunding Mortgage Bond, Series B, No. T-2, dated the first day of July, 1932, in the principal amount of $2,000,000,

you are to deliver to The Railroad Credit Corporation the following:

$154,080 principal amount of the new General Mortgage 4½% Income Bonds, Series A, in temporary form, in the following denominations, to wit:

15 Bonds of the denomination of $10,000 each

4 Bonds of the denomination of $1,000 each

Scrip certificates representing said bonds in the amount of $80.

2,416.4 shares of the new Preferred Stock, in temporary form in the following denominations:

24 Certificates for 100 shares each
1 Certificate for 16 shares

Scrip Certificates for 2/5 of a share of the new Preferred Stock,

not more than 35,425 shares of Common Stock (or scrip certificates for fractional shares) the amount of such shares so to be distributed to be reduced by one (1) share for each $62 of the amounts to which the debtor and its subsidiaries became entitled under the marshalling and distributing plan of 1931, insofar as such amounts were retained by The Railroad Credit Corporation and applied by it, after December 31, 1938, and prior to the distribution of such securities, to the obligations of the Railroad Company to The Railroad Credit Corporation.

Prior to December 29, 1944, you will be notified of the amount of such reduction. The balance of said 35,425 shares of Common Stock, together with the cash distribution with respect thereto shall be held until determination of the appeal of The Railroad Credit Corporation from the order of September 14, 1944, with respect to such reduction and if said appeal be successful shall be then distributed and paid over to The Railroad Credit Corporation; otherwise to be returned to the Railroad Company:

and you are to pay to The Railroad Credit Corporation a sum which shall be the aggregate of (a) $34,668 being the cash distribution with respect to the General Mortgage Income Bonds so delivered; (b) $38,203.28 being the cash distribution with respect to the Preferred Stock so delivered; (c) a sum which shall be at the rate of $9 a share on the Common Stock and scrip certificates therefor so delivered; and (d) $72.

Treatment of Claim of A. C. James Co.

Upon

(1) surrender to you of the following notes of the Railroad Company to A. C. James Co.

Note Dated March 28, 1932—$4,851,000.00 Due March 28, 1935

Note Dated May 31, 1932—$148,800.00 Due May 31, 1935

and (2) the surrender of the following bonds of the Railroad Company held as security for said notes:

General and Refunding Mortgage Bond, Series A, No. T-3, in temporary form, dated January 1, 1932, in the principal amount of $493,500.

General and Refunding Mortgage Bond, Series A, No. T-4, in temporary form in the principal amount of $186,000.

General and Refunding Mortgage Bond, Series A, No. T-6, in temporary form in the principal amount of $3,630,000.

you are to deliver to A. C. James Co. or the holder of said notes:

$163,680 principal amount of the new General Mortgage Bonds, in temporary form, in the following denominations:

16 Bonds of the denomination of	$10,000
3 Bonds of the denomination of	1,000
1 Bond of the denomination of	500
1 Bond of the denomination of	100
Scrip certificates representing said bonds in the amount of	80

2,567 shares of the new Preferred Stock, in temporary form, in the following denominations:

25 Certificates for	100 shares each
1 Certificate for	67 shares

37,635 shares of the new Common Stock, in temporary form, in the following denominations:

376 Certificates for 100 shares each
1 Certificate for 35 shares

and you are to pay to the holder of said notes the sum of $416,227.27, being the aggregate of (1) $36,828, the cash distribution with respect to the General Mortgage Bonds so delivered, (2) $40,584.27 the cash distribution with respect to the Preferred Stock so delivered, (3) $338,715, the cash distribution with respect to the Common Stock so delivered and (4) the sum of $100.

Of the collateral for the notes of Reconstruction Finance Corporation, The Railroad Credit Corporation and the A. C. James Co., all bonds of the debtor are to be cancelled and cremated by you and the other obligations returned to the Railroad Company.

Crocker First National Bank of San Francisco, California, is Corporate Trustee of the new First Mortgage Bonds and it has been instructed to authenticate and deliver to you the $10,000,000 of Series A Bonds of that issue which you are to deliver to the Reconstruction Finance Corporation.

The Chase National Bank of the City of New York is Corporate Trustee of the new General Mortgage Income Bonds and it has been instructed to honor your requisitions for General Mortgage 4½% Income Bonds, Series A, to be delivered by you as set out above.

All new General Mortgage Income Bonds so requested by you will be dated January 1, 1939. The denominations are $100., $500., $1,000., $5,000. and $10,000. Scrip in lieu of fractional amounts of new General Mortgage Income Bonds needed by you for exchange are to be obtained by you from the Scrip Agent as hereinafter provided.

Central Hanover Bank and Trust Company is Transfer Agent for the new Preferred and Common Stocks and it has been instructed to honor your requisitions for not exceeding 318,502 shares of new Preferred Stock and 319,032 shares of new Common Stock. Both new Common and new Preferred Stock Certificates are issuable in denominations of 100 shares and less than 100 shares. Only full shares of stock are to be requisitioned from Central Hanover Bank and Trust Company. Scrip in lieu of fractional shares are to be requisitioned from the Scrip Agent in accordance with the succeeding paragraph.

City Bank Farmers Trust Company is Scrip Agent for scrip certificates to be issued in respect to the General Mortgage Income Bonds and Preferred and Common Stocks. Bond scrip is issuable in the denomination of $20., Preferred Stock scrip in the denomination of one-fifth of a share, and Common Stock scrip will be in fractional denominations of which the denominator in each case is 1,000. The Scrip Agent has been authorized to honor your requisitions for scrip of all three classes required by you in connection with exchanges. The Corporate Trustee of the General Mortgage Income Bonds has

been instructed to reserve for account of the Scrip Agent sufficient bonds to cover outstanding scrip in accordance with the requirements of the Scrip Agreement between the Company and City Bank Farmers Trust Company dated December 28, 1944, upon notice of issuance of scrip by the Scrip Agent. Similarly the Transfer Agent of the new Preferred and new Common Stock has been instructed to reserve sufficient stock for account of the Scrip Agent in respect to outstanding Preferred and Common scrip, upon notice of issuance of such scrip. The Scrip Agreement provides that all classes of scrip issued thereunder become void on and after January 1, 1950, and permits the sale of the Bonds and Stock reserved for the scrip after January 1, 1948. In the event of redemption or sale of Bonds or Stock reserved for scrip, the scrip certificates are entitled to their pro rata share of the net proceeds including accrued interest and dividends. When any of these events occur it will no longer be possible to issue scrip certificates and at that time the undersigned Railroad Company will provide you with supplemental instructions as to procedure and an amount of cash estimated to be necessary to be paid to the old security holders in lieu of scrip.

Upon or prior to the opening of business on December 29, 1944, you will be put in funds for the account of The Western Pacific Railroad Company to cover the adjustment payments in cash to be made in connection with the issue of the new securities as set out above. Separate checks are to be

given for such adjustment payments with respect to Bonds, Preferred Stock and Common Stock respectively. At the date fixed for the consummation of the plan, i.e., December 29, 1944, there will be no interest or dividends payable on the new Bonds and Stocks requisitioned by you. In the case of subsequent presentations of existing securities for exchange, the Corporate Trustee of the new General Mortgage Income Bonds and the Transfer Agent for the new Common and Preferred Stocks have been instructed to send you, along with any such new Bonds and Stock requisitioned by you, checks for such interest and dividends as may hereafter be paid upon such securities, such checks to be drawn to the order of the holders indicated on your requisitions. Such checks should be delivered by you to the respective holders along with the new securities.

Prior to the commencement of the exchange we will furnish you with an opinion of our counsel as to whether or not withholding tax is required to be deducted by you on payment of the cash distribution to non-resident alien holders and such opinion will also cover the basis of transfer tax where the new securities are to be issued in a name other than that of the owner of the securities deposited.

The notes received by you from the Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company should be fully cancelled by you and returned to the Railroad Company.

There will be delivered to you prior to commencement of exchange the following documents:

1. Certified copy of Resolution or other document of the Reorganization Committee designating you as Depositary and Exchange Agent;

2. Certified copy of Resolution adopted by the Board of Directors of the Railroad Company authorizing execution of this letter agreement;

3. Certified copy of Order or Orders of the Federal Court approving your appointment, and approving these instructions and generally authorizing the consummation of the reorganization;

4. Copy of published notice over the signature of the Reorganization Managers relative to the commencement of exchange;

5. Supply of letters of transmittal and instructions to First Mortgage Bondholders and circular letters to such Bondholders regarding the basis of the exchange;

6. Copies of instructions given by the Railroad Company to the Corporate Trustee of the new General Mortgage Income Bonds, the Transfer Agent of the new Preferred and Common Stock and the Scrip Agent with respect to delivery of securities and future interest and dividends upon your requisition;

7. Letters from the General Mortgage Corporate Trustee and Transfer Agent and Scrip Agent of the new securities that they are prepared to honor your requisitions for the amount of new securities required for the exchange;

8. Specimens of old First Mortgage Bonds and all new securities; copies of new Mortgages and Scrip Agreement;

9. List of stop payment orders on old First Mortgage Bonds.

It is understood that these instructions may from time to time be supplemented or amended by additional instructions in writing, either upon your request to the undersigned or upon the initiative of the Reorganization Committee or the Railroad Company. Such instructions may be given either by the Reorganization Committee or by the President or Vice President, Secretary or Treasurer of the Railroad Company or by the Railroad Company and the Reorganization Committee jointly. If given by the Reorganization Committee such instructions will be signed by their Chairman or by any two members.

As Depositary and Exchange Agent you may advise with counsel for either of the undersigned or your own counsel in any matter arising in connection with the Depositary and Exchange Agency, and you shall be fully protected in relying upon the advice of such counsel.

It is understood and agreed that you are not to

be in any way responsible for the form or validity of any security delivered by you hereunder, and that you shall be fully protected in accepting any security, endorsement, assignment, instruction or other paper or document believed by you to be valid or genuine, and to have been signed by or on behalf of the proper person or persons. The undersigned Railroad Company agrees to indemnify and hold you harmless from and against any and all claims or liabilities asserted against you by reason of any action or actions taken by you pursuant to the instructions herein contained. Without limiting the foregoing indemnity provisions, it is hereby agreed that the same apply to and cover liability for taxes and other governmental charges which you may at any time incur by reason of the receipt or delivery of securities in connection with effecting exchanges hereunder or the recipt or the holding of payment of any cash in connection with your duties hereunder.

At any time after January 1, 1955, the Railroad Company may request you to terminate your duties as Depositary and Exchange Agent, and after the date fixed by the Railroad Company for such termination, you shall pay and deliver to the Railroad Company any cash and securities held by you as Depositary and Exchange Agent. Thereafter all exchanges of securities under the Plan of Reorganization shall be made by the Railroad Company in the discretion and under such conditions as may be prescribed by its Board of Directors or Executive

Committee. Until such time as your duties as Depositary and Exchange Agent are terminated, all cash and any securities which may be held by or reserved for you for distribution under the Plan of Reorganization shall be held in trust for the purposes herein expressed.

Yours very truly,

.....

.....

Reorganization Committee

THE WESTERN PACIFIC

RAILROAD COMPANY,

By .....

(Vice) President.

Attest:

.....

Assistant Secretary.

We agree to act in accordance with the foregoing letter agreement, a counterpart of which has been received and retained by us.

GUARANTY TRUST COMPANY

OF NEW YORK, as Depositary

and Exchange Agent

By .....

Trust Officer.

Dated:

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. CALBREATH
Clerk, District Court of the U. S., Northern District of California.

[Seal] By A. T. ALLEN
Deputy Clerk.

EXHIBIT No. 2

In the District Court of the United States for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

FINAL ORDER

The petition filed March 18, 1946, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western Pacific Railroad Company above-named, for an order approving their expenses, dis-

charging the Committee and terminating the proceedings duly came on to be heard on March 28, 1946, and was heard and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed March 18, 1946, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) All of the business, assets and property constituting the debtor's estate of every kind and character, real, personal and mixed, and all of the right title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order.

(b) The plan of reorganization of The Western Pacific Railroad Company, which was duly confirmed by order of this Court dated and entered October 11, 1943, has been fully and properly carried out and put into effect in accordance with the terms and provisions of said plan and the orders of this Court heretofore entered in this proceeding; all acts and things required by the order of this Court dated and entered November 27, 1944, to be done or performed in order to consummate said plan, have been properly done or performed; the exchange of more than 99% of the principle amount of securities of the reorganized company has been effected in accordance with the plan of reorganization and the orders of this Court; and adequate and proper arrangements have been made for the exchange of the remainder of said securities.

(c) The reasonable and necessary expenses of the Reorganization Committee in carrying out and putting into effect the plan of reorganization, as disclosed by Schedule "B" annexed to the petition for this order, filed by said Committee and supported by evidence introduced at the hearing upon said petition, exclusive of the fees and expenses of the attorneys for said Committee, which have heretofore been approved and allowed by order of this Court filed December 10, 1945, are within the maximum limits approved by the Interstate Commerce Commission and authorized by this Court by order filed October 23, 1944, and should be finally approved and allowed.

(d) Frederick H. Ecker, Frank C. Wright and

Robert E. Coulson, members of the duly constituted Reorganization Committee, have fulfilled their functions, faithfully performed their duties as members of the Reorganization Committee and now have no further duties and should be discharged.

(e) The plan of reorganization having been carried out and put into effect in accordance with the terms of the plan and the orders of this Court, a final decree should be entered in this cause, subject only to the reservations of the jurisdiction hereinafter made in this decree.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

1. That these proceedings be and they hereby are terminated subject only to the reservations of jurisdiction hereinafter made by the Court in this order, and the reservations of jurisdiction contained in the order of this Court discharging the Trustees of the Debtor's estate, dated and entered May 21, 1945.

2. That the expenses incurred by the Reorganization Committee in consummating, carrying out and putting into effect the plan of reorganization, as shown by the summary which is attached as Exhibit "B" to the petition for this order, filed by the Reorganization Committee, are hereby in all respects finally approved and allowed.

3. That the actions of the Reorganization Committee in putting into effect and carrying out the plan of reorganization and the orders and directions

of this Court relative thereto, are hereby approved, ratified and confirmed.

4. That Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee herein, be and each of them is hereby discharged and relieved from all further duties herein.

5. That the order of this Court dated and entered November 27, 1944, in this proceeding shall remain in full force and effect in so far as said order has not been fully carried out.

6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, per-

sonal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfer with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

7. The Western Pacific Railroad Company is hereby ordered and directed to reimburse, indemnify and hold harmless the members of the Reorganization Committee, or any of them, or any person employed by them, against any loss or expense arising out of or in connection with carrying out and putting into effect in good faith the plan of reorganization, including, without limitation of the generality of the foregoing, the contingent tax liability described in the order of the Interstate Com-

merce Commission of September 7, 1944, and allowed in the order of this Court entered October 23, 1944.

8. The Western Pacific Railroad Company is hereby directed to give notice of the entry of this final order by mailing, postage prepaid, a copy of this order to the Trustees of the Debtor's estate, the Reorganization Committee, each party of record in the reorganization proceedings before this Court or the Interstate Commerce Commission (or the counsel for each such party), and to cause promptly to be published a notice of the entry of this final order, setting forth in said notice the complete text of this order as certified by the clerk of this Court, such publication to be made once in each of the following: A daily newspaper of general circulation in the City of San Francisco, California; a daily newspaper of general circulation in the City of New York, New York; and a daily newspaper of general circulation in the City of Chicago, Illinois. Proof of such service and publication shall be filed by said Company with the Clerk of this Court within thirty days after the completion of the same.

9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944, in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to The Western Pacific Railroad Company, upon application by said Company, with respect to

carrying out the provisions of said order filed November 27, 1944, and of this order; to take such further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.

10. Except as hereby specifically provided in the reservations of jurisdiction set forth in Paragraph 9 above, and except as provided in the reservations of jurisdiction of the order of this Court filed May 21, 1945, discharging the Trustees of the Debtor's estate, the reorganization proceedings in this Court, entitled in the Matter of the Western Pacific Railroad Company, Debtor, No. 26591-S, are hereby terminated and the case is closed.

Dated: March 28, 1946.

A. F. St. SURE,
District Judge.

[Endorsed]: Filed Mar. 28, 1946.

EXHIBIT No. 3

In the District Court of the United States, for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER AUTHORIZING ESTABLISHMENT OF A RESERVE FUND FOR CONTINGENT TAX LIABILITIES

The petition filed February 21, 1944, by T. M. Schumacher and Sidney M. Ehrman, the Trustees of the properties of the Debtor above-named, for authority to establish a reserve fund of $7,100,000 for contingent tax liabilities, came on duly to be heard and was heard this day and thereupon submitted. Good cause appearing therefore, the Court being fully advised, finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court, that all of the averments of said petition are true, and that it is for the best interests of the estate of the Debtor that this order be made.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the Trustees are hereby authorized to establish, with funds in their hands belonging to

the estate of the Debtor and derived from the earnings of the railroad of the Debtor during the year 1943, a reserve fund in the amount of $7,100,000, to be designated as the "Reserve Fund for Contingent Tax Liabilities," to be invested in United States Treasury securities, and to be used for the payment of any Federal income and excess profits taxes which may be found due for the year 1943.

Dated: March 3, 1944.

A. F. St. SURE,
Judge.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE WESTERN REALTY COMPANY

Comes now the defendant The Western Realty Company, and answering the complaint of plaintiff herein, respectfully shows and alleges:

I.

Denies ~~each and~~ every allegation contained in paragraphs I and II of the complaint, except that said defendant admits that it is a Colorado corporation, that the plaintiff, The Western Pacific Railroad Corporation, is a Delaware corporation, that the defendants The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development

Company are California corporations, and that Deep Creek Railroad Company was formerly a Utah corporation and was dissolved prior to the commencement of this action.

II.

Denies each and every allegation contained in paragraph III of the complaint, except that said defendant admits that this is a civil action between citizens of different states and that the amount in controversy exceeds the sum of $5,000, exclusive of interest and costs.

III.

Denies each and every allegation contained in paragraph IV of the complaint, except that said defendant admits that, during the years 1942 and 1943 and the first four calendar months of the year 1944, the plaintiff and the above-named defendant corporations constituted an affiliated group of corporations within the meaning of the Internal Revenue Code and income and excess profits tax returns for said years were filed on a consolidated basis by the plaintiff on behalf of said affiliated group of corporations, that the consolidated returns for the year 1942 reported income and excess profits tax in the amount of $4,201,821.54, the whole of which sum was paid in 1943 with funds supplied by the Reorganization Trustees of the defendant The Western Pacific Railroad Company, that the consolidated returns for the year 1943 and the first

four months of 1944 reported no taxable income, and that the plaintiff filed in 1945 a claim for refund of said sum of $4,201,821.54 theretofore paid as income and excess profits tax for the year 1942, together with interest thereon.

IV.

Denies each and every allegation contained in paragraphs V, VI and VII of the complaint.

V.

The complaint fails to state a claim against the defendant The Western Realty Company upon which relief can be granted.

Wherefore, the defendant The Western Realty Company demands judgment that the complaint of the plaintiff herein be dismissed as to said defendant, together with the costs and disbursements of this action.

PILLSBURY, MADISON & SUTRO,

/s/ FELIX T. SMITH,

/s/ EVERETT A. MATHEWS,

WHITMAN, RANSOM, COULSON & GOETZ,

Attorneys for defendant The Western Realty Company.

[Endorsed]: Filed Dec. 30, 1946.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM OF DEFENDANTS, THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY COMPANY, DELTA FINANCE CO., LTD., AND STANDARD REALTY AND DEVELOPMENT COMPANY

Now comes the Plaintiff and for its Reply to the Counter-claim of the answering Defendants the Plaintiff denies all of the allegations thereof, being paragraphs of the Counterclaim numbered I, II, III, IV and V, to the extent that such allegations are inconsistent with the Plaintiff's Bill of Complaint, and denies categorically the allegations of paragraph V that the Plaintiff threatens to apply to its own use and benefit any sums of money refunded under its refund claim or any other funds to which the Bill of Complaint relates except in accordance with the decree and judgment of this Court as prayed in its Bill of Complaint.

Wherefore, plaintiff prays that said counterclaim be dismissed, and for such other and further relief as may be proper.

Dated: March 4, 1947.

THE WESTERN PACIFIC RAILROAD CORPORATION,
Plaintiff,
By /s/ LEROY R. GOODRICH,
Its Attorney.

Of Counsel:
FRANK G. NICODEMUS, JR.,
A. PERRY OSBORN.

[Endorsed]: Filed March 5, 1947.

In the District Court of the United States for the Northern District of California, Southern Division

No. 26508-G

THE WESTERN PACIFIC RAILROAD CORPORATION,

Plaintiff,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Defendants.

* * *

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

* * *

RUSSELL M. VAN KIRK, HENRY OFFERMAN and J. S. FARLEE & CO., INC., a Corporation,

Applicants for Intervention.

ORDER GRANTING LEAVE TO INTERVENE

Good Cause Appearing Therefor, it is hereby Ordered that Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, be and they are hereby granted leave to intervene as plaintiffs in the above-entitled action and to file herein their Complaint in Intervention which accompanies and is annexed to their Notice of Motion for Leave to Intervene dated March 11, 1947.

Done in Open Court this 7th day of April, 1947.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

[Endorsed]: Filed April 7, 1947.

In the District Court of the United States for the Northern District of California, Southern Division

No. 26508-G

THE WESTERN PACIFIC RAILROAD CORPORATION,

Plaintiff,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Defendants.

* * *

RUSSELL M. VAN KIRK, HENRY OFFERMAN and J. S. FARLEE & CO., INC., a Corporation,

Plaintiffs in Intervention,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY, DELTA FINANCE CO., LTD., and THE WESTERN PACIFIC CORPORATION,

Defendants in Intervention.

* * *

In the Matter of:

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

COMPLAINT IN INTERVENTION

Come now the above named plaintiffs in intervention, after leave of court first had and obtained, and complainting of defendants in intervention in the right of The Western Pacific Railroad Corporation and on behalf of themselves and all other stockholders of said corporation similarly situated, file this, their complaint in intervention, and allege as follows, to wit:

I.

Plaintiffs in intervention, Russell M. Van Kirk and Henry Offerman, are each a citizen of the State of New Jersey and plaintiff in intervention, J. S. Farlee & Co., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

II.

Defendant in intervention, The Western Pacific Railroad Corporation (hereinafter referred to as the "Corporation"), in behalf of which plaintiffs in intervention have intervened in this action, is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and each and all of the remaining defendants in intervention are corporations duly organized and existing under and by virtue of the laws of the State of California, except that defendants in intervention, The Western Realty Company and Deep Creek Railroad Company, are corporations duly organized and existing under and by virtue of the laws of the States of Colorado and Utah, respectively. Defendant in Intervention, The Western Pacific Railroad Company, is hereinafter referred to as the "Railroad Company."

III.

(a) This is a civil action between citizens of different states and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00; that this action in intervention is not a

collusive one to confer upon this court jurisdiction of an action of which it would not otherwise have jurisdiction.

(b) From on or about August 2, 1935, to on or about March 28, 1946, the defendant in intervention, "Railroad Company," was in reorganization under Section 77 of the National Bankruptcy Act in that certain proceeding entitled "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S in the above-entitled court, the final order terminating said reorganization proceedings having been made and entered therein on March 28, 1946; that from on or about September 23, 1935, until on or about December 29, 1944, all the properties of said "Railroad Company" were held by the Reorganization Trustees appointed in said proceedings, and on or about December 29, 1944, pursuant to prior order of court the said Reorganization Trustees returned all its business, assets and properties to said reorganized "Railroad Company" and said defendant in intervention, to wit, said "Railroad Company," thereupon assumed all the obligations and liabilities of said Reorganization Trustees incurred by them in connection with said properties and proceedings and which had not been barred by said reorganization proceedings; that to the extent that the present action may involve any of such obligations or liabilities of said Reorganization Trustees so assumed by said defendant in intervention, "Railroad Company," or any funds or properties so transferred to said defendant in intervention by said Reorganization Trustees, it is an ac-

tion which is permitted by the reservations of jurisdiction in said reorganization proceedings and said order dated March 28, 1946.

IV.

Plaintiff in intervention, Russell M. Van Kirk, is the holder of 11,468 shares of the preferred stock of defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation," and has been a stockholder of said corporation at all times since August 13, 1942; that plaintiff in intervention Henry Offerman is the holder of 3,903 shares of the preferred stock of said defendant in intervention "Corporation" and has been a stockholder of said corporation at all times since July 7, 1942; that plaintiff in intervention, J. S. Farlee & Co., Inc., is the holder of 9,247 shares of the preferred stock of said defendant in intervention, "Corporation," and has been a stockholder of said corporation at all times since January 28, 1944; that plaintiffs in intervention, and each of them, were shareholders of said defendant in intervention, "Corporation," at the time of the transactions of which they complain herein.

V.

(a) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that at all the times herein mentioned the defendants in intervention, Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Standard Realty and Development Company and Delta Finance Co., Ltd., and each of

them, were, and now are, wholly owned subsidiaries of defendant in intervention, The Western Pacific Railroad Company, viz, the "Railroad Company." Said defendants in intervention are hereinafter referred to as the "Railroad Group."

(b) From approximately the year 1916 to on or about April 30, 1944, the defendant in intervention, "Corporation," was the owner and holder of all the outstanding stock of defendant in intervention, "Railroad Company"; that during said period of time the said "Corporation" was a holding company, the principal assets of which consisted of all the outstanding stock of said "Railroad Company," as aforesaid, and all the stock of defendant in intervention, The Western Realty Company, as well as stock of the Denver & Rio Grande Railroad Co., a corporation; that during said time, until approximately the year 1941, the defendant in intervention, "Corporation," was primarily engaged in controlling and providing financing by loans and otherwise to said defendant in intervention, "Railroad Company," and the latter's aforementioned subsidiaries, to wit, the defendants in intervention, "Railroad Group."

(c) From on or about August 2, 1935, to on or about March 28, 1946, the defendant in intervention, "Railroad Company," was in reorganization under Section 77 of the National Bankruptcy Act in that certain proceeding entitled, "In the Matter of The Western Pacific Railroad Company, Debtor," No. 26591-S in the above-entitled court, as aforesaid; that said defendant in intervention,

"Railroad Company," was reorganized in said proceedings under a plan of reorganization filed by the Interstate Commerce Commission on or about June 21, 1939, in which proposed plan of reorganization the capital stock of said Debtor, "Railroad Company," so owned and held by the defendant in intervention, "Corporation," as aforesaid, was found by the Interstate Commerce Commission to be worthless and without equity or value; that said proposed plan of reorganization was affirmed by the Supreme Court of the United States on or about March 11, 1943, and was finally confirmed by the court in said reorganization proceedings on or about October 11, 1943; that in and by said plan of reorganization as finally confirmed on or about October 11, 1943, as aforesaid, it was found and determined that the stock of said defendant in intervention, "Railroad Company," so owned and held by defendant in intervention, "Corporation," being all the stock of said "Railroad Company," was wholly worthless and without equity or value; that pursuant to said finding an agreement was made and entered into on or about November 24, 1943, dated as of November 22, 1943, by and between the defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation," the hereinafter mentioned James Foundation of New York, Inc., and Frederick H. Ecker, Frank C. Wright and Robert E. Coulson as the Reorganization Committee of defendant in intervention, The Western Pacific Railroad Company, viz, the "Railroad Company," and certain other parties, wherein

and whereby it was provided, among other things, that said worthless stock of the "Railroad Company" so owned and held by the "Corporation," as aforesaid, should be assigned, transferred and delivered by the "Corporation" to the Reorganization Committee of the "Railroad Company" upon request by the latter for the purposes of said reorganization plan and for ultimate cancellation thereunder; that plaintiffs in intervention are informed and believe and therefore allege the fact to be that said stock was in fact so transferred on or about April 30, 1944; that on or about December 29, 1944, pursuant to prior order of the court in said reorganization proceedings, the Reorganization Trustees therein returned to said defendant in intervention, "Railroad Company," all its business, assets and property, as aforesaid, and thereupon said plan of reorganization was consummated; that the effective date of said plan of reorganization was January 1, 1939.

VI.

(a) As of December 31, 1946, the said defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation," had outstanding 381,205 shares 6% preferred stock and 574,457 shares of common stock; that plaintiffs in intervention are informed and believe and therefore allege the fact to be that all of said preferred and common stock of said "Corporation" is still outstanding; that each share of said common and preferred stock is entitled to one vote and upon liquida-

tion of the corporation the preferred stock is entitled to the payment of $100 per share plus accumulated dividends; that no dividends have been paid on said preferred stock since approximately the year 1927.

(b) As hereinbefore alleged the stock holdings of the defendant in intervention, "Corporation," in said defendant in intervention, "Railroad Company," were found to be worthless and without equity or value by the Interstate Commerce Commission on or about June 21, 1939, in the aforesaid plan for the reorganization of said "Railroad Company," which plan of reorganization was finally confirmed by the court in said reorganization proceedings on or about October 11, 1943; that likewise the aforesaid stock holdings of defendant in intervention, "Corporation," in the Denver & Rio Grande Railroad Co. were found to be worthless by the Interstate Commerce Commission in proceedings for the reorganization of that company, which finding was approved by the Supreme Court of the United States; that pursuant to the aforementioned agreement dated as of November 22, 1943, by and between said "Corporation" and said James Foundation of New York, Inc., and said Reorganization Committee of said "Railroad Company" and others, the aforesaid stock holdings of defendant in intervention, "Corporation," in defendant in intervention, The Western Realty Company, were transferred to said "Foundation" in purported satisfaction of an indebtedness of said "Corporation" to said "Foundation"; that the remaining assets

of said defendant in intervention, "Corporation," were negligible and its outstanding common stock, to wit, said 574,457 shares, has had no financial worth or value since approximately the year 1941; that presently the prior claims of said outstanding preferred stock, to wit, said 381,205 shares, are in excess of the sum of $50,000,000.

(c) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that since approximately the year 1941 the said defendant in intervention, "Corporation," has engaged in no business and has received only nominal income insufficient to cover its operating expenses; that no regular meetings of the stockholders of said "Corporation" have been held and no annual reports have been sent out to its stockholders by said "Corporation" since approximately said year 1941; that on or about April, 1943, the directors of said defendant in intervention, "Corporation," were in the process of liquidating said company; that on or about August 16, 1943, the securities of said "Corporation" were delisted from the New York Stock Exchange.

VII.

(a) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that continuously from about the year 1925 until his death in 1941 one Arthur Curtiss James directly and through companies known as A. C. James Co., Curtiss Southwestern Corporation and Curtiss Southwestern Company, the same being wholly

owned personal holding companies of the said James, owned 33,400 shares of the aforesaid outstanding preferred stock of said defendant in intervention, "Corporation," or approximately 8.8% of its total outstanding preferred stock, and 352,390 shares of the aforesaid outstanding common stock of said "Corporation" or approximately 61.5% of its total outstanding common stock; that the aforesaid stock holdings of the said James in said "Corporation" amounted to approximately 40% of its total outstanding voting stock, namely, the total outstanding preferred and common stock of said defendant in intervention, "Corporation"; that the balance of said outstanding stock of said "Corporation" was widely dispersed and held by numerous stockholders; that the said James directly and through his aforesaid personal holding companies, also owned a substantial amount of the secured bonds of said defendant in intervention, "Railroad Company," and was one of the dominant interests actively participating in the aforesaid proceedings for the reorganization of said "Railroad Company" and in addition the said personal holding companies of the said James held as collateral security for certain alleged loans to said defendant in intervention, "Corporation," the aggregate face amount of $5,980,000 of First Mortgage 5% Gold Bonds, Series A, due 1946 of said The Western Pacific Railroad Company, viz, the "Railroad Company," which bonds were owned by said "Corporation" but for which the aforesaid James' interests acted in said

reorganization through the aforesaid Robert E. Coulson, one of the Reorganization Committee of said "Railroad Company."

(b) The said Arthur Curtiss James died in the year 1941 and thereupon, pursuant to the provisions of his last will and testament, the aforementioned James Foundation of New York, Inc., a New York Corporation (referred to herein as the "Foundation") was organized and said "Foundation" thereupon succeeded to and became the owner of all the above-mentioned assets of the said James and his said personal holding companies; that accordingly ever since approximately the year 1941 said "Foundation" has continuously been and now is the holder of said 33,400 shares of said preferred stock and said 352,390 shares of said common stock in said defendant in intervention, "Corporation," representing, as aforesaid, approximately 40% of its outstanding voting stock and resulting, so plaintiffs in intervention are informed and believe and therefore allege the fact to be, in the absolute control and domination of said defendant in intervention, "Corporation," by said "Foundation," the balance of the outstanding voting stock of said "Corporation" being widely dispersed and held by numerous stockholders, including, as to the balance of said preferred stock, these plaintiffs in intervention; that in succeeding to the aforesaid assets of the said James and his said personal holding comapnies, as aforesaid, said, the "Foundation" also received and became the owner of the above-mentioned secured bonds of defendant in intervention, "Railroad Com-

pany," and the above-mentioned collateral loan secured by said $5,980,000 in face amount of first mortgage bonds of said "Railroad Company," which last mentioned bonds were owned as aforesaid by said "Corporation"; that the said "Foundation" continued to actively participate in the aforesaid reorganization of said defendant in intervention, "Railroad Company," through the said Robert E. Coulson and pursuant to the aforementioned agreement dated as of November 22, 1943, by and between said "Corporation" and said "Foundation" and said Reorganization Committee of said "Railroad Company" and others, said collateral, to wit, $5,980,000 in face amount of First Mortgage 5% Gold Bonds, Series A, due 1946 of said "Railroad Company" was transferred together with other securities belonging to said "Corporation" to said "Foundation" in purported satisfaction of said collateral loan; that pursuant to the above-mentioned plan of reorganization of said defendant in intervention, "Railroad Company," which plan was finally confirmed by the court in said reorganization proceedings on or about October 11, 1943, as aforesaid, and as a result thereof, said "Foundation" by virtue of its above-described interests in said "Railroad Company" received new securities therein amounting to more than 25% of the outstanding stock of said reorganized "Railroad Company" and millions of dollars of its bonds; that as of April 22, 1946, said "Foundation" was the largest stockholder of said defendant in intervention, "Railroad Company," holding 55,727 shares out of a total of

318,502 outstanding shares of the preferred stock of said "Railroad Company" and 153,165 shares out of a total of 408,283 outstanding shares of its common stock; that plaintiffs in intervention are informed and believe and therefore allege the fact to be that said "Foundation" has held said stock and said new bonds continuously since the consummation of said plan of reorganization on or about December 29, 1944, as aforesaid, and does now hold the same and by virtue thereof has continuously dominated and controlled said defendant in intervention, "Railroad Company."

(c) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that by virtue of the aforesaid stock ownerships and control the said Arthur Curtiss James during his lifetime and the said James Foundation of New York, Inc., viz, the "Foundation," subsequent to his death, have at all the times herein mentioned continuously dominated and controlled the defendants in intervention, to wit, the "Corporation," the "Railroad Company," the "Railroad Group" and The Western Realty Company and have caused to be elected as officers and directors of said companies persons who acted in the interest and for the benefit of the aforesaid James' interests and failed to exercise their independent judgment on behalf of said companies and their stockholders in matters involving the personal interest of the said James and said "Foundation" to the detriment of said "Corporation" and its remaining stockholders; that said

"Foundation" has continuously since its organization in or about the year 1941 and does now dominate and control the defendant in intervention, "Corporation," and has continued to elect officers and directors previously elected by the said James and others of its own choosing, certain of whom, as is more specifically hereinafter alleged, have directed and controlled the management of said "Corporation" and all of whom have acted as the agents of said "Foundation" and not independently for the best interests but to the detriment of said "Corporation" and its remaining stockholders; that specifically with respect to the transactions of which plaintiffs in intervention complain herein and which are hereinafter particularly alleged, the following persons acted and/or are now acting in the following capacities for said "Corporation" and said "Foundation" or said "Railroad Company," to wit:

1. The said Robert E. Coulson and one William W. Carman have been officers and trustees of said James Foundation of New York, Inc., viz, the "Foundation" continuously since its organization and now are officers and trustees thereof; that both the said Coulson and Carman have acted on behalf of the said Arthur Curtiss James and said "Foundation" as officers, directors or employees of said defendants in intervention, "Corporation," and/or "Railroad Company"; that the said Coulson was a director of said "Corporation" from prior to the year 1914 to on or about February 19, 1942, and was also a member of the Reorganization Commit-

tee of said "Railroad Company" during said reorganization proceedings and as such was one of the signatories to the aforementioned agreement dated as of November 22, 1943; that ever since said reorganization the said Coulson has been and now is a director of said defendant in intervention, "Railroad Company"; that at all the times herein mentioned the said Coulson has been and now is a partner in the firm of Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York City, which firm appears in the present action as attorneys for defendant in intervention, The Western Realty Company, which is now a wholly owned subsidiary of said "Foundation"; that said Messrs. Whitman, Ransom, Coulson & Goetz and the said Coulson have been at all the times herein mentioned and now are the attorneys for said "Foundation"; that said firm and the said Coulson were retained by the Reorganization Trustees in the aforesaid reorganization of defendant in intervention "Railroad Company" as tax counsel for said "Railroad Company" and its subsidiaries and as such handled all matters pertaining to the hereinafter mentioned transactions which are complained of herein; that with respect to said transactions the officers and directors of said defendant in intervention "Corporation" failed and refused to retain independent tax counsel for said "Corporation" and accepted and relied upon the advice of said Messrs. Whitman, Ransom, Coulson & Goetz as to the rights of said "Corporation" with full knowledge that said firm represented said "Railroad Company" and its

subsidiaries and was being compensated thereby; that as is hereinbefore alleged the said William W. Carman has at all times been and now is a trustee and an officer, to wit, president, of said "Foundation" and the said Carman executed the aforementioned agreement dated as of November 22, 1943, on behalf of said "Foundation" as its president; that the said Carman was likewise a director of said defendant in intervention "Corporation" from prior to the year 1941 to and including the year 1944.

2. Continuously since approximately the year 1941 one Michael J. Curry has been and now is an officer and director of said defendent in intervention, "Corporation"; that the said Curry was formerly secretary and treasurer of said "Corporation" and since some time during the year 1943 has been and now is its president; that the said Curry executed the aforementioned agreement dated as of November 22, 1943, on behalf of said "Corporation" as its president; that at all the times herein mentioned the said Curry has also been and now is an employee of said defendant in intervention "Railroad Company" being employed by it in connection with tax matters through arrangement made with said "Railroad Company" by the said Robert E. Coulson on behalf of his said law firm.

3. Continuously since the year 1945 one Mary C. Valouch has been and now is a director and officer, to wit, vice president, and secretary, of said defendant in intervention "Corporation"; that during said time the said Mary C. Valouch has been and now is an employee in the office of said tax counsel for said defendant in intervention "Railroad Company."

4. Continuously since prior to the year 1941 one Thomas M. Schumacher has been and now is a director of said defendant in intervention "Corporation" and was president thereof from some time prior to the year 1941 until succeeded by the said Michael J. Curry in the year 1943, as aforesaid; that the said Schumacher was likewise one of the Reorganization Trustees in the aforesaid reorganization of said defendant in intervention "Railroad Company" from on or about September 23, 1935, to on or about December 29, 1944.

5. During all the times herein referred to Messrs. Pierce & Greer of New York were general counsel for both said defendants in intervention "Corporation" and "Railroad Company."

(d) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that in addition to the above-mentioned persons certain other directors of defendant in intervention "Corporation" were at all the times herein mentioned and now are, employees of said "Foundation" or said defendant in intervention "Railroad Company," directly or indirectly, with the result that the offi-

cers and board of directors of said "Corporation" were and now are completely dominated and controlled by said "Foundation" and said "Railroad Company"; that all compensation received by said last-mentioned persons and said above-named persons and counsel have been paid and is now being paid directly or indirectly by said "Foundation" or said "Railroad Company."

VIII.

(a) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that during the years 1942, 1943 and 1944 the said defendant in intervention "Railroad Company" through its Reorganization Trustees and its aforesaid tax counsel and the officers and directors of said defendant in intervention "Corporation" and the aforesaid officers and trustees of said "Foundation" conceived a plan to confer upon said "Railroad Company" and its subsidiaries a federal income and excess profits tax saving in the approximate total amount of $14,301,821.54 without any benefit or consideration whatsoever to said "Corporation" by (1) causing said defendant in intervention "Corporation" to file consolidated income and excess profits tax returns for the years 1942, 1943 and 1944 for all the defendants in intervention herein as the parent corporation of an affiliated group of corporations within the meaning of Section 141 of the Internal Revenue Code at a time when said defendant in intervention "Corpora-

tion" had been stripped of its aforesaid holdings in said "Railroad Company" and had no duty or obligation whatsoever so to do; and by (2) including in said consolidated returns the aforesaid capital losses of said "Corporation" consisting chiefly of the aforesaid loss of stock holdings in said "Railroad Company" thereby reducing to zero the tax bill of said "Railroad Company" and its subsidiaries; that pursuant to said plan said defendant in intervention "Corporation" was caused to file on or about July 15, 1944, such consolidated return for the year 1943 wherein losses were reported as having been incurred in said year 1943 and as deductible on behalf of said group, which losses consisted chiefly of the aforesaid capital loss of defendant in intervention "Corporation" resulting from the aforesaid finding in said plan of reorganization finally confirmed by the court in said reorganization proceedings on or about October 11, 1943, as aforesaid, that its aforementioned stock in said defendant in intervention "Railroad Company" was wholly worthless and without equity or value; that the aforesaid use of said loss on a consolidated basis resulted in the elimination of all taxable income for said defendant in intervention "Railroad Company" and its subsidiaries for the year 1943 and also provided unused credit balances to carry back to the year 1942 and to carry forward to the year 1944 sufficient to eliminate all taxable income for 1942 and the first four months of 1944; that said defendant in inter-

vention "Railroad Company" and its subsidiaries were thereby saved approximately the sum of $7,100,000 in income and excess profits taxes which would have otherwise been payable by them for the year 1943; that based upon the aforementioned carry back of the unused credit balance of said loss to the year 1942 the said defendant in intervention "Corporation" was caused to file with the Federal Collector of Internal Revenue in the Second District of New York on or about March 9, 1945, a claim for refund in the sum of $4,201,821.54 theretofore paid by the Reorganization Trustees of said "Railroad Company" as income and excess profits taxes for the year 1942, together with interest thereon, substantially all of which sum represents income and excess profits taxes payable by said defendant in intervention "Railroad Company" on its income and profits for the year 1942; that based upon the aforesaid carry forward of the unused credit balance of said loss to the year 1944 said defendant in intervention "Corporation" was caused to file in the year 1945 such consolidated income and excess profits tax return for the year 1944 and included therein the income of defendant in intervention "Railroad Company" and its subsidiaries for the first four months of 1944, to wit, the period January 1st to April 30, 1944; that thereby said defendant in intervention, "Railroad Company," and its subsidiaries were saved an additional sum of approximately $3,000,000 in income and excess profits taxes which would have other-

wise been payable by them for the first four months of 1944.

(b) Said consolidated tax returns for the years 1943 and 1944 and said refund claim for the year 1942 were so filed after the aforesaid final adjudication on or about October 11, 1943, by the Court in said reorganization proceeding that said "Corporation's" stock holdings in said, "Railroad Company," were wholly worthless and without equity or value as found by the Interstate Commerce Commission on or about June 21, 1939, and affirmed by the Supreme Court of the United States on or about March 11, 1943, as aforesaid, and after the transfers of the properties belonging to said "Corporation" which were provided for in said agreement dated as of November 22, 1943, as aforesaid; that the date established in said returns as the date of severance of the affiliation of said defendants in intervention within the meaning of said Section 141 of the Internal Revenue Code was April 30, 1944, which, so plaintiffs are informed and believe and therefore allege the fact to be, was the date as of which said "Corporation's" said stock in said "Railroad Company" was transferred to the Reorganization Committee of said "Railroad Company" pursuant to said agreement of November 22, 1943; that said defendant in intervention "Corporation" had no taxable earnings or income or profits for the years 1942, 1943 or 1944, and no federal income or excess profits taxes were payable by it; that under the provisions of the Internal

Revenue Code and the rules and regulations promulgated thereunder said defendant in intervention "Corporation" was not obligated to file such consolidated returns for the years 1942, 1943 or 1944, but was entitled to elect to file separate returns solely in its own behalf reporting its said losses for its own possible future benefit and having lost all its aforesaid interests in said "Railroad Company" said "Corporation" was under no obligation whatsoever to said "Railroad Company" and its subsidiaries, or any thereof, legal, moral, financial or otherwise, to file said consolidated returns and refund claim and thus enable said defendants in intervention to effect a tax saving in excess of $14,300,000 for themselves without any benefit or consideration whatsoever to said defendant in intervention "Corporation."

(c) Plaintiffs in intervention are informed and believe and therefore allege the fact to be that the above-mentioned transactions, to wit, the filing of said consolidated tax returns and said refund claim on the basis of the aforesaid capital loss suffered by defendant in intervention "Corporation," as aforesaid, were accomplished by said defendant in intervention "Railroad Company" and its Reorganization Trustees and aforesaid tax counsel and said "Foundation" through the above-named persons and others who occupied fiduciary and controlling positions in said "Corporation" and similar positions with respect to said "Railroad Company" or "Foundation" and whose interests were best

subserved by favoring said "Railroad Company" and consequently said "Foundation" through its aforesaid holdings therein, at the expense of said "Corporation" and which persons were and still are dominated and controlled by said "Foundation" and said "Railroad Company"; that the interests of said defendant in intervention "Corporation" and its stockholders other than said "Foundation" were not represented by independent officers, directors or counsel; that by virtue of its aforesaid valuable and dominating interests in said defendant in interventoin "Railroad Company" as compared with its aforesaid stock holdings in the inactive and impecunious "Corporation" it was and is greatly to the financial interest and advantage of said "Foundation" to have the aforementioned tax savings accrue to said "Railroad Company" and its subsidiaries and to deprive the said "Corporation" thereof; that the said transactions were unfair and inequitable to said defendant in intervention "Corporation" in that (1) said "Corporation" was thereby caused to cede to said defendant in intervention "Railroad Company" and its subsidiaries the right to utilize the capital losses of said "Corporation" the use of which resulted in tax savings including said refund claim in excess of $14,300,000 for said "Railroad Company" and its subsidiaries for which said "Corporation" has to date received no benefit or consideration whatsoever, and (2) said transactions were in violation of recognized and good accounting practice in such

situations under which said "Corporation" should receive the amount of said tax savings from said "Railroad Company" and its subsidiaries and the proceeds of said refund claim when paid by the government as partial offsets against its said capital losses; that the officers and directors of said "Corporation" equitably and pursuant to recognized and good accounting practice and in the proper exercise of their fiduciary duty to all the stockholders thereof should have demanded and obtained for said "Corporation" through prior arrangement with the remaining defendants in intervention, said tax savings and refund claim or a fair and proper proportion thereof for the aforesaid use of said capital losses and as partial offsets against the same.

(d) No final action has as yet been taken by the government on said claim for refund for the year 1942 in the aforesaid amount of $4,201,821.54 and interest filed as aforesaid on or about March 9, 1945, and plaintiffs in intervention are informed and believe and therefore allege the fact to be that said consolidated tax returns for the years 1943 and 1944, to wit, said tax savings of approximately $7,100,000 and $3,000,000, respectively, have not as yet been finally audited and allowed by the government; that favorable action on said claim for refund will result in payment by the United States Government to said defendant in intervention "Corporation" as such parent corporation of said sum of $4,201,821.54, together with interest, and favorable action in the final audit of said consolidated returns

for the years 1943 and 1944 will result in a total tax saving to defendant in intervention "Railroad Company" and its subsidiaries of approximately $10,100,000 for which a reserve fund has been established by said defendant in intervention "Railroad Company" in said amount; that said defendant in intervention "Railroad Company" claims the whole of said refund claim and all proceeds therefrom and said tax savings to the prejudice of said "Corporation" and its stockholders.

IX.

(a) On or about June 27, 1946 plaintiffs in intervention herein Russell M. Van Kirk and Henry Offerman commenced a stockholders action in the United States District Court for the Southern District of New York, No. Civ. 36-584 therein, against the said Robert E. Coulson, William W. Carman, Michael J. Curry, Thomas M. Schumacher and Mary C. Valouch and certain other individuals and said James Foundation of New York, Inc., viz, the "Foundation," The Western Pacific Railroad Company, viz, the "Railroad Company" and The Western Pacific Railroad Corporation, viz, the "Corporation" as defendants, which action is still pending undetermined in said court; that in said action said plaintiffs in intervention are presently attacking the aforementioned agreement dated as of November 22, 1943, between said "Corporation," said "Foundation" and the Reorganization Committee of said "Railroad Company" and others pursuant

to which, among other things, said $5,980,000 in face amount of first mortgage bonds of said "Railroad Company" and all the outstanding stock in said, The Western Realty Company, all of which securities were owned by defendant in intervention "Corporation," were transferred to said "Foundation," as aforesaid, and in which said action said plaintiffs in intervention seek, among other things, to recover said securities or the value thereof and also seek to recover said above-mentioned tax savings and refund claim in the approximate total amount of $14,301,821.54, as aforesaid, in the right of said "Corporation" and for the benefit of its stockholders; that in said action the aforesaid firm of Messrs. Whitman, Ransom, Coulson & Goetz appear as the attorneys for the defendants therein, Robert E. Coulson and said "Foundation" and said Messrs. Pierce & Greer appear as the attorneys for the defendant therein "Corporation" and others that defendant in intervention herein "Railroad Company" is not subject to the jurisdiction of the court in said action and has not appeared therein although named as a defendant, as aforesaid; that on or about September 24, 1946, motions to dismiss said action by the defendants Coulson and James Foundation of New York, Inc., therein were denied by the court; that thereupon, to wit, on or about October 10, 1946, the defendant in intervention herein, The Western Pacific Railroad Corporation, viz, the "Corporation," being also a defendant in said New York action, was caused by its aforesaid

officers, directors and counsel to file the present action in this court, to wit, No. 26508-G, herein with respect to said tax savings and refund claim which are also involved, as aforesaid, in said New York action; that plaintiffs in intervention are informed and believe and therefore allege the fact to be that at no time prior to the filing of the present action in this court, on or about October 10, 1946, as aforesaid, did the present officers or directors of said "Corporation" ever assert any claim whatsoever on its behalf to said tax savings or refund claim or any thereof, but on the contrary the said officers and directors of said defendant in intervention "Corporation" with full knowledge of all the facts which are hereinbefore alleged and being dominated and controlled by and acting for the benefit of said "Foundation" and said "Railroad Company" to the detriment of said "Corporation," as aforesaid, have conceded the aforesaid claim of said "Railroad Company" to said tax savings and refund claim; that plaintiffs in intervention are further informed and believe and therefore allege the fact to be that the present action filed in this court by said defendant in intervention "Corporation" on or about October 10, 1946, as aforesaid, was commenced by the present officers and directors of said "Corporation" in the interest of said "Foundation" and "Railroad Company" and by virtue of the domination and control of said officers and directors by said "Foundation" and "Railroad Company" for the purpose of obtaining

an adjudication in this court on said tax savings and refund claim without allegation or proof of the facts which are hereinbefore alleged with respect to the domination and control of said "Corporation" by said "Foundation" and "Railroad Company" and the respective interests and situations of said companies at the time of said transactions, which adjudication if favorable to said "Railroad Company" and its subsidiaries might constitute a bar to the relief sought in this respect by said plaintiffs in intervention in said New York action; that A. Perry Osborn, Esq., 20 Exchange Place, New York, who appears of counsel for said defendant in intervention "Corporation" in the present action, is one of the present directors of said "Corporation"; that said defendant in intervention "Railroad Company" and its subsidiaries, said "Foundation" and its aforesaid officers and trustees and the present officers, directors and counsel for said "Corporation," and each of them, have at all the times herein mentioned had and do now have knowledge or notice of all the facts which are hereinbefore alleged.

(b) Plaintiffs in intervention have not requested said defendant in intervention "Corporation" or its present officers or directors to bring action against the remaining defendants in intervention herein with respect to the subject matter of this action in intervention for the reason that the aforesaid officers and directors who presently control said "Corporation" participated in the wrongs

which are complained of herein and are themselves dominated and controlled by said "Foundation" and "Railroad Company"; that any demand upon said defendant in intervention "Corporation" or its present officers and directors to seek redress of the wrongs complained of herein would in effect have been a demand that they disclose their own failure to perform their duties and to act independently for said "Corporation" and its stockholders and would have been futile; that by reason of the foregoing facts the representation herein of the interest of plaintiffs in intervention by the present officers, directors and counsel for defendant in intervention "Corporation" is wholly inadequate; that plaintiffs in intervention have no adequate remedy at law.

And for a second cause of action, plaintiffs in intervention allege:

I.

Plaintiffs in intervention refer to Paragraphs I to IX inclusive of their first cause of action herein and by such reference incorporate the same in this their second cause of action.

II.

As hereinbefore alleged there was pending in the above-entitled court from on or about August 2, 1935, to on or about March 28, 1946, that certain reorganization proceeding under Section 77 of the National Bankruptcy Act entitled "In the Matter

of The Western Pacific Railroad Company, Debtor," No. 26591-S, in said court; that on or about March 28, 1946, an order was made and entered by the court finally terminating said reorganization proceedings and containing certain reservations of jurisdiction and restraining orders, which final order is of record in the files of this court; that by virtue of all the facts which are hereinbefore alleged, plaintiffs in intervention request either (a) an adjudication herein that said final order of March 28, 1946, does not restrain or prevent the prosecution of the cause of action which is herein alleged, or (b) a modification of said order so as to permit the prosecution of said cause of action and the claims which are asserted herein; that juridiction therefor is based upon the bankruptcy jurisdiction of this court in the aforesaid reorganization proceeding.

Wherefore, plaintiffs in intervention pray for the order, judgment and decree of this Honorable Court as follows, to wit:

(a) Ordering and directing said defendant in intervention, The Western Pacific Railroad Company, viz, the "Railroad Company" and its said subsidiaries and defendant in intervention, The Western Reaity Company, to account to defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation" for the aforesaid total tax saviings for the years 1942, 1943 and 1944 amounting, as aforesaid, including said claim for refund, to the approximate total sum of $14,301,-

821.54, together with interest thereon at the legal rate;

(b) Ordering and directing said defendant in intervention "Railroad Company" to immediately pay over to said defendant in intervention "Corporation" said tax savings of said "Railroad Company" and its subsidiaries, for the years 1943 and 1944 amounting, as aforesaid, to the approximate sum of $10,100,000, together with interest thereon, at such time or times as said tax savings, or any thereof, are finally audited and allowed by the proper tax authorities of the United States Government;

(c) Declaring and determining that said defendant in intervention, The Western Pacific Railroad Corporation, viz, the "Corporation" is the sole owner of and is exclusively entitled to said refund claim respecting said tax saving for the year 1942 and all sums refundable thereunder amounting, as aforesaid, to the sum of $4,201,821.54, together with interest thereon, and quieting the right and title of said defendant in intervention "Corporation" therein and thereto against the claims of defendant in intervention "Railroad Company" and all other parties to this action, and declaring that said defendant in intervention "Corporation" is entitled to retain as against all other defendants in intervention herein any and all proceeds from said refund claim for its own use and benefit;

(d) Either declaring and determining that said final order of March 28, 1946, in said reorganization

proceeding, No. 26591-S, herein, does not restrain or prevent the prosecution of the claims which are herein made on behalf of said defendant in intervention "Corporation" to said tax savings and refund claim, or modifying said order of March 28, 1946, so as to permit the prosecution of said claims;

(e) Requiring said defendants in intervention to pay to plaintiffs in intervention their reasonable expenses incident to the prosecution of this action, including reasonable counsel fees, and

(f) For such other and further relief as to this Honorable Court may seem meet and equitable in the premises.

Dated: March 10, 1947.

ROGER AND CLARK,

/s/ WEBSTER CLARK,

/s/ DAVID FRIEDENRICH,

Attorneys for Plaintiffs in Intervention Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., a corporation.

Of counsel:

POMERANTZ, LEVY, SCHREIBER & HAUDEK.

State of California,
City and County of San Francisco—ss.

Webster V. Clark, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed and admitted to practice before all the courts of the State of California and the above-entitled court; that he is a member of the firm of Rogers and Clark, with offices at 111 Sutter Building, San Francisco, California, attorneys for plaintiffs in intervention in the above-entitled action; that the facts in the above entitled action are within the personal knowledge of affiant; that he has read the foregoing Complaint in Intervention and knows the contents thereof and the same is true of his own knowledge except as to those matters which are therein stated on information or belief and as to those matters that he believes it to be true; that the said plaintiffs in intervention are absent from the City and County of San Francisco where their said attorneys have their offices and for that reason affiant makes this verification on their behalf.

/s/ WEBSTER CLARK.

Subscribed and sworn to before me this 11th day of March, 1947.

[Seal] /s/ MARION CURTIS,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires August 12, 1949.

[Endorsed]: Filed April 7, 1947.

[Title of District Court and Cause.]

ANSWER OF THE WESTERN PACIFIC RAILROAD CORPORATION TO COMPLAINT IN INTERVENTION

The Western Pacific Railroad Corporation, plaintiff herein, for its Answer to the Complaint in Intervention filed by Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, respectfully shows and alleges as follows, to wit:

The plaintiff denies on its own behalf and on behalf of its officers and directors all allegations of the Complaint in Intervention of domination and control of the plaintiff, its officers and directors, by the James Foundation of New York, Inc., and The Western Pacific Railroad Company or any one or more of the subsidiaries or affiliates of either; as to all other allegations of the Complaint in Intervention plaintiff puts the plaintiffs in intervention to the proof thereof, and submits to the determination of the Court thereon.

Plaintiff alleges that it instituted and is prosecuting in the interest of its own stockholders the action set forth in the Bill of Complaint herein; it admits that said Railroad Company is wrongfully interposing as a defense to the cause of action alleged in the Bill of Complaint herein the Order of the Bankruptcy Court dated March 28, 1946, and avers that said Order does not restrain or prevent the prosecution of the cause of action as alleged in

the Bill of Complaint. Plaintiff submits that if said order be interpreted to bar the prosecution of the plaintiff's cause of action such interpretation is contrary to the true intent of the Court and that the Order should be modified so as to accurately express the intent of the Court and to permit the prosecution of said cause of action and the claims asserted by the plaintiff in its Bill of Complaint herein.

Wherefore, the plaintiff prays that plaintiff in intervention shall be required to proceed herein in subordination to the plaintiff and to the cause of action alleged by the plaintiff in its Bill of Complaint herein; and that Leroy R. Goodrich, attorney for the plaintiff, shall be designated as General Counsel to receive service of pleadings and other documents in this action; and that all papers shall issue out of or be served upon the office of such General Counsel, provided, however, that all papers served upon General Counsel for plaintiff shall include additional copies for transmission to Rogers and Clark, Webster V. Clark and David Freidenrich, attorneys for the plaintiffs in intervention.

THE WESTERN PACIFIC
RAILROAD CORPORATION,

By /s/ LEROY R. GOODRICH,
Its Attorney.

Of Counsel:
FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN.

[Endorsed] Filed June 30, 1947.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE WESTERN REALTY COMPANY TO COMPLAINT IN INTERVENTION

Comes now the defendant in intervention, The Western Realty Company, and answering the complaint in intervention herein, respectfully shows and alleges upon information and belief:

As to the First alleged cause of action:

1. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in Paragraphs I, IV and IX of said complaint.

2. Denies each and every allegation contained in Paragraph II of said complaint, except that said defendant admits that it is a Colorado corporation; that the defendant The Western Pacific Railroad Corporation is a Delaware corporation; that the defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway, The Standard Realty and Development Company, and Delta Finance Co., Ltd., are California corporations, and that Deep Creek Railroad Company was formerly a Utah corporation and was dissolved prior to the commencement of this action.

3. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (a) and (b) of Paragraph III of said complaint, ex-

cept that said defendant admits that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and that the defendant, The Western Pacific Railroad Company was reorganized under section 77 of the National Bankruptcy Act in the proceeding in this court entitled "In the Matter of The Western Pacific Railroad Company, Debtor" (No. 26591-S),

4. Denies each and every allegation contained in subdivision (a) of Paragraph V of said complaint, except that said defendant admits that the defendants Sacramento Northern Railway and The Standard Realty and Development Company were and are wholly owned subsidiaries of the defendant, The Western Pacific Railroad Company; and denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (b) and (c) of Paragraph V of said complaint, except that said defendant admits that, from on or about June 4, 1920, to on or about May 15, 1944, all of its outstanding stock was held by the defendant, The Western Pacific Railroad Corporation; that the defendant, The Western Pacific Railroad Company, was reorganized under section 77 of the National Bankruptcy Act in the proceeding in this court entitled "In the Matter of The Western Pacific Railroad Company, Debtor," (No. 26591-S), and that the unsecured debts and capital stock of the defendant, The Western Pacific Railroad Company, were found to be without equity or value in said proceeding, which finding was ultimately sustained

by the Supreme Court of the United States on or about March 15, 1943.

5. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (a), (b) and (c) of Paragraph VI of said complaint, except that said defendant admits that the unsecured debts and capital stock of the defendant, The Western Pacific Railroad Company, were found to be without equity or value in the reorganization proceeding of the defendant, The Western Pacific Railroad Company, as aforesaid, and that on or about May 15, 1944, all of the outstanding stock of said defendant, The Western Realty Company, held by the defendant, The Western Pacific Railroad Company, was transferred to the James Foundation of New York, Inc.

6. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (a), (b), (c) and (d) of Paragraph VII of said complaint, except that said defendant admits that all of its outstanding stock has been held by James Foundation of New York, Inc., since on or about May 15, 1944; that Robert E. Coulson is a partner in the firm of Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York, N. Y., which firm appears in this action as attorneys for said defendant, and that Michael J. Curry was formerly an officer of the defendant, The Western Pacific Railroad Corporation.

7. Denies each and every allegation contained in subdivision (a) of Paragraph VIII of said complaint, except that said defendant admits that, during the years 1942 and 1943 and the first four calendar months of 1944, the defendants in intervention constituted an affiliated group of corporations within the meaning of the Internal Revenue Code and income and excess profits tax returns were filed on a consolidated basis by the defendant, The Western Pacific Railroad Corporation on behalf of said affiliated group of corporations; that the consolidated returns for the year 1942 reported income and excess profits tax in the amount of $4,201,821.54, the whole of which sum was paid in 1943 with funds supplied by the reorganization trustees of the defendant, The Western Pacific Railroad Company; that the consolidated returns for the year 1943 and the first four months of 1944 reported no taxable income, and that the defendant, The Western Pacific Railroad Corporation, filed in 1945 a claim for refund of said sum of $4,201,821.54 theretofore paid as income and excess profits tax for the year 1942, together with interest thereon; and denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in subdivisions (b), (c) and (d) of Paragraph VIII of said complaint, except that said defendant admits that the consolidated tax returns for the year 1943 and the first four calendar months of 1944 were filed on or about July 15, 1944, and June 15, 1945, respectively, and that the claim for refund of the amount paid as

income and excess profits tax for the year 1942, as aforesaid, was filed on or about March 9, 1945.

As to the Second alleged cause of action:

1. Denies that it has any knowledge or information thereof sufficient to form a belief as to each and every allegation and reallegation contained in the second alleged cause of action set forth in said complaint, except as hereinabove otherwise specifically denied or admitted.

For a complete defense to the First and Second alleged causes of action:

1. The complaint in intervention fails to state a claim against the defendant, The Western Realty Company, upon which relief can be granted.

Wherefore, the defendant, The Western Realty Company, demands judgment that the complaint in intervention herein be dismissed as to said defendant, together with the costs and disbursements of this action.

PILLSBURY, MADISON
& SUTRO,
/s/ FELIX T. SMITH,
/s/ EVERETT A. MATHEWS,

WHITMAN, RANSOM,
COULSON & GOETZ,

Attorneys for Defendant, The Western Realty Company.

Receipt of copy attached.

[Endorsed]: Filed July 1, 1947.

[Title of District Court and Cause.]

ORDER DENYING APPLICATION FOR TEMPORARY RESTRAINING ORDER ON CONDITION, AND PRETRIAL ORDER

The application of interveners above named for a temporary restraining order enjoining and restraining the plaintiff and the defendants and each of them from consummating the settlement of tax liability to and refund claim against the United States, having come on before the court in open court in the courtroom of the above-entitled court in the Post Office Building, San Francisco, California, on Monday, the 25th day of August, 1947, the interveners appearing by Webster V. Clark, Esq., and David Freidenrich, Esq., and by Julius Levy, Esq., of the New York Bar, specially admitted for the purpose of presenting the motion of the interveners, and the plaintiff appearing by its attorney, Leroy R. Goodrich, Esq., and the defendant, Western Realty Comany, appearing by its attorney, Everett Mathews, Esq., and the other defendants appearing by their attorneys, Messrs. Allan P. Matthew and James D. Adams, and the said interveners having filed the affidavit of Julius Levy in support of said application and proposed forms of temporary restraining order and order to show cause, and of temporary injunction, and the defendants having presented to the Court a form of stipulation between plaintiff and the defendants, in the form annexed to this order and marked

Exhibit A, and the said application having been presented by the interveners and opposed by the defendants on Monday, August 25, 1947, and on Tuesday, August 26, 1947, all parties being represented by their aforesaid counsel during the entirety of said hearing on both of said dates, and the court having considered the same; and

Said hearing having developed and clarified certain issues and contentions of the parties concerning the effect of the aforesaid settlement, as follows:

(a) Plaintiffs in Intervention having contended that, as set forth in the aforesaid affidavit of Julius Levy, the form of said proposed settlement will prejudice the cause of plaintiff and plaintiffs in intervention herein by subjecting that part thereof involving said claim for refund to certain technical defenses and other parts thereof to substantive disadvantages—all of which plaintiffs in intervention contend would not be otherwise applicable, and

(b) Plaintiff Corporation having contended that, by virtue of a stipulation to be entered into between said plaintiff and defendants, said settlement will merely reduce pro tanto the amount of the claim in litigation herein and will not subject any part of said claim either to any technical defenses or to any substantive disadvantages which would not have otherwise been applicable and will not prejudice or enhance the pre-existing rights or remedies of any party at the expense of any other; and

(c) Defendants (other than The Western Realty

Company) having contended that by virtue of said stipulation the settlement with the Government was made without prejudice to the respective claims and defenses of the parties to the litigation except that all those claims and defenses should be deemed to relate to a tax saving as reduced by settlement with the Government and that the claim for refund should be deemed to have been allowed in proportion which it bears to the total tax saving, and that the tax saving for the subsequent years should be deemed to have been reduced in like proportion and that the defenses of the parties should not be imperiled, waived or prejudiced nor should the claims be imperiled, waived or prejudiced except as all thereof relate to a fixed or determinable amount of tax saving in consequence of the settlement with the Government;

Now, Therefore, upon filing and considering the aforesaid affidavit of Julius Levy, the aforesaid proposed stipulation (Exhibit A), the minutes of the hearing herein and all of the papers and prior proceedings,

It is Hereby Ordered:

(1) That the application of interveners for a restraining order be and the same is hereby denied upon the condition that the defendants shall enter into a stipulation with the plaintiff in the form annexed hereto marked Exhibit A; and upon the further condition that said hearing upon said application of interveners shall be deemed a pretrial

hearing on the aforesaid issues as if properly noticed as such so that the Court may make and enter an appropriate pretrial order pursuant thereto; and

(2) That the aforesaid settlement with the United States Government shall have force and effect in this action and as between the parties hereto solely to the extent that it reduces pro tanto the total amount in controversy herein and that in all other respects this Court shall and does hereby preserve the respective rights and positions of all parties and shall determine the issues and give judgment herein, in the same manner as if said tax saving had been allowed and said refund claim allowed and paid by the United States Government in the ordinary course and manner prescribed by law and as proportionately reduced by said settlement.

Dated: August 29, 1947.

/s/ LOUIS E. GOODMAN,
District Judge.

Approved as to Form:

LEROY R. GOODRICH,
FRANK C. NICODEMUS, JR.,
A. PERRY OSBORN,
By /s/ LEROY R. GOODRICH,
Attorneys for Plaintiff.

ROGERS & CLARK,
WEBSTER V. CLARK,
DAVID FREIDENRICH,

POMERANTZ, LEVY,
SCHREIBER & HAUDEK,
JULIUS LEVY,

By /s/ WEBSTER V. CLARK,

Attorneys for Plaintiffs in Intervention.

ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,

McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS
& GREENE,

By /s/ JAMES D. ADAMS,

Attorneys for Defendants Other Than The Western Realty Company.

[Endorsed]: Filed August 29, 1947.

[Exhibit A attached to the preceding Order is identical to the Stipulation and Agreement between plaintiff and defendants relating to agreement with the Bureau of Internal Revenue. See pages 168 to 175 inclusive.

[Title of District Court and Cause.]

STIPULATION AND AGREEMENT BETWEEN PLAINTIFF AND DEFENDANTS RELATING TO AGREEMENT WITH THE BUREAU OF INTERNAL REVENUE

1. The Bureau of Internal Revenue has accepted a proposal for the settlement of corporation income and excess profits tax liability on behalf of the parties hereto, copies of which said proposal and acceptances are annexed hereto marked Exhibit A.

2. It is stipulated and agreed as follows:

(a) That the approval and acceptance of such settlement by the plaintiff and the defendants shall be without prejudice to the interests, claims or defenses asserted by the parties hereto, respectively, in the subject matter of this action and without prejudice to the position of the said parties inter se with respect thereto, and that all the interests and claims asserted by the said parties are to be determined with relation to, and as limited to, the net amount of alleged tax saving involved in this action as diminished by the settlement.

(b) More particularly, the claim for refund

of taxes paid for the year 1942 shall not be deemed to have been abandoned by said settlement, but on the contrary said refund claim shall be deemed to have been diminished in the proportion in which the aggregate of the tax savings involved in this action shall have been diminished by the settlement, and as so diminished to have been allowed, paid to the plaintiff as the agent for the affiliated group designated in Regulations 104 and 110, and by the plaintiff paid into court, and the tax savings for the year 1943 and for the first four months of 1944 shall be deemed to have been diminished in like proportion. Nothing herein contained shall obligate any party hereto to make any deposit or payment into court.

(c) By acquiescence in such settlement none of the parties hereto waives any of its interests, claims or defenses in the above-entitled action, as against any other party, but all such interests, claims and defenses shall relate to the amount of tax savings as diminished by said settlement, and all parties stipulate and agree that the aggregate amount of the tax savings involved in or claimed in said action has been diminished by said settlement by the amount of $4,201,821.54.

(d) Nothing herein contained shall be deemed to be or constitute a recognition or admission on the part of any party of the validity, merit or equity of the claims of any other party to said tax savings as reduced, or to any part thereof, or a waiver, surrender, or reliquishment in any manner

or to any extent of the defenses or any thereof of any party to the claims of any other party in and to such tax savings, as reduced.

(e) In the event the said tax liabilities of the parties hereto shall not be finally settled in accordance with said agreement with the Bureau of Internal Revenue, this stipulation shall be of no force or effect whatsoever, and all the parties shall be released herefrom with like effect as if this stipulation had never been made.

Dated September 3, 1947.

/s/ LEROY R. GOODRICH,

/s/ F. C. NICODEMUS, JR.,

Attorneys for Plaintiff, The Western Pacific Railroad Corporation.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM EVERSON,

McCUTCHEN, THOMAS,
MATTHEWS, GRIFFITHS,
& GREENE,

Attorneys for Defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

PILLSBURY, MADISON
& SUTRO,

/s/ FELIX T. SMITH,
/s/ EVERETT A. MATHEWS,

WHITMAN, RANSOM,
COULSON & GOETZ,

By /s/ EVERETT A. MATHEWS,
Attorneys for Defendant, The
Western Realty Company.

EXHIBIT A

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

February 11, 1947.

The Honorable Joseph D. Nunan, Jr.,
Commissioner of Internal Revenue,
Washington, D. C.

Attention: Mr. Frank Eddingfield.

Re: The Western Pacific Railroad Corporation and Affiliated Corporations 1942, 1943 and 1944 Federal Income Taxes.

Dear Sir:

The Western Pacific Railroad Corporation and its affiliated subsidiaries filed consolidated returns

for the calendar years 1942 and 1943 and the said Western Pacific Railroad Corporation filed a consolidated return for the calendar year 1944 including therein its said subsidiaries for the period from January 1, 1944, to April 30, 1944, during which period affiliation existed.

On the said return for 1942 a consolidated tax liability of $4,201,821.54 was reported and duly assessed and paid. On the said return for 1943 there was reported a net loss and no taxable income. On the said return for 1944, based on a carryover of the unused 1943 net loss, there was reported no taxable income and no tax liability. A claim for refund of the tax so paid for 1942, based on a carryback of the said 1943 net loss, was filed and is now pending in your office.

The taxpayer on behalf of itself and its aforesaid affiliated subsidiaries hereby offers to settle and determine the tax liabilities of the said corporations for the said taxable years 1942, 1943 and 1944 in the amounts shown on the returns filed as aforesaid. This proposal of settlement does not relate to or affect the tax liability of the said subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated. The within proposal is made without prejudice to any rights or claims of the parties, if the proposal is not accepted by you.

As part of this proposal The Western Pacific Railroad Corporation, on behalf of itself and its

aforesaid affiliated subsidiaries agrees that, if this proposal is accepted, it will consent to a rejection of the said claim for refund of the 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is further agreed by the said The Western Pacific Railroad Corporation on behalf of itself and its aforesaid affiliated subsidiaries that if this proposal is accepted it will execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement.

Authority for the submission of the within proposal of settlement by the undersigned is contained in a Power of Attorney heretofore filed in your office.

Respectfully,

THE WESTERN PACIFIC
RAILROAD CORPORATION,

JAMES K. POLK,
Attorney-in-Fact.

Treasury Department
Washington 25

Aug. 13, 1947.

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to
IT:R:A-4
JES

The Western Pacific Railroad Corporation
and Affiliated Companies,
c/o Mr. James K. Polk,
40 Wall Street,
New York 5, New York.

In re: Years—1942, 1943 and 1944.

Gentlemen:

Reference is made to your letter dated February 11, 1947, regarding the examination of income and profits tax returns for the years indicated above.

You are advised that all the administrative action in connection therewith, based upon the record supplied this office by the internal revenue agent in charge, has been completed and the returns placed in the closed files.

Very truly yours,

E. J. McLARNEY,
Deputy Commissioner.

Treasury Department
Washington 25

Aug. 26, 1947.

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to
IT:C1:CC: Rej

The Western Pacific Railroad Corp.,
c/o Mr. J. K. Polk,
40 Wall Street,
New York 5, New York.

In re: Claims for refund of $4,201,821.54,
$7,454.73 and $161,449.48.
For the year 1942

Gentlemen:

In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. J. McLARNEY,
Deputy Commissioner.

994M

[Endorsed]: Filed September 5, 1947.

[Title of District Court and Cause]

ANSWER OF THE WESTERN PACIFIC RAILROAD COMPANY ET AL TO COMPLAINT IN INTERVENTION

Come now defendants; The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company, and pursuant to order of court and without waiving any of the objections to the complaint in intervention made by defendants' motions to strike portions of that complaint, and specifically reserving the right to make further objections and to assert further defenses to that complaint by way of answer, motion or otherwise after a ruling upon those motions, allege by way of answer to the complaint in intervention as follows:

I.

Defendants admit the allegations of paragraph I.

II.

Defendants admit the allegations of paragraph II except that defendants allege that Deep Creek Railroad Company was in liquidation in 1942, 1943 and 1944 and was finally dissolved in 1944.

III.

Answering the allegations of paragraph III, defendants admit the allegations of subparagraph (a). They further admit that defendant The Western

Pacific Railroad Company was in reorganization from August 2, 1935, to March 28, 1946, and that from on or about September 23, 1935, to December 29, 1944, the properties of defendant The Western Pacific Railroad Company were held and operated by the Reorganization Trustees. Defendants deny the remaining allegations of paragraph III.

IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph IV and on that ground they deny them.

V.

Answering paragraph V, defendants admit the allegations of subparagraph (a). They further admit that prior to April 30, 1944, plaintiff owned all the stock of defendant The Western Pacific Railroad Company; that plaintiff also owned the stock of The Western Realty Company and fifty per cent of the stock of The Denver and Rio Grande Western Railroad Company; that defendant The Western Pacific Railroad Company was in reorganization from August 2, 1935, to March 28, 1946; that the Interstate Commerce Commission, this Court and the Supreme Court determined in connection with the reorganization that the stock of defendant The Western Pacific Railroad Company was without equity or value; that an agreement was made as of November 22, 1943, providing among other things for the transfer of that

stock to the reorganization committee appointed in the reorganization proceeding; that the transfer took place on or about April 30, 1944; that on December 29, 1944, the reorganization trustees returned to defendant The Western Pacific Railroad Company all of its properties. Defendants deny the remaining allegations of paragraph V.

VI.

Answering paragraph VI, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in that paragraph and on that ground they deny them, except that defendants admit that the stock of defendant The Western Pacific Railroad Company was found to be without value in the reorganization proceeding.

VII.

(a) Answering the allegations of subparagraph (a) of paragraph VII, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of those allegations and on that ground they deny them, except that defendants admit that defendant The Western Pacific Railroad Company prior to reorganization was indebted to the A. C. James Company in the amount of $4,999,800, which indebtedness was secured by general and refunding mortgage bonds of defendant The Western Pacific Railroad Company in the face amount of $4,249,500 and defendants further admit that Robert E. Coulson was a mem-

ber of the reorganization committee appointed by this Court in the reorganization proceeding.

(b) Answering the allegations of subparagraph (b) of paragraph VII, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of those allegations and on that ground they deny them, except that defendants admit that pursuant to the plan of reorganization, bonds and stock of the reorganized company were issued to the A. C. James Company and that as of April 22, 1946, the James Foundation of New York, Inc., was the largest single stockholder of defendant, The Western Pacific Railroad Company. Defendants deny that the Foundation now dominates or controls defendant, The Western Pacific Railroad Company, or that it has ever done so.

(c) Answering the allegations of subparagraph (c) of paragraph VII, defendants admit that Robert E. Coulson and William W. Carman are officers of the James Foundation of New York, Inc.; that Robert E. Coulson was at one time a director of plaintiff corporation; that Robert E. Coulson was a member of the reorganization committee and signed the agreement of November 22, 1943; that Robert E. Coulson is now and since the reorganization has been a director of defendant, The Western Pacific Railroad Company; that Robert E. Coulson is now and for some time has been a partner in the law firm of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York

City, the firm representing The Western Realty Company in this litigation; that the Reorganization Trustees participated in engaging James K. Polk of that firm as tax counsel to represent the affiliated group of corporations; that William W. Carman executed the agreement of November 22, 1943; that William W. Carman was at one time a director of plaintiff corporation; that Michael J. Curry has been and now is an officer and director of plaintiff corporation; that Michael J. Curry executed the agreement of November 22, 1943; that Mary C. Valouch has been and now is an officer of plaintiff corporation; that Mary C. Valouch is an employee of the firm of Whitman, Ransom, Coulson & Goetz; that Thomas M. Schumacher has been and now is a director of plaintiff corporation and was at one time its president; that Thomas M. Schumacher was one of the Reorganization Trustees in the reorganization proceeding. Defendants deny the remaining allegations of subparagraph (c).

(d) Defendants deny the allegations of subparagraph (d) of paragraph VII.

VIII.

(a) Defendants deny the allegations of subparagraph (a) of paragraph VIII.

(b) Answering the allegations of subparagraph (b) of paragraph VIII, defendants admit that the consolidated returns for the years 1943 and 1944 and the refund claim for 1942 were filed

after October 11, 1943, and after November 22, 1943; that the stock of defendant, The Western Pacific Railroad Company, was transferred to the reorganization committee on April 30, 1944; that plaintiff corporation had no taxable income for 1942, 1943 and 1944. Defendants deny the remaining allegations of subparagraph (b).

(c) Defendants deny the allegations of subparagraph (c) of paragraph VIII.

(d) Defendants deny the allegations of subparagraph (d) of paragraph VIII, except that defendants admit and allege that any refund which might have been made pursuant to the refund claim, and any fund in any way attributable to that claim, belongs to defendant, The Western Pacific Railroad Company.

IX.

Answering the allegations of paragraph IX, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of those allegations and for that reason they deny them, except that defendants admit that until this action was filed plaintiff corporation never asserted the claim which is the subject of this action and except that defendants specifically deny that defendants or any one of them dominate or control plaintiff corporation and defendants further deny that this action was commenced for or on behalf of or at the instance of the defendants, or any of them, or that this action is in any respect collusive.

X.

Answering the allegations of paragraph I of the second cause of action, defendants refer to paragraphs I to IX, inclusive, of this answer and by this reference incorporate into this paragraph the allegations there appearing.

XI.

Answering the allegations of paragraph II of the second cause of action, defendants admit that defendant, The Western Pacific Railroad Company, was in reorganization from August 2, 1935, to March 28, 1946, and that the final order in the reorganization proceeding was entered March 28, 1946. Defendants deny the remaining allegations of paragraph II.

XII.

For a further and separate defense to the complaint in intervention, defendants allege that said complaint and each cause of action therein fails to state a claim against defendants, or any of them, upon which relief can be granted.

XIII.

For a further and separate defense to the second cause of action of the complaint in intervention, defendants allege that this court, without bankruptcy jurisdiction, has no jurisdiction over the subject matter of the second cause of action.

XIV.

For a further and separate defense to the complaint in intervention, defendants allege that the

issues framed by said complaint are not within the scope of this action and are not properly the subject of a complaint in intervention.

XV.

For a further and separate defense to the complaint in intervention defendants allege that said complaint does not name as defendants indispensable and necessary parties.

XVI.

(a) During the years 1942 and 1943 and the first four calendar months of the year 1944, the plaintiff and the defendants, including the defendant, Deep Creek Railroad Company, which was in the process of liquidation in the years 1943 and 1944, were an affiliated group of corporations within the meaning of the Internal Revenue Code. Plaintiff was at all said times the parent corporation of said group and filed income and excess profits tax returns on a consolidtated basis for said group for the said years 1942 and 1943. In the year 1945, plaintiff filed an income and excess profits tax return for the year 1944 and included in said return the income of the other members of said affiliated group for the first four months of 1944. The said consolidated return for the year 1942 reported income and excess profits tax payable by the affiliated group in the sum of $4,201,821.54, and the aforesaid returns for the years 1943 and 1944 reported no taxable income. On March 9, 1945, the plaintiff filed with the Federal Collector

of Internal Revenue in the Second District of New York, a claim for refund of the sum of $4,201,821.54 theretofore paid as income and excess profits taxes for 1942, together with the interest thereon. The whole of said last mentioned amount of tax was paid in 1943 by plaintiff with funds supplied to plaintiff for that purpose by the Reorganization Trustees of defendant, The Western Pacific Railroad Company. Thereafter and in the year 1943, certain of the defendants herein paid or credited to said Reorganization Trustees their respective portions of said tax, so that the net amounts of said tax borne and paid by the parties of this suit were as follows:

Plaintiff	$ 00.00
Defendant The Western Pacific Railroad Company	4,144,828.87
Defendant Sacramento Northern Railway	2,847.58
Defendant Tidewater Southern Railway Company	53,608.94
Defendant The Western Realty Company	00.00
Defendant Deep Creek Railroad Co.	00.00
Defendant Standard Realty and Development Company	00.00
Defendant Delta Finance Co., Ltd.	536.15
Total	$4,201,821.54

On or about September 1, 1947, the tax liability of the affiliated group to the Federal Government for the years 1942, 1943 and 1944 was settled by an agreement whereunder the 1942 refund claim was denied and the 1943 and 1944 returns were accepted as filed. This settlement is the subject of a stipulation filed in this action on September 5, 1947. In so far as that stipulation requires that this action be determined as though the 1942 refund had been allowed in part, defendants allege that defendant, The Western Pacific Railroad Company, is entitled to the whole of said sum together with all interest thereon, and to the whole amount refunded. Defendant, The Western Pacific Railroad Company, will credit or pay to the defendants Sacramento Northern Railway, Tidewater Southern Railway Company, and Delta Finance Co., Ltd., their respective proportions thereof, and said three last named defendants look to defendant, The Western Pacific Railroad Company, for such credit or payment. None of the parties to the above entitled cause, other than the defendant, The Western Pacific Railroad Company, and said last named three defendants, paid or contributed any sum or thing of value to the payment of said tax or any part thereof, and none of said parties other than the defendant, The Western Pacific Railroad Company, has any right, title, interest or claim, at law or in equity, in or to said refund claim or the amount refundable thereunder or any part thereof. Under and by virtue of the Internal Revenue Code

and the regulations thereunder providing for and relating to consolidated returns for affiliated corporations, the tax liability of said affiliated group for Federal income and excess profits taxes was required to be, and was, determined upon the basis of the taxable net income of the said group as a unit. Provision for the allocation to the respective members of such group of their proportion of the tax so determined to be payable was lawful and proper, and the whole of said tax for 1942 was allocated to the defendant, The Western Pacific Railroad Company, and the three other defendants aforesaid, as above set forth, but no right, title, interest or claim was created or arose, or could be created or arise, on the part of any member of said affiliated group against any other member thereof, by virtue of said consolidated returns or any thereof, or by virtue of the individual deductible losses or taxable gains of such members, or otherwise, for any sum in excess of the portion of the tax actually paid or payable by the member making such claim. In the year 1943, plaintiff and other members of said group incurred deductible losses in a total amount sufficient to eliminate all taxable income for the affiliated group for 1943 and to provide unused credit balances to carry back to 1942 and carry forward to 1944 sufficient to establish no taxable income for the years 1942 and 1944, and in said federal tax returns for 1943 and 1944 plaintiff reported said losses and said carry-back and carry-forward por-

tions thereof, and the aforesaid claim for refund of the 1942 taxes referred to the said carry-back. The major portion of the aforesaid deductible losses incurred in the year 1943 was the loss of plaintiff arising from the fact that the stock of the defendant, The Western Pacific Railroad Company, held by plaintiff became worthless in said year. In and by reporting said loss in said returns for 1943 and 1944, and in and by referring to the same in filing said claim for refund, plaintiff suffered no detriment, loss, cost or expense and furnished no legal or equitable consideration or contribution to the members of the affiliated group or to any of them.

(b) By the terms of the Internal Revenue Code and the regulations thereunder, any amount refundable under said refund claim is and was payable by the United States to the plaintiff as collecting agent for the member of said group, namely, defendant, The Western Pacific Railroad Company, which originally provided the moneys for payment of the tax. Said claim was filed and was made for the use and benefit of said defendant as the member of said affiliated group which provided the moneys for payment of the entire tax for the group. The other defendants which contributed to the payment of said tax, namely, Sacramento Northern Railway, Tidewater Southern Railway Company, and Delta Finance Co., Ltd., will look to defendant, The Western Pacific Railroad Company, for such credit or payment as may be appropriate.

Plaintiff is not entitled beneficially to the refund of the same or any part thereof or any interest thereon. Neither said claim for refund nor the moneys that are refundable thereunder constitute or are a fund of said affiliated group, or a fund in respect whereof the members of said group may interplead or be interpleaded, but on the contrary said claim was at all times the exclusive right and property of defendant, The Western Pacific Railroad Company, and said defendant is entitled to the whole sum refundable or deemed to be refundable thereunder.

XVII.

Defendant, The Western Pacific Railroad Company, has a reserve fund for contingent tax liabilities in the sum of $10,100,000, invested in United States Government securities, for the purpose of discharging the liability of said defendant for such federal income and excess profits taxes, if any, as may be imposed upon said defendant for the years 1943 and 1944. Neither the plaintiff nor any member of said affiliated group other than defendant, The Western Pacific Railroad Company, furnished or contributed any money or other thing of value to said fund. Said fund and the securities comprising the same are the exclusive property of the defendant, The Western Pacific Railroad Company, and the said fund is held by said defendant to provide for the payment of its own taxes, if any are payable by it, and not for the benefit, advantage, use or behoof of plaintiff or any other

member of said group. Neither said fund nor any part thereof is a fund of said affiliated group, or a fund in respect whereof the members of said group may interplead or be interpleaded, and neither plaintiff nor any member of said affiliated group other than the defendant, The Western Pacific Railroad Company, has any right, title, interest or claim in or to said fund, or in or to any part thereof, at law or in equity.

XVIII.

It was plaintiff's duty under the Internal Revenue Code and regulations to make and file income and excess profits tax returns for the years 1942, 1943 and 1944. In and by making and filing said income and excess profits tax returns for the years 1942 and 1943 and 1944, plaintiff performed its said duty in accordance with the requirements of the Code and regulations. Plaintiff as a separate corporation had no income or excess profits tax liability on either a separate or a consolidated basis for 1942, 1943 and 1944 and paid no tax for any of said years. In and by filing said returns plaintiff furnished no consideration or contribution whatsoever to other members of said affiliated group, or any of them, and suffered no detriment, loss, cost or expense for itself or for said members or any of them, in that its action in filing said returns was performed under a duty imposed by law.

XIX.

In and by filing the said returns for the years 1942, 1943, and 1944, and in and by filing said refund claims, plaintiff acted as the agent and representative of the affiliated group to file such returns and claim for refund, but plaintiff did not therein or thereby gain or acquire any right or claim as against any other member of said group to be paid any sum or sums or receive anything of value for or on account of filing said returns or claim; or for or on account of theoretical taxes not paid or payable by said group or any member thereof, and on the contrary the exaction or receipt by plaintiff from the members of said group or any thereof, of any sum or other thing of value, for or on account of so-called tax savings, to wit, moneys not paid or payable as taxes, by any other member or members of said group, resulting from the filing of consolidated returns, would have been and was and is inequitable, unjust, and unconscionable, and the claims made by plaintiff and by the intervenor in this cause to payment or other compensation for or on account of such tax savings, were and are inequitable, unjust, and unconscionable, in that plaintiff was an agent and fiduciary for the members of said affiliated group in making said returns, and may not lawfully or equitably use or avail of its said agency to obtain or secure a profit or advantage for itself at the expense of other members of said group for whom it was such agent.

XX.

In and by filing the said returns and filing said refund claim, plaintiff acted as the agent and representative designated by the Internal Revenue Code and the regulations thereunder relating to consolidated returns for affiliated groups, but plaintiff did not therein or thereby gain or acquire any right or claim as against any other member or members of said group to be paid any sum or sums or receive anything of value for or on account of filing said returns or claim, or for or on account of taxes not paid or payable by said group or any member thereof, and on the contrary the exaction or receipt by plaintiff or by the intervenors from the members of said group or any thereof, of any sum or other thing of value, for or on account of such filing or said taxes not paid or payable, would have been and was and is illegal, unjust and inequitable, and contrary to the intent and purpose of the Internal Revenue Code and the regulations thereunder, and plaintiff's claims and the claims of the intervenors in this case are illegal, unjust and inequitable, and contrary to the intent and purposes of the Code and said regulations, in that such exaction or receipt and the claims made by plaintiff and by the intervenors in this cause would constitute and be a purchase and sale of deductible tax losses, or exaction of compensation therefor, and a sale of the privilege of filing consolidated returns, contrary to the intent and purpose of the said statutes, and the regulations thereunder.

XXI.

At the time plaintiff filed said consolidated returns for the year 1943, to wit, July 15, 1944, wherein plaintiff reported its said large deductible loss of 1943, plaintiff had an interest in the said affiliated group, in that plaintiff was then entitled, under certain contingencies, to regain the ownership of all the stock of the defendant, The Western Pacific Railroad Company, and plaintiff's act and decision in filing the same was done and taken for the advantage and benefit of plaintiff in that plaintiff's said contingent interest in the stock of said defendant gave to plaintiff an interest in the effect upon the tax liability of said defendant of filing said consolidated returns. In and by reporting said deductible loss in said consolidated return, plaintiff elected to, and became bound to, apply the carry-back portion thereof to the year 1942, and to file a refund claim on account of such carry-back and the aforesaid refund claim was thereafter filed by plaintiff in pursuance of its said election and obligation so to do.

XXII.

Ever since the year 1918 and until April 30, 1944, plaintiff was the parent corporation of and controlled the members of an affiliated group of corporations and determined whether or not consolidated returns should be filed for said group, including itself, and therein and thereby exercised for itself and said group and in the common interests of the members of the group and the interest of

the plaintiff as the sole owner of the ultimate equity in the group the statutory privilege extended by the applicable provisions of The Revenue Acts and Section 141 of the Internal Revenue Code of filing or not filing consolidated returns and elected continuously in favor of consolidated returns and therein and thereby plaintiff elected for itself and the other members of said group and from time to time committed the group for future years to file such consolidated returns. The defendants The Western Pacific Railroad Company and Deep Creek Railroad Company were members of said affiliated group at all of said times and the other defendants herein were members of said group at various times. In and by its said control and elections from time to time plaintiff derived many advantages and benefits in the manner and to the extent intended by the said statutes and regulations, including, among others, the future consequences of such elections, as well as the results and effects in the years of filing the returns, and the various members of said group, including plaintiff, had variously individual incomes and deductible losses taken up in said consolidated returns from year to year. At all said times plaintiff controlled the allocation of the taxes as between the members of said group, and continuously and consistently allocated the group tax for each year between the members of said group, including itself, who had individual taxable incomes in such year, in the proportions that their individual incomes bore to the total of such incomes, ignoring

losses of other members of the group, but plaintiff never charged itself nor claimed credit for itself or charged or claimed credit for any member of said group for or on account of theoretical taxes not payable by the group in consequence of deductible losses suffered or incurred by one or more of its members in years when other members had taxable gains. Neither plaintiff nor the interveners made any claim of that nature against or in favor of any member of the group until the making of the claims stated in its complaint herein, which said claims were not made until long after the said affiliation had been severed and were made at a time when plaintiff had no ownership of or interest in said group or any member thereof. Plaintiff and the interveners as stockholders of plaintiff and all other members of said group became bound by, and agreed to, the said long continued custom and practice of allocating between the members of said group the actual group tax, and no more, and therein and thereby plaintiff waived and relinquished whatsoever right it might otherwise have had to claim as against any member of said group, any other or further allocation, adjustment or claim arising out of the filing of such consolidated returns or the individual taxable gains and deductible losses of the members of said group. By reason of said custom, practice and agreement and by reason of the advantages and benefits received by plaintiff from the said exercise of its privilege of filing consolidated returns for said group for all said years, plaintiff's

claims and the claims of the intervenors in this suit are unjust, inequitable and unconscionable.

XXIII.

At all times mentioned herein to and including April 30, 1944, plaintiff was the owner and holder of all of the capital stock of defendant The Western Pacific Railroad Company. From August 2, 1935, to December 29, 1944, defendant The Western Pacific Railroad Company was a railroad corporation in reorganization under the provisions of Section 77 of the Bankruptcy Act, in that certain proceeding in the United States District Court for the Northern District of California, Southern Division, entitled "In the Matter of The Western Pacific Railroad Company," No. 26591-S in the files of said Court, and the title to and possession of all of its properties were at all times from September 23, 1935, to December 29, 1944, held by T. M. Schumacher and Sidney M. Ehrman, as the Reorganization Trustees appointed by said court. Said defendant The Western Pacific Railroad Company was reorganized in said proceeding under a Plan of Reorganization filed by the Interstate Commerce Commission June 21, 1939, which said Plan of Reorganization was finally confirmed by said Court by its order in said proceeding made October 11, 1943. In and by said Plan of Reorganization as finally confirmed October 11, 1943, it as determined that the stock of said defendant held by plaintiff herein, being all of the preferred and common capi-

tal stock of said defendant, was without equity or value. Under and pursuant to said Plan of Reorganization and the order of said Court in said proceeding made November 27, 1944, and at 12:01 A.M., on December 29, 1944, said Trustees returned and transferred to the said reorganized corporation, defendant The Western Pacific Railroad Company, all the business, assets and property, of every kind and description held by said Trustees in said bankruptcy proceeding, free and clear of all claims other than such claims as were preserved under the said Plan of Reorganization and were not limited or discharged by the orders of said Court

XXIV.

In and by their claims against the defendant The Western Pacific Railroad Company and against and in respect of the said reserve and the said refund claim belonging to the defendant The Western Pacific Railroad Company, plaintiff and the interveners seek to establish and enforce liens senior to the liens of those claimants in said reorganization proceeding whose liens were found to have equity and value and were preserved and provided for in the said Plan of Reorganization, and plaintiff and the interveners seek thereby to gain a preference over such claimants. The entire business, assets and properties of said reorganized company were returned and transferred to it by said Trustees pursuant to said Plan and the orders of said Court; subject only to the claims so preserved. In and

by said Plan of Reorganization all claims junior to the claims of First Mortgage Bondholders and General and Refunding Mortgage Bondholders of said defendant The Western Pacific Railroad Company were found and determined to be without equity or value, and the claims of said bondholders were preserved, and were paid and discharged under said Plan in common stock, and other securities, of the said reorganized company, so that the said bondholders became the owners of the entire common stock of the reorganized company. Plaintiff's aforesaid claims and the claims of the interveners in this cause and each of them are unjust, inequitable and unconscionable in this, that the aforesaid deductible loss incurred by plaintiff, and the filing of said federal tax returns and refund claim reporting said loss, furnish no just or equitable ground or reason for giving or granting to plaintiff a preference over said prior claimants, to wit said bondholders, as to all or any part of said reserve fund or said refund claim or any other assets or property of said reorganized company, but said claims of plaintiff and the interveners cannot now be recognized or allowed in any manner or to any extent without thereby granting such inequitable preference.

XXV.

Each and all the claims of plaintiff and the interveners in and to said reserve fund, or any portion thereof, and in and to said refund claim, or the amount refundable thereunder, are unjust,

inequitable, and unconscionable in all the respects hereinafter in this paragraph averred or mentioned. Said claims and each of them arose and could have been presented to the said Bankruptcy Court more than two years before the commencement of this action. Plaintiff was a party to said reorganization proceeding and had personal notice of all of the proceedings in the Bankruptcy Court and before the Interstate Commerce Commission in respect of the business, assets and properties of the defendant The Western Pacific Railroad Company and the Plan of Reorganization thereof. The interveners, at any time after they purchased their stock interest in plaintiff, could have asked leave of court to be made parties to the reorganization. No such leave was requested. Plaintiff and the interveners stood by and wholly failed and neglected to present their claims, or any thereof, to the said Court or to said Commission or to the said Reorganization Trustees or to the defendant The Western Pacific Railroad Company, and wholly failed to notify the said Court, Commission, Trustees or defendant company thereof prior to the effectuation and consummation of said Plan of Reorganization, and permitted the said Plan to be effectuated and consummated without presenting or giving notice of said claims to said Court, Commission, Trustees or defendant company so that said Plan of Reorganization was effectuated and consummated by said Trustees pursuant to said Plan and the orders of said Court and Commission, and all parties in interest under

said Plan accepted and received the new securities and the other provisions made for them under said Plan, without notice of plaintiff's said claims, or the claims of the interveners or any thereof. Plaintiff and the interveners further stood by and wholly failed and neglected to present claims, or any thereof, to the said Court, Trustees and defendant company, or any thereof, and wholly failed to notify them or any of them of such claims or any thereof, prior to the final settlement of the accounts of said Trustees by said Court, and prior to the termination of said reorganization proceedings, and permitted said accounts to be settled and said proceedings to be terminated without giving notice of said claims or any thereof, or presenting the same or any thereof, and all parties in interest participated in the said proceedings, and said accounts were settled and allowed, and said proceedings were terminated, without any party to said proceedings having notice of said claims or any thereof. In and by the neglect and conduct of plaintiff and the interveners aforesaid plaintiff and the interveners were guilty of laches and the said claims and each and all thereof became and are stale and inequitable, and barred by the said laches and inequitable conduct and neglect. These defendants refer to the averments of the preceding paragraphs of this answer in connection with and as stating further grounds for their defense that plaintiff's claims and the claims of the interveners are stale and barred by laches.

XXVI.

The rights of action set forth in the complaint in intervention in respect of, or pertaining to, that portion of the reserve fund created by said court order, to wit, $7,100,000 did not accrue within two years next before the commencement of this action. The rights of action set forth in said complaint in respect of the remainder of said reserve fund, to wit, $3,000,000 and in respect of the said refund claim, to wit, the claim for refund of $4,201,821.54 taxes paid for the year 1942, did not accrue within two years next before the commencement of this action.

XXVII.

Said Bankruptcy Court on March 28, 1946, made its Final Order in said reorganization proceeding terminating said proceeding, subject only to the reservations of jurisdiction made and referred to in said order, and in and by said order said Court permanently restrained and enjoined all persons from instituting, prosecuting or pursuing claims against said defendant The Western Pacific Railroad Company, or against any of the assets or property of said defendant, on account of any right, claim or interest which such person might have had in, to or against said defendant, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of said Court). In and by said Final Order plaintiff and the interveners were and are forever restrained and enjoined from instituting

or prosecuting this cause as against the defendant The Western Pacific Railroad Company and from instituting or prosecuting any action or proceeding to establish or enforce the claims and each thereof against said defendant which are set forth in their complaints herein.

XXVIII.

In and by said Plan of Reorganization and the said Orders of said Court, and each of them, plaintiff and the interveners were and are forever barred and foreclosed from claiming as against the defendant The Western Pacific Railroad Company all or any part of the aforesaid claim for refund of taxes paid by said Trustees in the sum of $4,201,821.54, and forever barred and foreclosed from claiming all or any part of the said refund; and any sum payable upon said refund claim, including interest thereon, became and was and is the property and asset of defendant The Western Pacific Railroad Company, free and clear of all claims and demands of plaintiff or the interveners.

XXIX.

In and by said Plan of Reorganization and the said Orders of said Court, and each of them plaintiff and all parties to this action other than defendant, The Western Pacific Railroad Company, were and are forever barred and foreclosed from claiming all or any part of said reserve fund of $10,100,000 and forever barred and foreclosed from claiming against said defendant any sum or contribution

whatsoever on account of the so-called tax savings, to wit, the nonexistence of taxable net income, reported by the said returns filed for the years 1943 and 1944, and the entire business, assets and property returned and transferred by said Reorganization Trustees to said defendant were in and by said Plan and Orders returned and transferred to said defendant free and clear of all such claims of plaintiff and the interveners and the other members of said affiliated group or any of them. In and by said Orders of said Court and the said Plan of Reorganization and each of them, each and every, all and singular, the claims of plaintiff and the interveners in this cause against the defendant, The Western Pacific Railroad Company, were and are forever barred and foreclosed.

XXX.

Said Bankruptcy Court on March 3, 1944, made its order authorizing and directing the said Trustees to establish a reserve fund for contingent tax liabilities in the amount of $7,100,000 for the sole and exclusive purpose of providing for the payment of federal income and excess profits taxes for the year 1943 in the event the same should become payable by said Trustees or by the reorganized company, defendant, The Western Pacific Railroad Company. In and by said Order, said reserve fund became and was, and is, a fund belonging exclusively to the reorganized company, defendant, The Western Pacific Railroad Company, and may not be subjected to the claims of the interveners or the

claims of the other members of the said affiliated group or any of them. Said reserve fund created by said Court order is a part of the reserve fund of $10,100,000 mentioned in the complaint in intervention. The remainder of said reserve fund, to wit, $3,000,000, was created by resolution of the Board of Directors of the reorganized company, The Western Pacific Railroad Company adopted March 26, 1945, for increasing said reserve fund held for said purposes, exclusively, to the sum of $10,100,000. Neither plaintiff nor the interveners, nor any other member of the affiliated group, other than defendant, The Western Pacific Railroad Company, has ever contributed anything to said reserve fund and neither plaintiff nor the interveners nor any of the said other members of said group have any right, title, interest or claim in or to said reserve fund, or in or to any portion thereof at law or in equity.

XXXI.

At all times from August 2, 1935, until March 28, 1946, the rights of plaintiff against the defendant, The Western Pacific Railroad Company, and the Reorganization Trustees were before this Court for adjudication in the reorganization proceeding. Plaintiff and the interveners could have obtained in that proceeding an express adjudication of the claims which are presented in this action. Their failure to do so renders those claims forever barred under the principles of res judicata.

That, as heretofore alleged, there was paid, in respect to the tax liability of the Affiliated Group for the year 1942 the sum of $4,201,821.54 the right to recover which upon claim for refund inured to plaintiff; that no other or additional payments were made to the Collector of Internal Revenue by the Affiliated Group; that, under the settlement hereinabove referred to, the said sum of $4,201,-821.54 was retained by the Treasury of the United States as representing full payment of the tax liability of the defendants for the three tax periods; that by reason solely of the plaintiff's surrender to defendants at their request of its separate right to the exclusive utilization of the heavy losses sustained by and credits belonging to the plaintiff, and of plaintiff's joinder at defendants request in the filing of consolidated returns of tax with them and consequent assumption of consolidated return liabilities and disabilities the acceptance of the proposed settlement by the Commissioner based upon recognition of plaintiff's losses and credits affected a net tax savings by defendants for the three tax periods amounting to the difference between the aggregate excess profits and income tax liabilities, which defendants had incurred and would otherwise have had to pay, as shown in the foregoing summary, amounting to $21,712,886.79 and the sum accepted by the Government in said settlement; that said savings, retained and now in the possession of the defendants aggregate $17,511,065.25.

Eighth: That the Internal Revenue Code dating back as early as the Revenue Act of 1917 has con-

tinuously provided for the filing of tax returns on a consolidated basis by closely affiliated corporations, in some periods the filing of such returns being mandatory, in others optional; in some periods by railroad companies only; in other periods (including the three tax periods in which the foregoing tax savings were effected) by corporations generally; but at no time has Congress made any express provision for the allocation to one or more members of an affiliated group for tax savings or benefits resulting from the filing of such returns on a consolidated basis.

Under the statutes of the United States and the regulations of the Treasury Department with regard to the filing of consolidated income and excess profits tax returns the parent is created the sole agent and representative of the group and the group is regarded as an economic unit governed and controlled by the parent corporation which is itself regarded as the taxpayer, each member of the group by joining in a consolidated return being made severally and individually liable to the United States for the entire tax payable for the group under such return, but without statutary provision for allocation of the tax liability among the group members inter sese. The reason for the absence of such provision is that the legislation contemplates a parent and subsidiary corporation relationship in which the parent is a proprietor entirely in control and by reason of its proprietorship accrues to itself the benefit and enrichment flowing from any

XXXII.

At no time before the institution of this action did plaintiff or the interveners in any way assert the claims which are the subject of this action. If they had asserted those claims promptly, the defendant, The Western Pacific Railroad Company, the Reorganization Trustees and all parties to the reorganization proceeding could have applied to this Court, conducting the reorganization, for an order directing plaintiff to file the consolidated returns for 1942, 1943 and 1944 and the refund claim for 1942 without any charge by the plaintiff or the interveners or any compensation to them. If that application had been denied, the Reorganization Trustees and the defendants could then have elected to file separate income tax returns and to avail themselves of the rights, privileges, options and advantages belonging to persons who pay taxes to the Federal Government. The Reorganization Trustees and the defendants could have taken steps to improve their tax position by, among other things, taking advantage of the tax benefit which would arise from a determination of the insolvency of defendant Sacramento Northern Railway. The Reorganization Trustees and the defendants have in reliance upon the silence of plaintiff and the interveners changed their position to their detriment. Plaintiff and the interveners are therefore estopped from asserting their claims. They are also estopped from maintaining in this action a position inconsistent with the position plaintiff maintained in the

reorganization proceeding. Plaintiff and the interveners are further precluded from maintaining their claims by reason of the fact that the concurrence of each member of the affiliated group was necessary in order that consolidated returns might be filed. The claims of plaintiff and of the interveners to the alleged tax saving are therefore unjust and unconscionable because plaintiff's claim to that alleged saving could in no event be better than the claim of each of the defendants.

XXXIII.

Defendants are informed and believe and upon information and belief allege that the interveners are foreclosed from asserting the claims which are the subject of complaint in intervention by reason of the fact that the persons from whom they purchased their stock in the plaintiff corporation are estopped from asserting those claims and by reason of the further fact that the interveners are not qualified to maintain a stockholders' suit on behalf of plaintiff corporation.

XXXIV.

Defendants allege that by reason of the circumstances set forth in this answer, the claims of plaintiff and the interveners are barred by each of the following affirmative defenses: Discharge in bankruptcy pursuant to Section 77, of the Bankruptcy Act, res judicata, estoppel, laches, failure of consideration, illegality, statute of limitations and waiver.

XXXV.

Defendants deny each of the allegations of the complaint in intervention which is not specifically admitted in this answer.

Wherefore, defendants pray for the order, judgment and decree of this Honorable Court:

1. Declaring and determining that defendant, The Western Pacific Railroad Company, is the sole owner of and is exclusively entitled to said reserve fund and said refund claim and all sums refundable thereunder and quieting the right and title of said defendant therein and thereto against the claims of plaintiff and the interveners and all other parties to this cause and restraining and enjoining plaintiff and the interveners and all other parties to this cause other than defendant, The Western Pacific Railroad Company, from instituting or prosecuting claims thereto.

2. Declaring and determining that neither plaintiff nor the interveners have any rights or claims against these defendants or any of them for or on account of any matter or thing averred in the complaint in intervention.

3. For defendants' costs of suit herein and such

other and further relief as may be meet and equitable in the premises.

Dated: November 5, 1947.

THE WESTERN PACIFIC RAILROAD COMPANY,

SACRAMENTO NORTHERN RAILWAY,

TIDEWATER SOUTHERN RAILWAY COMPANY,

DELTA FINANCE CO., LTD.,

STANDARD REALTY AND DEVELOPMENT COMPANY.

By /s/ ALLAN P. MATTHEW,

JAMES D. ADAMS,

ROBERT L. LIPMAN,

BURNHAM ENERSEN,

Their Attorneys.

Receipt of copy attached.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 5, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL BILL OF COMPLAINT

The Western Pacific Railroad Corporation, the plaintiff herein by leave of Court first had and obtained, files this, its Supplemental Bill of Complaint, and respectfully shows and alleges as follows:

First: That at the time of the filing of the Bill of Complaint herein the consolidated excess profits and income tax returns of the plaintiff and its affiliated companies for the year 1942 and 1943 and the period January 1, 1944, to April 30, 1944 (hereinafter sometimes called "the three tax periods"), on which last named date affiliation ended, had not been finally audited and accepted by the Commissioner of Internal Revenue and the claim or cause of action therein set forth and alleged by plaintiff against all or any of its former affiliated companies, defendants herein, was inchoate and unliquidated; that sometime prior to the filing of the Bill of Complaint and prior to March 28, 1946, on which last named date the Bankruptcy Proceeding was terminated with certain reservations of jurisdiction, James K. Polk, tax counsel with the firm of Whitman, Ransom, Coulson & Goetz, undertaking and purporting at the instance of defendants to represent the separate as well as the common interests of plaintiff as well as of defendants entered into negotiations with the Commissioner of Internal Revenue for a settlement of their tax liabilities for the three tax periods under which

the Treasury of the United States (a) would accept as final the consolidated income and excess profits tax returns of the Affiliated Group for the three tax periods (b) allow in reduction of defendants' taxable income and profits the losses and credits that had accrued to plaintiff and (c) retain the tax payment made thereunder, being the sum of $4,201,821.54 paid for 1942, and the plaintiff would withdraw or consent to the rejection of its then pending claim for a refund of said payment of $4,201,821.54, together with interest thereon from the date of payment; and that on February 11, 1947, the aforementioned negotiations for a settlement of said tax liabilities had so far progressed toward a final and definitive agreement as to justify the transmission of a formal written offer of settlement.

Second: That on February 11, 1947, James K. Polk, one of the Attorney-in-Fact representing the plaintiff and its former affiliated companies (hereinafter called the Affiliated Group) and a member of the firm of Whitman, Ransom, Coulson & Goetz, tax counsel for the Affiliated Group, transmitted to the Commissioner of Internal Revenue a formal written offer of settlement which in terms was made on behalf of the plaintiff and its former affiliated companies, a true copy of which communication is hereto annexed and made a part hereof, marked Exhibit A.

Third: That the plaintiff had not been informed in advance of the transmission of said offer of settlement, Exhibit A, nor of the pendency of the

prior negotiations leading up thereto, nor of the probable realization of substantial tax savings, of which the plaintiff would be beneficiary, until many months after the transmission fo Exhibit A when a copy thereof was furnished to the plaintiff by said James K. Polk of the firm of Whitman, Ransom, Coulson & Goetz with a request for approval and ratification of the action so taken on behalf of the Affiliated Group by him as their Attorney-in-Fact.

Fourth: That on August 13, 1947, the Board of Directors of the plaintiff approved and ratified the transmission of said offer subject, however, to the condition that the defendant, The Western Pacific Railroad Company, enter into a stipulation (afterwards approved by this Court) to be signed by the attorneys for the plaintiff and for the defendants (and afterwards so signed pursuant to the direction of this Court), a copy of which stipulation is hereto annexed and made a part hereof, marked Exhibit B.

Fifth: That on August 13, 1947, the Deputy Commissioner of Internal Revenue on behalf of the Treasury of the United States accepted the then pending offer of settlement in a communication dated on said date and addressed to the plaintiff and its affiliated companies, a true copy of which is hereto annexed and made a part hereof, marked Exhibit C.

Sixth: That thereafter, on August 26, 1947, the Deputy Commissioner of Internal Revenue in ac-

cordance with the terms of settlement previously accepted by him on behalf of the Treasury of the United States transmitted a communication dated on said date and addressed to the plaintiff which rejected the pending claim of the plaintiff for a refund of the taxes provided for by the Trustees of the defendant, The Western Pacific Railroad Company, and paid by the plaintiff as parent of the Affiliated Group for the year 1942 in the amount of $4,201,821.54, a true copy of which communication is hereto annexed and made a part hereof, marked Exhibit D.

Seventh: That on said last mentioned date the claim of the plaintiff against defendants to account for the benefit and enrichment claimed by defendants for themselves through the utilization of plaintiff's deductible losses and credits in effecting tax savings became definitive and justiciable in an amount susceptible of mathematical calculation and thereupon the plaintiff employed the firm of Lybrand, Ross Bros. & Montgomery, Certified Public Accountants, to determine by a calculation the excess profits and income tax liabilities of the defendant, The Western Pacific Railroad Company, and each of the other defendants for the three tax periods on a separate or individual basis without the benefit of the authorized deductions and credits belonging to the plaintiff; and there here follows the summary made by said firm of Accountants of their computation for the three tax periods for each of said affiliated companies, which summary and computation the plaintiff hereby alleges to be correct:

	Year 1942	Year 1943	Period January 1 to April 30, 1944	Total
The Western Pacific Railroad Corporation:				
Excess profits tax	None	None	None	
Income tax	None	None	None	None
The Western Pacific Railroad Company:				
Excess profits tax	$4,825,020.69	$10,614,539.48	$1,397,379.67	
Income tax	2,090,672.67	2,133,230.11	557,411.83	
Total	$6,915,693.36	$12,747,769.59	$1,954,791.50	$21,618,254.45
Sacramento Northern Railway:				
Excess profits tax	None	None	None	
Income tax	None	None	None	None
Tidewater Southern Railway Company:				
Excess profits tax	None	None	None	
Income tax	$ 55,907.03	$ 19,843.16	$ 2,460.73	
Total	$ 55,907.03	$ 19,843.16	$ 2,460.73	78,210.92

	Year 1942	Year 1943	Period January 1 to April 30, 1944	Total
Deep Creek Railroad Company:				
Excess profits tax	None	None	None	
Income tax	None	None	None	None
The Western Realty Company:				
Excess profits tax	None	None	None	
Income tax	$ 6,168.43	$ 4,562.82	$ 507.75	
Total	$ 6,168.43	$ 4,562.82	$ 507.75	11,239.00
Standard Realty and Development Company:				
Excess profits tax	None	None	None	
Income tax	None	$ 1,060.25	$ 40.39	1,100.64
Total	None	$ 1,060.25	$ 40.39	
Delta Finance Company, Ltd.:				
Excess profits tax	$ 910.57	None	None	
Income tax	2,265.06	906.15	None	
Total	$ 3,175.63	$ 906.15	None	4,081.78
				$21,712,886.79

tax economies effected through the filing of consolidated income and excess profits tax returns. In the three tax periods in which the aforementioned tax savings were effected the legislative requirement was ownership directly or indirectly by the parent of at least 95% of the capital stock of each of the subsidiary corporations so that in normal circumstances there could not be a substantial diverse interest between the parent and any subsidiary corporation by reason of which an allocation upon principles of equity could become necessary to prevent the loss to the parent of its property interest in the tax savings flowing from utilization of its individual losses and credits in any consolidated income and excess profits tax returns. Since, however, the plaintiff herein lost its proprietary control of the defendant subsidiary corporations, although retaining the right to join with defendants in consolidated returns, prior to the date on which the earliest of the tax returns in question became due, the establishment of its inchoate right to an allocation of the tax benefits arising from the filing of the consolidated returns and the enforcement of such inchoate right upon its becoming definitive by settlement with the Government, requires the intervention of a Court of Equity if plaintiff is not to go remediless.

As is shown by the foregoing summary the defendants for the three tax periods incurred individual liabilities to pay to the Treasury of the United States amounts aggregating $17,511,065.25

in addition to $4,201,812.54 originally paid for 1942 as their tax burden in respect of war earnings during the three tax periods which under the policy of the Government implicit in the Revenue Code could not be retained as corporate income except as to a relatively negligible portion thereof. For the defendant, The Western Pacific Railroad Company, and any of the other defendants to be permitted to retain any part of said $17,511,065.25 derived from their utilization of plaintiff's rights under the Internal Revenue Code to the detriment of plaintiff and to their own monetary advantage and derived from their utilization of plaintiff's losses and credits to the exclusion of plaintiff would be fortuitiously and unjustly to enrich them and would moreover permit them to keep wartime profits not taken by the Government solely because Congress allowed as an offset there against losses suffered by and credits belonging to the plaintiff, such losses and credits being allowed by the Congress solely in order that the plaintiff and its stockholders, as the owners of the enterprise throughout the three tax periods, would benefit through the imposition of tax only on the income, after deduction of losses and allowance of credits of the entire commonly owned enterprise. In other words, the tax saving was produced by losses suffered by and credits belonging to the plaintiff and can be justified only because throughout the three tax periods the plaintiff and defendants were affiliated and under the same common ownership. It was the plaintiff

and its stockholders who were intended to be benefited by the provisions of the Internal Revenue Code permitting affiliated corporations under common ownership to file consolidated returns and combine their income and losses and credits. To allow the defendants to keep the tax saving would be inconsistent with the basic objective of Congress and would distort the purpose of Congress in allowing such losses and credits as deductions in consolidated returns.

On the other hand, to allocate the abated taxes amounting to $17,511,065.25 to the plaintiff in mitigation of its losses would be to carry out the purpose of Congress in permitting the filing of consolidated income and excess profits tax returns, and to the extent of such mitigation of the plaintiff's losses there will be relief from a forfeiture which equity abhors and by the same judicial action there will be the avoidance of an unjust enrichment of defendants which would offend basic equitable principles and shock the conscience of this Court.

The plaintiff invokes the rule fundamental in the interpretation of all Congressional legislation that where one interpretation leads to unjust, unreasonable and improper results and another interpretation equally admissible leads to a result which conforms to a just, reasonable and defensible legislative intent the latter interpretation is imperative.

Ninth: That during the three taxable periods the plaintiff had no taxable income and it sustained losses of $73,113,079.01 which it had the right

to carry back to the years 1941 and 1942 and to carry forward to the years 1944 and 1945 as an offset against any taxable income for such years. During the three tax periods plaintiff also had large excess profits credits and credit carry-overs and carry-backs which it could utilize to offset any future excess profits it might have. The defendants had large taxable net incomes during each of the three tax periods as follows:

	1942	1943	Jan.-Apr. 1944
Western Pacific Railroad Co.	$10,806,257.38	$18,191,914.49	$2,975,142.13
Sacramento Northern Railway	7,424.36	129,242.17	(192,955.89)
Tidewater Southern Railway	139,767.58	49,704.07	9,484.[illegible]
Deep Creek Railroad Co.	None	None	None
Western Realty Co.	(3,612.17)	(595.64)	1,197.67
Standard Realty & Development Co.	None	11,479.88	161.58
Delta Finance Co.	1,397.67	3,624.60	(157.66)

on which as separate taxpayers they incurred income and excess profits tax liabilities in an amount aggregating not less than $21,712,886.79.

The plaintiff and the defendants, as affiliated corporations, had a right to file consolidated income and excess profits tax returns during the three tax periods the effect of which would be to consolidate the net incomes and losses and credits of the group with taxes imposed only on the resulting consolidated net income and consolidated excess profits net income and such filing of consolidated income and excess profits tax returns would eliminate all or substantially all of the separate tax liabilities of

the defendants. In the ordinary case of filing consolidated returns any consequent benefit would inure to the common parent through its proprietary interest, but since the plaintiff herein lost its proprietary interest in and managerial control of the defendants prior to the filing of the consolidated income and excess profits tax returns and prior to the settlement with the Government of the tax liability for the three taxable periods, the benefits could no longer inure to it unless the defendants are required to account nor could plaintiff alone bring about the filing of consolidated returns. Unless it receive the benefit resulting to the Affiliated Group from filing consolidated returns, the plaintiff could derive nothing but detriment from joining in consolidated returns; the plaintiff made itself jointly and severally liable for any tax liability of the group by joining in the consolidated income and excess profits tax returns and it deprived itself of the valuable right to use for its own exclusive benefit its own excess profits credits and net operating losses by carrying forward such credits and losses against future income it might have during the taxable periods in the years 1944 and 1945. The plaintiff had the right to file separate returns for the three tax periods and thus avoid the liabilities and the detriment to its individual interest entailed by joining in the consolidated income and excess profits tax returns. If the plaintiff had elected to file separate returns during the three tax periods the income and excess profits tax liability of the defendants which they would in such event

have been required to discharge by cash payment would have been not less than $21,712,886.79.

The plaintiff had no right or power as parent corporation to cause the defendants to consent to the filing of consolidated income and excess profits tax returns because of the reorganization proceedings. At the special instance and request of the defendants and the Trustees in the reorganization proceedings acting for the defendants the plaintiff, however, consented to the filing on its behalf of consolidated income and excess profits tax returns with defendants for each of the three tax periods and thereby at the Trustees and defendants special instance and request surrendered and transferred to defendants its right to utilize for its own exclusive benefit the losses of $73,113,079.01 and its excess profits credit and the defendants used such rights to their great benefit and advantage to discharge their federal income and excess profits tax liabilities for the said periods. The benefit conferred upon the defendants by the discharge of its tax liability at its request amounted to $17,511,065.25.

The defendants are obligated in equity and good conscience to account for and pay to the plaintiff the tax saving in the amount of $17,511,065.25 held by the defendants without right and solely as constructive trustees for the plaintiff.

Tenth: The defendants or said Trustees for the defendants presented the consolidated income and excess profits tax returns for signature to the plaintiff for each of the three tax periods through James K. Polk, tax counsel with the firm of Whitman,

Ransom, Coulson & Goetz which firm of attorneys had been counsel for both plaintiff and defendants prior to the reorganization, and for the Trustees in the reorganization. The same firm of attorneys were also counsel for the James Foundation of New York, Inc., which was not merely a stockholder and creditor of the plaintiff but was as well a creditor of the defendant, The Western Pacific Railroad Company, both prior to and during the reorganization. As a consequence of the reorganization and of heavy purchases of securities of said defendant during the progress of the reorganization the James Foundation became predominantly interested as a bondholder in the defendants and thus adversely interested to the plaintiff in this tax matter. The defendants continued to employ the same common counsel with the plaintiff after the defendants, The Western Pacific Railroad Company and its subsidiaries, were in reorganization and their interests were no longer the same as those of the plaintiff. Plaintiffs officers and general counsel were not conversant with tax matters and relied completely on said tax counsel to protect its rights and more particularly relied on such common tax counsel to advise them if and when any diversity of interest affecting the tax rights of the parties arose so that separate counsel could be retained to protect separate interests. The plaintiff had a right to be advised of its separate rights with respect to the utilization of its losses and excess profits credits and of the fact that it had the right to require an allocation to it of the tax benefit resulting to the

defendants from the use of the plaintiff's tax losses and excess profits credits to discharge the federal income and excess profits tax liabilities of the defendants; the defendants fully realized and had knowledge of this but nevertheless caused the consolidated income and excess profits tax returns to be prepared for each of the three tax periods and presented to the plaintiff through the common tax counsel for signature as a mere matter of routine without disclosing to the plaintiff the adversity in tax interests of the parties or the plaintiff's legal position and rights in the matter. The entire tax matter for the three tax periods was handled by the defendants through the common tax counsel in entire disregard of plaintiff's individual rights and interests and on the basis of effecting the greatest possible tax economies for defendants through the utilization of plaintiff's tax rights until final settlement with the Bureau of Internal Revenue on August 13, 1947, and this was done without consulting or informing the plaintiff as to the progress of the matter until the proposed settlement was presented to the plaintiff through the common tax counsel for ratification and signature. In the settlement with the Bureau of Internal Revenue the defendants waived a claim for refund of consolidated income taxes paid for the year 1942 in the amount of $4,201,821.54 based upon a carry-back of the plaintiff's 1943 tax losses which amount was payable to the plaintiff by the United States Treasury. The additional income and excess profits tax liabilities of the defendants for the three tax periods

discharged, as confirmed by said settlement, by the filing of the consolidated income and excess profits tax returns and the transfer thereby of the plaintiff's losses and excess profits credits to the use of the defendants was not less than $17,511,065.25.

The defendants are obligated in equity and good conscience to account for and pay to the plaintiff the tax saving in the amount of $17,511,065.25 held by the defendants without right but solely as constructive trustees for the plaintiff.

Eleventh: That the obligation of the Trustees of the defendants, The Western Pacific Railroad Company and its subsidiaries, to account for and pay to the plaintiff the aforesaid tax savings was an obligation incurred by the Trustees in their operation of the debtor's estate and was an obligation assumed by the defendant, The Western Pacific Railroad Company, under Orders of this Court in the Bankruptcy Proceeding and properly chargeable against the properly payable out of moneys transferred to the defendant, The Western Pacific Railroad Company, by said Trustees, which moneys vastly exceeded the amount of working capital contemplated by the Plan of Reorganization and the $17,511,065.25 included therein representing tax savings realized solely by reason of the misfortune of the plaintiff and the utilization by said defendant of plaintiff's rights and which in equity and good conscience belong wholly to the plaintiff and are held by the defendant, The Western Pacific Railroad Company, without any beneficial interest

therein but solely as custodian or trustee for the plaintiff.

Twelfth: In answering the plaintiff's Bill of Complaint the defendants set up and interpose as a bar to the assertion by the plaintiff of its equitable right to an allocation of the tax savings amounting to $17,511,065.25 the Decree or Order of this Court dated March 28, 1946, which Decree or Order this plaintiff avers is inapplicable to this proceeding and is not a bar to enforcement of the cause of action set up in the Bill of Complaint for the following reasons, among others:

1. The cause of action set up in the Bill of Complaint is in the category of those expressly excepted from the operation of said Decree or Order.

2. The cause of action set up in the Bill of Complaint is in the nature of an equitable accounting for moneys in the custody of but not belonging to the defendant, The Western Pacific Railroad Company, and held by it without beneficial interest therein and solely as custodian or Trustee for the plaintiff.

3. At the time of the entry of said Decree or Order the plaintiff's rights as proprietary parent of the Affiliated Group were inchoate and unliquidated and had not become fixed, liquidated and justiciable until the compromise agreement with the Government hereinbefore mentioned.

4. The aforesaid tax savings although in the

custody of the defendant, The Western Pacific Railroad Company, are held by it in a fiduciary capacity and will be so held until final allocation thereof is made precisely as is the plaintiff in a fiduciary position with respect to the tax refund moneys in its possession in accordance with the Stipulation annexed hereto as Exhibit B. The inchoate right of the plaintiff to an allocation of the aforesaid tax savings resulting from the utilization in the excess profits and income tax returns for the three tax periods of its deductible losses was an unliquidated claim against the Trustees of the estate of the defendant, The Western Pacific Railroad Company, who had requested the plaintiff to file said excess profits and income tax returns on a consolidated basis and who subsequently transferred the entire trust res including moneys representing such tax savings to the defendant, The Western Pacific Railroad Company, subject to all liabilities of said Trustees, one of which was their obligation to the plaintiff to account to it for the tax savings thereafter determined to have resulted from such utilization of the plaintiff's deductible losses.

5. In addition to the foregoing reasons the plaintiff avers that said Decree or Order if deemed applicable to the cause of action set forth in the Bill of Complaint should be set aside or modified so as to exempt said cause of action from its operation for the following further reasons:

(a) The firm of Whitman, Ransom, Coulson & Goetz and James K. Polk, a member thereof, at

the instance of the Trustees, one of whom was the Chief Executive Officer of the plaintiff, were appointed tax counsel for the Trustees and for the plaintiff. Said firm were also counsel for the James Foundation of New York, Inc. Robert E. Coulson, a member of said firm, was a member of the Reorganization Committee of the defendant, the Western Pacific Railroad Company, and said firm was counsel for said Reorganization Committee when said Decree or Order was procured from this Court. Said James Foundation of New York, Inc., owned preferred stock and common stock in the plaintiff as well as being a large secured creditor of the plaintiff. Said James Foundation of New York, Inc., also owned claims against, and securities of the defendant, The Western Pacific Railroad Company. As a consequence of said reorganization and of heavy purchases of securities of said Railroad Company during the progress of the reorganization said James Foundation of New York, Inc., became predominantly interested as bondholder and stockholder of the defendant, The Western Pacific Railroad Company, and by reason of said predominance became adversely interested to the plaintiff.

(b) At the outset of the legal relationship of the firm of Whitman, Ransom, Coulson & Goetz to the Affiliated Group the interests of the parties were identical since the plaintiff was the holder of all capital stock of the defendant, The Western Pacific Railroad Company; but when a reorganization was proposed eliminating the stock interest therein of the plaintiff, which eventually took place,

there was always a potentiality and later an actuality of adverse and conflicting interests between the plaintiff and the defendants. The plaintiff's Officers and General Counsel were not experienced in or conversant with tax matters and wholly relied upon said firm of Whitman, Ransom, Coulson & Goetz and said James K. Polk to keep it fully informed of its rights, it being well established that where attorneys represent conflicting interests there is a fiduciary responsibility on their part to see that no rights or claims are neglected and that full disclosures are made to all parties and to all judicial and administrative tribunals. In the discharge of their duties as tax counsel for all parties concerned said firm of Whitman, Ransom, Coulson & Goetz and said James K. Polk performed in the manner following:

i. They prepared excess profits and income tax returns for the three tax periods and caused the same to be executed by the plaintiff without pointing out to the plaintiff that the plaintiff as a member of the Affiliated Group was assuming several responsibility for all tax liabilities of the Affiliated Group and was acquiring a right to an equitable determination or allocation of the tax benefits, if any, arising from the filing of said Returns on a consolidated basis;

ii. They entered into negotiations with the Commissioner of Internal Revenue for a settlement of the tax liabilities of the Affiliated Group without informing the plaintiff thereof;

iii. On February 11, 1947, they transmitted to the Commissioner of Internal Revenue a formal written offer of settlement for tax liabilities without informing the plaintiff of said offer;

iv. They failed to advise the plaintiff corporation of substantial tax benefits implicit if the deductible losses of the plaintiff were accepted by the Government as set up in said excess profits and income tax returns;

v. Throughout their representation of the plaintiff they failed to advise the plaintiff as to what were its rights as a member of the Affiliated Group filing said Returns on a consolidated basis and failed to advise it of its right to an allocation of tax benefits in mitigation of its losses; and

vi. Finally, they failed to advise the Court in the reorganization proceeding at the time of their submission of the Decree or Order dated March 28, 1946, of their various conflicting interests and failed to advise the Court that there would be a right in the plaintiff to bring an action for an equitable allocation of tax benefits if the excess profits and income tax returns were accepted by the Government which right of action might be barred by said Decree or Order resulting in irreparable injury to the plaintiff and in the unjust enrichment of another of their clients, namely, the James Foundation of New York, Inc.

For all of the foregoing reasons the plaintiff alleges that said Decree or Order of March 28, 1946, if susceptible to the construction sought to be placed upon it by the defendant. The Western

Pacific Railroad Company, should be modified so as to exempt this particular cause of action from its operation or should be set aside in its entirety as having been improvidently entered.

The plaintiff does not aver that in so conducting themselves the firm of Whitman, Ransom, Coulson & Goetz or James K. Polk were aware of wrongdoing or consciously disregarded the interests of the plaintiff. It is quite possible that their actions or inaction were inadvertent and that said firm or James K. Polk were unaware or unconvinced of the plaintiff's rights; but whether inadvertent or intentional their disregard of the plaintiff's rights and their failure to inform the Court thereof, at a time when the diversity of interest was apparent, would render the operation of said Decree or Order as a bar to the plaintiff's cause of action grossly inequitable and wholly inadmissible.

Thirteenth: That the plaintiff verily believes and alleges that the whole of said sum of $17,511,065.25 is due and owing to it and that there are no valid offsets or counterclaims there against or against the plaintiff on the part of any of the defendants but if any such claims do exist or are thought to exist by any of the defendants such claims should be required to be filed and adjudicated in this proceeding to the end that all accounts between the plaintiff and its former affiliated companies may be judicially settled.

Fourteenth: Reference herein to the defendants includes the corporations named herein as defend-

ants whether acting through their corporate officers or authorized agents or through Trustees during the period of trusteeship.

Wherefore, the plaintiff demands judgment in accordance with the prayer of the Bill of Complaint and specifically that the defendant, The Western Pacific Railroad Company, be adjudged and decreed to be accountable to the plaintiff for the sum of $17,511,065.25 and that judgment in favor of the plaintiff and against the defendant, The Western Pacific Railroad Company, be rendered for said sum; that the accounts of the plaintiff with all or any of its former affiliated companies may be judicially settled and the plaintiff discharged from any liabilities in respect thereof; and that the plaintiff be accorded such other and further relief as shall be agreeable to the usages and practices of equity and the Rules of Civil Procedure and as to this Court shall seem meet.

THE WESTERN PACIFIC
RAILROAD CORPORATION.

By /s/ LEROY R. GOODRICH,
Its Attorney.

Of Counsel:

FRANK C. NICODEMUS, JR.,

A. PERRY OSBORN,

NORRIS DARRELL.

[Endorsed]: Filed December 17, 1947.

[Exhibits A, B and C attached to the Supplemental Bill of Complaint are identical to the Stipulation and Agreement between Plaintiff and Defendant Relating to Agreement with the Bureau of Internal Revenue. See pages 168 to 175 inclusive.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE WESTERN REALTY COMPANY

Comes now defendant The Western Realty Company, and answering plaintiff's supplemental bill of complaint, respectfully shows and alleges:

I.

Denies each and every allegation contained in paragraph "First," except it is informed and believes and therefore admits that the consolidated income and excess profits tax returns filed by plaintiff and its affiliated companies for the years 1942, 1943 and the first four months of 1944 had not been finally audited by the Commissioner of Internal Revenue at the time of the filing of the bill of complaint herein and that commencing on February 11, 1947, negotiations were entered into with the Commissioner of Internal Revenue to settle the tax liabilities of plaintiff and its affiliated companies and on February 11, 1947, and on May 19, 1947, offers to settle the tax liabilities of plaintiff and its affiliated companies were made in the words and figures of Exhibit A annexed to the supplemental bill of complaint and Exhibit 1 hereto annexed.

II.

Denies each and every allegation contained in paragraph "Second," except it is informed and believes and therefore admits that offers of settlement were made on behalf of plaintiff and its affiliated companies in the words and figures of Exhibit A annexed to the supplemental bill of complaint and Exhibit 1 hereto annexed.

III.

Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "Third," except it denies that plaintiff would be the beneficiary of any tax savings.

IV.

Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph "Fourth," except it admits that it entered into a stipulation with plaintiff and others in the words and figures of Exhibit B annexed to the supplemental bill of complaint.

V.

Denies each and every allegation contained in paragraph "Fifth," except it is informed and believes and therefore admits that under date of August 13, 1947, the Commissioner of Internal Revenue addressed a letter to plaintiff and its affiliated companies, copy of which is annexed to the supplemental bill of complaint as Exhibit C.

VI.

Denies each and every allegation contained in paragraph "Sixth," except it is informed and believes and therefore admits that under date of August 26, 1947, the Commissioner of Internal Revenue addressed a letter to plaintiff and its affiliated companies, copy of which is annexed to the supplemental bill of complaint as Exhibit D.

VII.

Denies each and every allegation contained in paragraph "Seventh," except it denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff employed Lybrand, Ross Bros. & Montgomery to make the calculations alleged, that Lybrand, Ross Bros. & Montgomery did, in fact, make such calculations, and it is informed and believes and therefore admits that no other or additional payments were made to the Collector of Internal Revenue by plaintiff and its affiliated companies for the years 1942, 1943 and the first four months of 1944 than the $4,201,821.54 paid by the Trustees in Reorganization of defendant The Western Pacific Railroad Company for the year 1942.

VIII.

Denies each and every allegation contained in paragraph "Eighth," except it admits that from time to time the Internal Revenue Code and the several Revenue Acts in force from 1917 to 1938 have provided that affiliated companies meeting the

requirements therein laid down may file tax returns on a consolidated basis and begs leave upon the trial of the action to refer to the pertinent provisions of the Internal Revenue Code and Regulations with respect to the rights, duties and liabilities of affiliated companies having the right to and availing themselves of the privilege of filing tax returns on a consolidated basis.

IX.

Denies each and every allegation contained in paragraph "Ninth," except it is informed and believes and therefore admits that plaintiff had no taxable income during the years 1942, 1943 and the first four months of 1944 and sustained substantial losses in the year 1943 which it had the right to carry back and to carry forward as an offset against taxable income, that certain of the defendants had taxable net income during the years 1942, 1943 and the first four months of 1944, that plaintiff and defendants, as affiliated corporations, had the right to and did file consolidated income and excess profits tax returns and utilized certain losses of plaintiff in the returns for the years 1942, 1943 and the first four months of 1944.

X.

Denies each and every allegation contained in paragraph "Tenth," except it is informed and believes and therefore admits that James K. Polk was and is a specialist in tax matters and was and is a member of the firm of Whitman, Ransom, Coulson & Goetz, counsel for The James Foundation of New York, Inc., a stockholder and creditor of plaintiff

and a creditor of defendant prior to and during the reorganization, and that James K. Polk and Whitman, Ransom, Coulson & Goetz were employed to advise and did advise the Trustees in Reorganization of defendant The Western Pacific Railroad Company in tax matters.

XI.

Denies each and every allegation contained in paragraph "Eleventh."

XII.

Denies each and every allegation contained in paragraph "Twelfth," and begs leave upon the trial of the action to refer to the answers interposed by defendants to the bill of complaint for a true and correct statement of the allegations thereof, and it is informed and believes and therefore admits that Whitman, Ransom, Coulson & Goetz and James K. Polk were employed to advise the reorganization trustees of defendant The Western Pacific Railroad Company on tax matters, that Whitman, Ransom, Coulson & Goetz were counsel for The James Foundation of New York, Inc., that Robert E. Coulson, a member of said firm, was a member of the reorganization committee of defendant The Western Pacific Railroad Company, that Whitman, Ransom, Coulson & Goetz were counsel for such reorganization committee, that The James Foundation of New York, Inc., was a stockholder and creditor of plaintiff and of defendant The Western Pacific Railroad Company and that James K. Polk conducted negotiations with the Commissioner of Internal Revenue

leading up to the settlement of the tax liabilities of the affiliated group for the years 1942, 1943 and the first four months of 1944.

XIII.

Denies each and every allegation contained in paragraph "Thirteenth."

For a First Separate and Complete defense, defendant alleges:

XIV.

The bill of complaint and the supplemental bill of complaint fail to state a claim against defendant upon which relief can be granted.

Wherefore, defendant demands judgment that the bill of complaint and the supplemental bill of complaint be dismissed as to it, together with costs and disbursements.

PILLSBURY, MADISON & SUTRO,

EUGENE M. PRINCE,
EVERETT A. MATHEWS,
HOMER G. ANGELO,

WHITMAN, RANSOM, COULSON & GOETZ,

MILBANK, TWEED, HOPE & HADLEY,

By /s/ EVERETT A. MATHEWS,
Attorneys for Defendant The Western Realty Company.

EXHIBIT 1

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N.Y.

May 19, 1947.

Mr. C. R. Krigbaum
Internal Revenue Agent in Charge
225 Broadway
New York, N.Y.

The Western Pacific Railroad Corporation and Affiliated Corporations 1942, 1943 and 1944 Federal Income Taxes

Dear Sir:

Reference is made to the conference held in your office May 6th with regard to the tax liabilities of The Western Pacific Railroad Corporation and its affiliated companies for the taxable years 1942, 1943 and 1944.

At this conference an agreed basis of settlement of the tax liabilities involved was reached and this letter contains the written undertaking of the taxpayers effectuating the settlement.

The taxpayer on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liabilities of said corporation for the taxable years 1942, 1943, and 1944 in the amounts shown on the returns as filed. This proposal of settlement accordingly relates to the consolidated returns filed for the calendar years 1942 and 1943 and 1944, in which

said return for 1944 The Western Pacific Railroad Corporation included therein its subsidiaries for the period January 1, 1944 to April 30, 1944, during which period affiliation existed. This settlement does not relate to or affect the tax liability of the subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated.

As part of the settlement The Western Pacific Railroad Corporation consents to the rejection of the pending claim for refund of 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is also stipulated that The Western Pacific Railroad Corporation on behalf of itself and its affiliated subsidiaries will, if this settlement is accepted, execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement.

The settlement reached with your office is agreed to without prejudice, however, to any rights or claims of the parties in the event the settlement is not accepted by the Commissioner of Internal Revenue.

Authority for settlement of the tax liabilities of the above-named taxpayers by the undersigned is

contained in power of attorney heretofore filed with your office.

Respectfully,

THE WESTERN PACIFIC RAILROAD CORPORATION,

JAMES K. POLK,
Attorney-in-Fact.

Receipt of Copy Attached.

[Endorsed]: Filed June 14, 1948.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY COMPANY, DELTA FINANCE CO., LTD., AND STANDARD REALTY AND DEVELOPMENT COMPANY TO PLAINTIFF'S SUPPLEMENTAL BILL OF COMPLAINT

Come Now defendants The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company and, without waiving any objections to plaintiff's Supplemental Bill of Complaint (hereinafter for convenience referred to as the Supplemental Complaint), and specifically reserving the right to make objections to the propriety of said

Supplemental Complaint and to the filing thereof, by way of answer thereto admit, deny and allege as follows:

I.

Deny all of the allegations of paragraph first of the Supplemental Complaint, except the following which are admitted: At the time of the filing of the Bill of Complaint herein the consolidated income and excess profits tax returns of the plaintiff and its affiliated companies (hereinafter for convenience called the Affiliated Group) for the years 1942 and 1943 and the period January 1, 1944, to April 30, 1944, had not been finally audited and accepted by the Commissioner of Internal Revenue.

II.

Admit the allegations of paragraph second of the Supplemental Complaint.

III.

Answering the allegations of paragraph third of the Supplemental Complaint, these defendants allege that they are without knowledge or information sufficient to form a belief with regard to whether or not plaintiff had been informed that the said offer of settlement, Exhibit A to the Supplemental Complaint (being also set forth in Exhibit A to the stipulation and agreement filed in this cause September 5, 1947) was to be submitted to the Commissioner of Internal Revenue in advance of the transmission thereof to said Commissioner on February 11, 1947, and except as last above stated deny each and every allegation contained in paragraph third

of said Supplemental Complaint. Further answering the allegations of said paragraph third, allege that negotiations with the Commissioner of Internal Revenue to settle the tax liabilities of these defendants to the United States were commenced February 11, 1947, and in connection with such negotiations, offers for settlement of the tax liability to the United States were made February 11, 1947, and May 19, 1947, in the words and figures of said Exhibit A and Exhibit 1 annexed to this answer.

IV.

Answering the allegations of paragraph fourth of the Supplemental Complaint, allege that these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained except these defendants admit that they entered into a stipulation and agreement in writing with the plaintiff and the defendant, Western Realty Company, which said stipulation was filed in this cause September 5, 1947, and is the stipulation mentioned in paragraph III of this Answer.

V.

Deny each and every allegation contained in paragraph fifth of the said Supplemental Complaint except these defendants admit that under date of August 13, 1947, the Commissioner of Internal Revenue addressed to the plaintiff and affiliated companies a letter dated August 13, 1947, copy of which is annexed to the Supplemental Complaint as Exhibit C thereto (being also set forth in Exhibit A

to the aforesaid stipulation filed in this cause September 5, 1947).

VI.

Deny each and every allegation contained in paragraph sixth of the said Supplemental Complaint except that these defendants admit that under date of August 26, 1947, the Commissioner of Internal Revenue addressed a letter to plaintiff and affiliated companies, copy of which is annexed to the Supplemental Complaint as Exhibit D thereto (being also set forth in Exhibit A to the aforesaid stipulation filed in this cause September 5, 1947).

VII.

Deny each and every allegation contained in paragraph seventh of the Supplemental Complaint except these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff employed Lybrand, Ross Bros. & Montgomery to make calculations alleged and that they in fact made such calculations, and except that these defendants admit that no payments were made to the Commissioner of Internal Revenue by these defendants or any of them or by the plaintiff for income and excess profits taxes for the years 1942, 1943 and the first four months of 1944 other than the $4,201,821.54 paid by the Reorganization Trustees in the reorganization of defendant, The Western Pacific Railroad Company, for the year 1942.

VIII.

Deny each and every allegation contained in paragraph eighth of said Supplemental Complaint except these defendants admit that from time to time the laws and statutes relating to Federal income and excess profits taxes and regulations thereunder have made provisions with respect of the filing of consolidated income and excess profit tax returns.

IX.

Deny each and every allegation contained in paragraph ninth of the Supplemental Complaint except these defendants are informed and believe and therefore admit that plaintiff had no taxable income during the years 1942, 1943 and 1944, nor in the first four months of 1944, and that plaintiff sustained losses in each of the calendar years 1942, 1943 and 1944 and that certain of these defendants had taxable net income during the years 1942, 1943 and the first four months of 1944 and that plaintiff and defendants as companies affiliated during said years and portion of year had the right to and did file consolidated income and excess profits tax returns for said years, 1942, 1943 and 1944 (these defendants having been included in said consolidated return for the year 1944, as to the first four months of that year) and that a substantial portion of the loss of the plaintiff in the year 1943 was carried forward in the said consolidated income and excess profits tax returns for the year 1944.

X.

These defendants deny each and every allegation contained in paragraph tenth of said Supplemental Complaint except they admit that James K. Polk was and is a member of the firm of Whitman, Ransom, Coulson & Goetz, counsel for The James Foundation of New York, Inc., which was a stockholder and creditor of plaintiff and a creditor of defendant, The Western Pacific Railroad Company, prior to and during the reorganization of said last named Company, and that the said Polk and the said firm were employed to advise and did advise the Reorganization Trustees in the reorganization of said last named defendant in tax matters.

XI.

Deny each and every allegation contained in paragraph eleventh of said Supplemental Complaint.

XII.

Answering the allegations of paragraph twelfth of the Supplemental Complaint,——

(a) Admit and allege that in answering plaintiff's Bill of Complaint herein these defendants have set up and do interpose as a bar to the assertion by plaintiff of its pretended claim the decree and order of the Bankruptcy Court in said Reorganization Proceedings dated March 28, 1946; that the firm of Whitman, Ransom, Coulson & Goetz and James K. Polk, a member thereof, were employed by the aforesaid Reorganization Trustees as tax counsel to advise regarding the preparation

and filing of consolidated income and excess profits tax returns for the years 1942 and 1943 and the first four months of 1944; that said firm was counsel for The James Foundation of New York, Inc.; that Robert E. Coulson, a member of said firm, was nominated jointly by A. C. James Co. and Railroad Credit Corporation to be a member of the Reorganization Committee of defendant The Western Pacific Railroad Company and was appointed as such by the Interstate Commerce Commission and the Bankruptcy Court; that said firm was counsel for said Reorganization Committee; that The James Foundation of New York, Inc., was a stockholder and creditor of plaintiff and was a secured creditor of the debtor in reorganization, and from and after January 1, 1945, has been and is a stockholder of defendant The Western Pacific Railroad Company; that said James K. Polk conducted negotiations with the Bureau of Internal Revenue leading up to the settlement that was made in August, 1947, of the income and excess profits tax liabilities of the affiliated group for the years 1942 and 1943 and the first four months of 1944, said settlement being shown by the aforesaid stipulation, filed in this cause September 5, 1947; and that on April 2, 1947, and thereafter said Polk fully advised plaintiff with regard thereto and that thereafter plaintiff approved and agreed to said settlement.

(b) Except as hereinbefore admitted and alleged, deny each and every allegation contained in

paragraph twelfth of said Supplemental Complaint.

XIII.

Deny each and every allegation contained in paragraph thirteenth of the Supplemental Complaint.

XIV.

Deny each and every allegation contained in paragraph fourteenth of the Supplemental Complaint.

XV.

Further answering said Supplemental Complaint, these defendants refer to and by such reference incorporate herein all the allegations contained in their answer and counterclaim on file herein with the same force and effect as if set forth in full and repeated in this answer to said Supplemental Complaint.

XVI.

For a further and separate defense to the plaintiff's Complaint and Supplemental Complaint herein, these defendants allege that said Complaint and Supplemental Complaint and each cause of action therein fail to state a claim against these defendants or any of them upon which relief can be granted.

XVII.

For a further and separate defense to the plaintiff's Complaint and Supplemental Complaint, these defendants allege that this Court, without bankruptcy jurisdiction, is without jurisdiction or power to modify or set aside, in whole or in part, the orders, judgments and decrees made by the

Bankruptcy Court in the said reorganization proceedings or any thereof.

XVIII.

For a further and separate defense to the plaintiff's Complaint and Supplemental Complaint, these defendants allege that neither said Complaint nor said Supplemental Complaint name as defendants indispensable and necessary parties.

XIX.

At all times from August 2, 1935, to March 28, 1946, the rights of plaintiff against the defendant, The Western Pacific Railroad Company, and the Reorganization Trustees were before this Court for adjudication in the reorganization proceeding. Plaintiff could have obtained in the reorganization proceeding an express adjudication of the claims which are presented in this action. Failure of plaintiff to do so renders said claims forever barred under the principles of res adjudicata.

XX.

At no time before the institution of this action did plaintiff or any one in behalf of plaintiff in any way assert the claims which are the subject of this action. If they had asserted these claims promptly, the defendant, The Western Pacific Railroad Company, the Reorganization Trustees and all parties to the reorganization proceeding could have applied to the Court conducting the reorganization for an order directing plaintiff to file the consolidated returns for 1942, 1943 and 1944 and the refund claim

for 1942 without any charge by or in behalf of the plaintiff for compensation to it. If that application had been denied, the Reorganization Trustees and the defendants could then have elected to file separate income tax returns and to avail themselves of the rights, privileges, options and advantages belonging to the persons who pay taxes to the Federal Government. The Reorganization Trustees and the defendants could have taken steps to improve their tax position, among other things, by taking advantage of the tax benefit which would arise from a determination of the insolvency of the defendant, Sacramento Northern Railway. The Reorganization Trustees and the defendants have, in reliance of the silence of the plaintiff, changed their position to their detriment. Plaintiff is therefore estopped from asserting its claims. It is also estopped from maintaining in this action a position inconsistent with the position plaintiff maintained in the reorganization proceedings. Plaintiff is further precluded from maintaining its claims by reason of the fact that the concurrence of each member of the affiliated group was necessary in order that consolidated returns might be filed. The claims of plaintiff to the alleged tax saving are therefore unjust and unconscionable because plaintiff's claim to the alleged saving would in no event be better than the claim of each of the defendants.

XXI

These defendants allege that by reason of the circumstances set forth in this Answer and in their

Answer to the plaintiff's Complaint herein the claims of plaintiff are barred by each of the following defenses: Discharge in bankruptcy pursuant to Section 77 of the Bankruptcy Act, res adjudicata, estoppel, laches, failure of consideration, illegality, statute of limitations and waiver.

Wherefore, these defendants pray for the order, judgment and decree of this Honorable Court

1. Declaring and determining that defendant, The Western Pacific Railroad Company, is the sole owner of and is exclusviely entitled to the reserve fund and refund claim mentioned in its Answer to plaintiff's Complaint hereunder, and quieting the right and title to said defendant therein and thereto against the claims of plaintiff and all other parties to this cause and restraining and enjoining plaintiff and all other parties to this suit other than defendant, The Western Pacific Railroad Company, from instituting or prosecuting claims thereto.

2. Declaring and determining that plaintiff has no rights or claims against these defendants or any of them for or on account of any matter or thing averred in planitiff's Complaint or Supplemental Complaint herein.

3. For defendant's costs of suit herein and all such other and further relief that may be meet and equitable in the premises.

Dated: June 22, 1948.

THE WESTERN PACIFIC RAILROAD COMPANY,

SACRAMENTO NORTHERN RAILWAY,
TIDEWATER SOUTHERN RAILWAY COMPANY,
DELTA FINANCE CO., LTD.,
STANDARD REALTY AND DEVELOPMENT COMPANY,

By /s/ ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,
Their Attorneys.

EXHIBIT 1

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

May 19, 1947

Mr. C. R. Krigbaum
Internal Revenue Agent in Charge
225 Broadway
New York, N. Y.

The Western Pacific Railroad Corporation and Affiliated Corporations, 1942, 1943 and 1944 Federal Income Taxes.

Dear Sir:

Reference is made to the conference held in your office May 6th with regard to the tax liabilities of The Western Pacific Railroad Corporation and its

affiliated companies for the taxable years 1942, 1943 and 1944.

At this conference an agreed basis of settlement of the tax liabilities involved was reached and this letter contains the written undertaking of the taxpayers effectuating the settlement.

The taxpayer on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liabilities of said corporation for the taxable years 1942, 1943 and 1944 in the amounts shown on the returns as filed. This proposal of settlement accordingly relates to the consolidated returns filed for the calendar years 1942 and 1943 and 1944, in which said return for 1944 The Western Pacific Railroad Corporation included therein its subsidiaries for the period January 1, 1944, to April 30, 1944, during which period affiliation existed. This settlement does not relate to or affect the tax liability of the subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated.

As part of the settlement The Western Pacific Railroad Corporation consents to the rejection of the pending claim for refund of 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is also stipulated that The Western Pacific Railroad Corporation on behalf of itself and its affiliated subsidiaries will, if this settlement is accepted, execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal

Revenue for the purpose of effectuating the settlement.

The settlement reached with your office is agreed to without prejudice, however, to any rights or claims of the parties in the event the settlement is not accepted by the Commissioner of Internal Revenue.

Authority for settlement of the tax liabilities of the above-named taxpayers by the undersigned is contained in power of attorney heretofore filed with your office.

Respectfully,

THE WESTERN PACIFIC RAILROAD CORPORATION,

JAMES K. POLK,
Attorney-in-Fact.

Receipt of copy attached.

[Endorsed]: Filed June 22, 1948.

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION OF MEREDITH H. METZGER, FORMERLY MEREDITH H. VAN KIRK, AS A PLAINTIFF IN INTERVENTION

Pursuant to stipulation of the parties entered into at the pretrial conference herein on January 11, 1949, and upon the representation by counsel for in-

terveners that 8,200 shares of the preferred stock of plaintiff and defendant in intervention The Western Pacific Railroad Corporation out of the 11,468 shares alleged in the Complaint in Intervention herein to be held by plaintiff in intervention, Russell M. Van Kirk, now deceased, were distributed on or about January 17, 1949, to Meredith H. Metzger, formerly Meredith H. Van Kirk, widow of said decedent, in the estate of said decedent now pending before the Surrogate of the County of Monmouth, State of New Jersey, said decedent Russell M. Van Kirk having died in December, 1947, during the pendency of this action; that said Meredith H. Metzger is now the lawful owner and holder of 11,385 shares of said preferred stock of said Corporation including said 8,200 shares so distributed to her from the estate of her deceased husband and through the ownership of said shares either she or her deceased husband has been a stockholder of said Corporation continuously since on or about February 23, 1944; and that the said Meredith H. Metzger is now and continuously since some years prior to April 7, 1947, the date of the filing of said Complaint in Intervention herein, has been a citizen and resident of the State of New Jersey.

It Is Hereby Stipulated and Agreed by and between the respective parties hereto that the said Meredith H. Metzger, formerly Meredith H. Van Kirk, widow of said deceased plaintiff in intervention, Russell M. Van Kirk, shall be substituted as

a plaintiff in intervention herein in the place and stead of the said Russell M. Van Kirk, deceased, as the owner and holder of his said shares, to wit, the 8,200 shares so distributed to her out of the estate of said decedent, and as the owner of a total of 11,385 shares of the preferred stock of said Corporation, subject to all prior proceedings had herein and to all claims and defenses heretofore raised by any of the parties hereto with the same force and effect as if she had been one of the original plaintiffs in intervention herein owning and holding 11,385 shares of the preferred stock of said Corporation and having been a stockholder of said Corporation continuously since on or about February 23, 1944; and that the requirements of Rule 25, FRCP, with respect to motion, notice of hearing and hearing are hereby waived.

Dated: January 27, 1949.

WEBSTER V. CLARK.
ROGERS AND CLARK,
DAVID FREIDENRICH,
JULIUS LEVY,
ABRAHAM L. POMERANTZ.
POMERANTZ, LEVY,
SCHREIBER & HAUDEK,

By /s/ WEBSTER V. CLARK,

Attorneys for Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, Plaintiffs in Intervention.

LEROY R. GOODRICH,

FRANK C. NICODEMUS, JR.,

A. PERRY OSBORN,

NORRIS DARRELL,

MAHLON DICKERSON,

BROBECK, PHLEGER & HARRISON,

By /s/ MAHLON DICKERSON,

Attorneys for Plaintiff and Defendant in Intervention, The Western Pacific Railroad Corporation.

PILLSBURY, MADISON & SUTRO,

EUGENE M. PRINCE,

EVERETT A. MATHEWS,

HOMER G. ANGELO,

WHITMAN, RANSOM, COULSON & GOETZ,

MILBANK, TWEED, HOPE & HADLEY.

By /s/ A. DONALD MacKINNON,

Attorneys for Defendant and Defendant in Intervention, The Western Realty Company.

ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,
McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

By /s/ JAMES D. ADAMS,

Attorneys for Defendants and Defendants in Intervention, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

ORDER

Pursuant to the foregoing stipulation and the stipulation entered into by the parties at the pretrial conference herein on January 11, 1949, and good cause appearing therefor, it is hereby ordered that Meredith H. Metzger, formerly Meredith H. Van Kirk, the widow of the plaintiff in intervention, Russell M. Van Kirk, now deceased, and the distributee in the estate of said decedent of 8,200 shares of the preferred stock of plaintiff and defendant in intervention, The Western Pacific Railroad Corporation, owned and held by said decedent, be and she is hereby substituted as a plaintiff in intervention herein in the place and

stead of said decedent as the owner and holder of his said shares, subject to all prior proceedings had herein and to all claims and defenses heretofore raised by any of the parties hereto with the same force and effect as if she, the said Meredith H. Metzger, had been one of the original plaintiffs in intervention herein owning and holding 11,385 shares of the preferred stock of said Corporation and having been a stockholder of said Corporation continuously since on or about February 23, 1944.

Dated: January 28th, 1949.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed January 28, 1949.

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

Plaintiff, a former holding company, whose interest in its subsidiary had been finally declared valueless in the subsidiary's reorganization proceeding under § 77 of the Bankruptcy Act, has tendered the novel claim that it should be awarded, in equity, a part, if not all, of the subsidiary's income tax saving while in reorganization, resulting from the filing of consolidated corporate income tax returns.

A somewhat detailed history must be set down

in order to properly appraise the unique demand of plaintiff.

Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad company, herein referred to as the "debtor"; defendant, the reorganized subsidiary, is The Western Pacific Railroad Company.

Statement of Facts

Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission. 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Su-

preme Court reversed the Circuit Court and affirmed the order of the District Court. (318 U.S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor. (318 U.S. 508, 509.) [1] Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things, the plaintiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actualy made until April, 1944, because of an unsuccessful litigative[2] attempt

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[1] See in re Denver & R.G.W.R. Co. 10 Cir. 150 Fed. 2d 28 and R.F.C. v. D. & R.G.R. Co. 328 U.S. 495,. where similar holdings upon similar contentions were made.

[2] Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944.)

to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was $4,144,828. Later in 1943, after the filing of the 1942 return and payment of the tax, the tax attorneys for defendant "discovered" Section 123 of the Revenue Act of 1942. (26 USC 23(g)4.)[3] They proposed what they de-

[3] "Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capi-

noted a "paradoxical" theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some $75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this $75,000,000 loss in 1943, could be "carried back" to 1942 (§122(b)(1) of the Internal Revenue Code.) and part could be "carried over" to 1944 (§122(b)(2) of the Internal Revenue Code.).

Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some $17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the $75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commis-

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tal asset." (Subsection 4 of § 23g). By this subsection, losses resulting from worthlessness of stock of an affiliate became operating losses instead of capital losses as theretofore.

sioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.[4]

On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consoli-

[4] The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commissioner or Court.

dated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

On December 17, 1947, plaintiff filed a supplementary bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as "duality of control."

In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some $17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff's claim as an equitable demand.

Discussion

The income tax picture presented is bizarre indeed. It is "paradoxical" as the defendant's tax attorneys put it.[5] The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of $21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization Court to be valueless. But the tax attorneys for the defendant conceived a "paradoxical" plan. They

[5] In a letter dated May 20, 1943 (plff. Ex. 50) addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff's stock loss in the debtor to offset debtor's profits, saying: "This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless." (Interlineation supplied.)

decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder[6] affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942. (26 USC §23(g)4).[7] Thus, part of the lost $75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the $21,346,567 tax would be paid.

This was more than mere tax "saving"; it amounted to a complete tax "escape." But the debtor had already paid $4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of "carry-back," part of the $75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or "escape" offered for the three years in question, the claim for refund was waived and the Commissioner then accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that

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[6] §141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

[7] See footnote #3.

the debtor paid $4,144,828 taxes to the United States in order to escape the $21,346,567 previously mentioned, or a net saving or "escape" of $17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (§23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid $4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.[8]

How the amendment to the statute, (§23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and

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[8] It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss, could have been a true factor affecting the tax settlement, inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns.

exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses. 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938.

Research does not disclose any statement of Congressional reason or purpose for the enactment of Section 123 of the Revenue Act of 1942 (26 USC 23(g)4. It was not in the original House Bill (H.R. 7378), but was an amendment added in the Senate (S. Rept. 1631, p. 89, 77th Cong. 2nd Sess.) Neither the Senator Report, nor the Conference Report of the Bill, H. Rept. 2586 (Cong. Rec. 77th Cong. 2nd Sess. p. 8401, 8441) state the reasons for the amendment. It is of interest that in the Revenue Act of 1942 (26 USC 117(i).) securities held by banks were accorded the same benefits as Section 123 accorded to affiliated corporations. While the purpose and intent of Congress has not anywhere been precisely stated, it is a fair and justifiable inference that the intent was to enlarge the general benefits afforded by consolidated or affiliated corporate returns.

It may be briefly stated that the philosophy of the consolidated return is to disregard the corporate entity and to tax as a single business or economic unit, what really is a business unit. This has been found to be sound, equitable and convenient tax procedure. It treats an affiliate group of corporations as one business enterprise, the various affiliates being considered as if they were branch offices of the main business establishment. The income from all units is considered as a single income, and the losses from all units, are treated as a single loss. See the following in this connection: Mertens, Law of Federal Income Taxation, (1942) Vol. 8, §46.01 and §46.02: Montgomery's Federal Taxes—Corporations and Partnerships (1948-1949. Vol. II, p. 678; Miller, "The Taxation of Intercompany Income;" Law and Contemporary Problems, 1940, Vol. 7, 301, 306; Commerce Clearing House Standard Federal Tax Reporter, 1949, Vol. 1, paragraph 200C-1. See also statement of the Acting Secretary of the Treasury, regarding the preliminary report of the Special Committee of the Committee on Ways and Means, 1933, p. 13.

In my opinion, it is crystal clear that in enacting Section 23(g)4, the Congress were merely furthering the general purposes and benefits of the statutory provisions allowing the filing of affiliated corporation returns. Obviously it intended by the provision, (23(g)4), to allow a parent company in an affiliated group, if its ownership of stock in a subsidiary becomes worthless, to offset it against other income of the parent company in any other subsidiaries or

subsidiary, in the same manner, as it had been permitted to offset operating losses in one subsidiary as against operating gains in another. To assume however that the Congress intended by 23(g)4 to statutorily authorize what was done in this case, is to attribute plain stupidity to the Congress of the United States—an unthinkable procedure, despite the general habit of criticism, both fair and unfair.

But here the inexplicable occurred. For $4,144,828, the United States released $21,346,567 in taxes upon a basis which is completely incomprehensible. The tax "escape" invites a type of scrutiny which this Court is powerless to give it.

Obviously the Court cannot pass judgment upon the validity of the tax compromise and settlement. It is now closed. It is final and cannot be reopened except for fraud.

I am not unmindful of the recognized and approved philosophy that a taxpayer may avail himself of every proper means of reducing his taxes.[9] In every sense of the word, however, there was a real escape from the payment of taxes here. If I had the power, I would not hesitate to set aside the tax settlement. Indeed, if I could, I would order these taxes paid to the United States. That would effectively dispose of the cause.

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[9] U.S. v. Isham, 84 U.S. 496, 506; Jones v. Helvering App. D.C. 71 Fed. 2d 214, 217; Iowa Bridge Co. v. Commissioner, 8 Cir. 39 Fed. 2d 777; Commissioner v. Eldridge, 9 Cir. 79 Fed. 2d 629, 631; Mertens: Law of Fed. Taxation (1948) Vol. 10A § 61.06 at 249. Paul: Studies in Federal Taxation (1937) p. 104.

Perhaps it may be said that it is impertinent for the Court to concern itself with a closed tax transaction and agreement such as this. But if equity principles are our guide, then this tax settlement is of the web and woof of the issue to be decided. Equity has no precise boundaries, and certainly not in this unique controversy.

If this were an ordinary and more common type of tax saving, there might be impertinence to the Court's concern with it. But this so-called "saving" is inextricably entwined with the equities. Its very nature shapes and molds these equities. It is a "pot of honey equally attractive to principals and advocates."[10] When equity is invoked to divide or distribute the "pot," it cannot be blindfolded as to the origin or nature of the "honey."

It is argued, in effect, by plaintiff that, irrespective of whether or not the tax settlement was in accord with the statute, nevertheless it is a completed transaction and a closed book and should have no place in the determination of the validity of plaintiff's cause of action. It is asserted that tax savings having been made, the only question remaining is whether or not on the record here, the defendant must turn over to plaintiff an amount equal to, or a substantial part of, the tax savings. But in my opinion, the tax escape was erroneous and unjust. It cannot be cured by committing the further inequity of distributing the gain thus made to others.

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[10] Breving v. Lloyd Cuarto, 84 Fed. Supp. 33, 35.

Debtor, having made good its "escape," now comes plaintiff and prays for a share, if not all, of that which "escaped." Whether there was, or was not, "duality of control" respecting the directorates of the two companies, appears to me to be not too important. True, there is a preponderance of the evidence in favor of the plaintiff's contention of "duality of control." Be that as it may, I am compelled to rest decision upon the fundamental issue of the justice and equity of plaintiff's right, if any, to be paid for that which was escaped. Analytically speaking, what the plaintiff seeks is to collect from the defendant an amount equal to all, or a substantial part of, taxes that the debtor did not pay to the United States.

What is the true nature of the claim of plaintiff and of the relief it seeks? What plaintiff really seeks is not all or a share of the so-called tax savings. Rather it is a circuitous way of obtaining something in the nature of equity or value for its ownership, rejected in the reorganization plan. Or put differently, it is an effort to share in the earnings of the debtor during the reorganization period. Essentially a so-called tax saving is but a different name for an earning. Assuming, arguendo, the validity of plaintiff's contention, its right or claim is dependent upon the debtor making earnings. If there were no earnings there could be no so-called tax saving. A "saving" in taxes is a negative concept. It is a benefit to one obligated to pay money, resulting from not having to pay. No benefit could

inure from participating in non-payment of an obligation, unless there rested upon the participant an obligation to pay. Absent such obligation, any sharing of that which is not paid out, would be gratuitous. In effect therefore, recognition of plaintiff's claim would be recognition of a right in plaintiff to share in debtor's earnings. As already stated, a demand substantialy seeking this end was heretofore asserted by way of opposition to the plan and rejected. Ecker v. Western Pac. Co. 318 U.S. 448.

Not only that, but the philosophy underlying Section 77 of the Bankruptcy Act stands as a barrier against the equitable validity of plaintiff's claim in this cause. Rehabilitation of a debtor by readjusting its financial structure in the interest of the debtor, its creditors and the public, in a fair and equitable plan of reorganization, is the essential purpose of Section 77. If a debtor in fact has an equity, it is and should be recognized. If not, it is disregarded. Above all, Section 77 was devised to provide in the public interest both a speedy and efficient means of resuscitating, among others, sick and ailing railroads.

See: Van Schaick v. McCarthy, 10 Cir. 116 Fed. 2d 987, 992; New England Coal & Coke Co. v. Rutland R. Co. 2 Cir. 143 Fed. 2d 179, 185; In re Denver & R.G.W.R. Co., 10 Cir. 150 Fed. 2d 28, 34; Thompson v. State of Louisiana, 8 Cir. 98 Fed. 2d 108, 110; Craven "The Judicial and Administrative Mechanism of Section 77," 1940, 7 Law and Contemporary Problems 464.

When it was finally determined, after running the full gamut of court and administrative procedure, in the reorganization of the Western Pacific Railroad Company, that the plaintiff's interest was worthless, nothing short of some extraordinary cause justifying reopening the reorganization proceeding could effect a change. To make any award in this cause, under the assumed authority of equity principles, would be in effect to modify the administrative and judicial judgments in the reorganization proceeding. Such a procedure would be an indirect nullification of the purpose of the reorganization statute, in the guise of an afterthought allegedly of equitable persuasion.

What was the actual result of the tax saving agreement by which it was determined that some $21,000,000 in taxes were not due to the United States? Simply that the debtor did not pay taxes. It does not follow at all from this, that an obligation to pay the unpaid tax money, one to another, was thereby created.

The so-called "duality of control," much discussed and emphasized, is not important in resolving the tendered issue. For in the final analysis, plaintiff's hope to succeed here depends upon whether it could have lawfully acquired these unpaid tax monies by voluntary agreement between the directorates of the two companies. In my opinion, it could not. For such a procedure would violate and nullify the reorganization plan and the decree of the Court confirming it. It would permit

the plaintiff to share in the earnings of the debtor during the period of reorganization. Equity would aid the creditors of debtor to prevent it. Indeed there is some merit to defendant's contention that a firm obligation rested upon plaintiff to conform and cooperate to the end that the creditors and new owners should be benefited to the fullest.

What would be the result if the contention of plaintiff, that law and equity imposes an obligation upon defendant to pay the whole amount of unpaid tax money over to plaintiff, were sustained? It would mean a court order directing defendant to pay over to plaintiff an amount equal to the taxes the debtor should have paid to the United States. So the plaintiff, which formerly owned and was a failure in operating the debtor, would get from the defendant a sum of money out of debtor's earnings during reorganization equal to the taxes the debtor should have paid to the United States resulting from its profitable operations. In my opinion, such a whirligig rationale transcends all reasonable concepts of equity and justice.

An array of able counsel on both sides have put forth prodigious and ingenious efforts,[11] one side to retain the benefits of the tax "escape," and the

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[11] In the preparation for the trial, and to develop the historical facts concerning the controversy and upon the subject of the so-called "duality of control," the depositions of 13 witnesses were taken over a period of many months and cover 6190 pages of transcript. Briefs, on submission of the cause, total 485 printed pages.

other to obtain them. And all the time the taxes escaped in reality belong to the United States.

The Court cannot cause these taxes to be paid, where they should be paid, to the United States. But, as between the parties, no persuasion of conscience or equity impels me to do otherwise than to leave the parties where they are, the defendant with its amazing and undeserved tax success; the plaintiff, as the reorganization decree left it, without interest in the debtor.

For the reasons stated, judgment will go for the defendant.[12]

Dated: September 6, 1949.

[Endorsed]: Filed September 6, 1949.

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[12] Inasmuch as there is little factual dispute pertinent to the issue decided, this opinion may well serve, under the rules, so far as necessary, as findings of fact and conclusions of law. But counsel, if they wish, may submit findings pursuant to the Rules, provided they are limited to the issues involving the essential equitable considerations upon which the decision rests.

[Title of District Court and Cause.]

FINDINGS AND CONCLUSIONS PROPOSED BY PLAINTIFF

Defendants having given notice under the stipulation and order of September 8, 1949, that they elected not to submit a draft of findings of fact and conclusions of law, plaintiff submits and proposes findings and conclusions as follows:

"Findings of Fact and Conclusions of Law

"The above-entitled cause having been duly tried before the Honorable Louis E. Goodman, District Judge, the court now makes the following

"Findings of Fact

* * *

"6. The offer of settlement made by defendant to the Commissioner of Internal Revenue, as stated in this Court's opinion, was made in the plaintiff's name but without its knowledge.

"7. Said offer of settlement was made in February, 1947. Subsequently defendant's tax counsel first notified the plaintiff thereof. Thereafter plaintiff and defendant agreed upon a stipulation to be entered into in the present case in the form of plaintiff's Exhibit 7. Thereupon the intervenors applied to the court herein for a temporary restraining order enjoining and restraining the plaintiff and defendant from consummating the proposed settlement. Upon the hearing of said application for

a restraining order defendant presented to the court the proposed stipulation referred to above, and after the hearing this Court, on August 29, 1947, made and entered its order in the form attached hereto. Thereafter said stipulation was signed by the parties and filed herein on September 5, 1947.

* * *

Conclusions of Law

"The court concludes as follows:

"By virtue of the stipulation filed herein on September 5, 1947, and this Court's order of August 29, 1947, the sum of $3,385,290.00 must be deemed to have been refunded to plaintiff by the Treasury Department in the ordinary course and manner prescribed by law and by the plaintiff paid into this Court. Said sum is now held by defendant as agent of the court. Defendant should be directed to return said sum of $3,385,290.00 to the Clerk of this Court, and the Clerk should be directed to deliver said sum forthwith to the plaintiff in accordance with this Court's opinion that the funds or tax savings resulting from the settlement with the government should be left with the party receiving the same; and the court further concludes that defendant should not be required to account to plaintiff for any tax savings not represented by refunds."

By proposing the foregoing Findings and Conclusions plaintiff does not waive its claim that it is entitled also to judgment for tax savings not

represented by refunds, but it submits that upon the basis of the reasoning of the Court's opinion the Conclusions of Law proposed above necessarily follow.

Dated: November 3, 1949.

/s/ HERMAN PHLEGER,

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER AND HARRISON,

/s/ FRANK C. NICODEMUS, JR.,

/s/ A. PERRY OSBORN,

/s/ MAHLON DICKERSON,

/s/ NORRIS DARRELL,

/s/ LeROY R. GOODRICH,

Attorneys for Plaintiff.

[Endorsed]: Filed November 4, 1949.

[Exhibit A attached to the preceding Proposed Findings of Facts and Conclusions of Law is identical to the Order Denying Temporary Restraining Order on Condition and Pretrial Order. See pages 163 to 167.]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR REARGUMENT AND TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW APPEARING IN THE COURT'S OPINION FILED SEPTEMBER 6, 1949.

To the above-named defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company, and Allen P. Matthew, Esq.; James D. Adams, Esq.; Robert L. Lipman, Esq, Burnham Enersen, Esq., Walker Lowry, Esq., and Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, Balfour Building, San Francisco, California, their attorneys; to the above-named defendant, Western Realty Company and Eugene M. Prince, Esq.; Everett A. Mathews, Esq.; Homer G. Angelo, Esq., and Messrs. Pillsbury, Madison & Sutro, 225 Bush Street, San Francisco, California, and A. Donald McKinnon, Esq., and Messrs. Milbank, Tweed, Hope & Hadley, 15 Broad Street, New York, New York, and Forbes D. Shaw, Esq., and Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York, New York, its attorneys, and to the above-named plaintiff, The Western Pacific Railroad Corporation and Herman Phleger, Esq.; Maurice E. Harrison, Esq.; Moses Lasky, Esq., and Messrs. Brobeck,

Phleger & Harrison, 111 Sutter Street, San Francisco, California, and Messrs. Frank C. Nicodemus, Jr., A. Perry Osborn, Norris Darrell, Mahlon Dickerson and Leroy R. Goodrich, its attorneys:

You and Each of You Will Please Take Notice that on Monday, the 14th day of November, 1949, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled Court, the Honorable Louis E. Goodman presiding, in the United States Post Office Building, San Francisco, California, the undersigned will move said Court on behalf of the plaintiffs in intervention herein, Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, for leave to reargue this case and to amend and add to the findings of fact and conclusions of law appearing in the Court's opinion dated and filed herein on September 6, 1949, to require defendants to pay the sum of $3,385,290.00 to the clerk of said Court and said clerk in turn to surrender possession of said sum and pay the same over to the plaintiff The Western Pacific Railroad Corporation as constituting the proceeds due plaintiff from the refund claim filed by it with the United States Government for the taxable year 1942 as reduced by settlement with the Government.

Said motion will be made on the grounds that on or about August 29, 1947, this Court made and entered its pretrial order herein based upon the

written stipulation of said plaintiff and defendants, as the condition for the denial by said Court of an application theretofore made by interveners for an order restraining the settlement with the United States Government of plaintiff's and defendants' tax liability on a consolidated basis for the taxable years 1942 and 1943 and the first four months of 1944, which pretrial order expressly provides that this Court shall determine the issues and give judgment herein in the same manner as if the tax savings for the year 1943 and first four months of 1944 had been allowed and said refund claim allowed and paid by the United States Government in the ordinary course and manner prescribed by law, to wit, to plaintiff in accordance with Treasury Department regulations 104 and 110, and as proportionately reduced by said settlement and which stipulation expressly provides that said refund claim as diminished by said settlement shall be deemed to have been allowed by the United States Government and paid to said plaintiff corporation as required by law and by said plaintiff paid into this Court; that in its said opinion made and filed herein on September 6, 1949, as aforesaid, the Court has announced its intention of leaving the parties where they are; that the proceeds from said refund claim as proportionately reduced by said settlement in accordance with said pretrial order and stipulation amount to the sum of $3,385,290.00 and remain in the actual possession of defendants; and that in concluding in its

said opinion that defendants should have judgment herein without ordering the surrender of said sum of $3,385,290.00 to the plaintiff corporation, the Court acted under a misapprehension of fact in that it overlooked and gave no effect whatsoever to its aforesaid pretrial order or to said stipulation.

Said motion will be further made and based upon this notice, upon the affidavit of Julius Levy, Esq., dated October 28, 1949, annexed hereto, the accompanying points and authorities and upon all the records, papers, pleadings and files in this action.

Dated: November 3, 1949.

WEBSTER V. CLARK,
ROGERS AND CLARK,
DAVID FREIDENRICH,
JULIUS LEVY,

By /s/ WEBSTER V. CLARK,

Attorneys for Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., a corporation, Plaintiffs in Intervention.

[Title of District Court and Cause.]

AFFIDAVIT OF JULIUS LEVY

Julius Levy, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiffs-intervenors herein.

This affidavit is submitted in support of a motion for reargument and to amend the findings set forth in this Court's opinion dated September 6, 1949.

Basis for the Motion

In its opinion this Court, because it found the tax savings were "erroneous and unjust"—a tax "escape"—and "in reality" the property of the United States, concluded that equity must leave the parties "where they are."

The Court then proceeded to leave the parties where it believed they were—defendant with all and plaintiff with none, of the tax savings.

In so doing, we respectfully urge that the Court labored under a misapprehension of fact. It overlooks its own pretrial order (unmentioned in the opinion) entered on intervenors' motion to enjoin the tax settlement with the United States.

Plaintiff, in fact, as determined by that pretrial order, was in the position of having $3,385,290 of the tax "escape." Therefore, to leave plaintiff where the Court found it, requires plaintiff to be left with $3,385,290.

The Court's Order and Its Effect

During the pendency of this action, on August 25, 1947, the intervenors brought on a motion to enjoin the consummation of the then pending offer to settle with the United States Government. By that offer, the Government's total claim of $21,000,000 covering the 1942 refund claim and the

years 1943 and part of 1944, were to be settled for approximately $4,000,000. The suggested mechanics for accomplishing this result were for the Government to accept the 1943 and 1944 returns as filed and to reject the refund claim.

But for the settlement, the refund claim, if eventually approved, would have been paid by the United States to the plaintiff; plaintiff would have had possession of those tax savings. Similiarly, if the 1943 and 1944 returns were accepted, defendant which had paid no taxes for those years, would remain in possession of those tax savings. However, the proposed settlement, if consummated without more, would deprive plaintiff of possession of any part of the tax savings—its refund claim was being waived—and it would give to defendant sole possession of all of the tax savings.

We sought to enjoin the settlement solely because its form would prejudice plaintiff's rights in this very litigation.

We urged that the settlement's failure to continue plaintiff's normal right to possession of a part of the savings would seriously prejudice plaintiff's rights in this litigation. Defendant's defenses of limitation, laches, etc., heretofore sufficient (if sustained) merely to defeat plaintiff's claim to savings in defendants' possession but without force to determine plaintiff's right to retain tax savings in plaintiff's possession, would, if the settlement were put through in the contemplated form, operate to defeat plaintiff's entire claim in the action

since defendant alone would possess all the savings. The importance of possession was emphasized by defendants' answer; for before the settlement, it pleaded a counterclaim to recover from plaintiff the proceeds of the refund claim when, as and if it came into plaintiff's possession (Answer, par. V).

Over and above the prejudice foreseeable from the contents of the pleadings, we urged and hypothesized that this Court might very well conclude, for one reason or another, to leave the parties where it found them; and, again, it would be of the greatest importance for plaintiff to have possession of so much of the tax savings as would normally come into its possession. For all of these reasons, we contended that the form of the settlement should not alter the normal status quo of the parties to this litigation. We suggested an easy and effective expedient for preventing the settlement from divesting plaintiff of possession of about $3,000,000 of tax savings, i.e.: The parties should by agreement give plaintiff possession of the refund claim proceeds pro tanto reduced by the settlement and permit defendant to retain possession of the remaining tax savings similarly reduced. Both parties could then litigate their title to the tax savings in this action unaffected and unprejudiced by changes in possession produced solely by the form of any settlement with the United States Government.

This Court thereupon entered the following order designed to accomplish this very result:

"It Is Hereby Ordered:

"(1) That the application of interveners for a restraining order be and the same is hereby denied upon the condition that the defendants shall enter into a stipulation with the plaintiff in the form annexed hereto marked Exhibit A; and upon the further condition that said hearing upon said application of interveners shall be deemed a pretrial hearing on the aforesaid issues as if properly noticed as such so that the Court may make and enter an appropriate pretrial order pursuant thereto; and

"(2) That the aforesaid settlement with the United States Government shall have force and effect in this action and as between the parties hereto solely to the extent that it reduces pro tanto the total amount in controversy herein and that in all other respects this Court shall and does hereby preserve the respective rights and positions of all parties and shall determine the issues and give judgment herein, in the same manner as if said tax saving and been allowed and said refund claim allowed and paid by the United States Government in the ordinary course and manner prescribed by law and as proportionately reduced by said settlement."

By its unequivocal language clearly reflecting the parties' intention, this order expressly fixes the

parties' "positions," i.e., plaintiff is put in the position of having the reduced refund proceeds and the stipulation, Exhibit "A," deems these very funds "paid to the plaintiff * * * and by the plaintiff paid into court." The order then requires the Court to determine the "issues" and to render the "judgment" on the basis of that clearly stated position of plaintiff.

Hence this Court, to leave the parties "where they are," must in its final judgment leave the plaintiff with the reduced refund proceeds of $3,385,290, and the defendants with the balance. Anything else would make both the parties' stipulation and the Court's order a mockery and a meaningless gesture which had served merely to engender misplaced reliance.

We have not sought to answer any contentions bearing on the rights of the parties inter sese. This Court has cut short any such inquiry by its conclusion that, because of the contaminated origin of the tax savings, it will leave the parties "where they are." It has thereby rendered immaterial whatever may have been the rights of the parties inter sese, if this Court were disposed to determine them. For, as this Court stated, the evil of the savings' origin "cannot be cured by committing the further inequity of distributing the gain thus made to others" (Op. 14).

We therefore submit that reargument should be granted and this Court's opinion amended to require defendants to pay $3,385,290 to the Clerk

of the Court and the Clerk, in turn, to surrender its possession to the plaintiff.

/s/ JULIUS LEVY.

Sworn to before me this 28th day of October, 1949.

/s/ ETHEL RADIN,
Notary Public in the State of New York

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION OF PLAINTIFF AND OF ALEXIS I. duP. BAYARD, RECEIVER, TO JOIN RECEIVER AS PARTY PLAINTIFF UNDER RULE 25(c) R.C.P.

To defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Deep Creek Railroad Company, Standard Realty and Development Company, Tidewater Southern Railway,

and to their attorneys, Allen P. Matthew, Esq.; James Adams, Esq.; Robert L. Lipman, Esq.; Burnham Enersen, Esq.; Walker Lowry, Esq., and Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene;

To defendant, Western Realty Company, and to its attorneys Everett A. Matthews, Esq.; Messrs.

Pillsbury, Madison & Sutro, J. Donald MacKinnon, Esq.; Messrs. Milbank, Tweed, Hope & Hadley; Forbes D. Shaw, Esq., and Messrs. Whitman, Ransom, Coulson & Goetz;

To plaintiffs in intervention, Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc., and to their attorneys, Messrs. Rogers and Clark, Webster V. Clark, Esq.; David Freidenrich, Esq.; Julius Levy, Esq., Messrs. Pomerantz, Levy, Schreiber & Haudek, and Abraham L. Pomerantz, Esq.

Please Take Notice, hereby given, that on Monday, the 21st day of November, 1949, at the hour of 10 o'clock a.m. or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court, in the Post Office Building, in the City and County of San Francisco, before the Honorable Louis E. Goodman, District Judge, the plaintiff and Alexis I. duP. Bayard, as Receiver of the plaintiff, will move the court for an order directing said Alexis I. duP. Bayard, as such Receiver, to be joined as party plaintiff herein.

This motion will be made on the following grounds: An order was made and entered by the Court of Chancery of the State of Delaware in and for New Castle County appointing Alexis I. duP. Bayard as Receiver of plaintiff, The Western Pacific Railroad Corporation, to take charge of its estate and effects and to collect the debts and properties due and belonging to it with power to enter his appearance in, and to prosecute and defend

in its name or otherwise, all suits and proceedings which may be necessary or proper for said purpose, including the instant action; Exhibit A hereto attached is a certified copy of said order. Said order was issued in a certain suit instituted by the filing of a petition by the Attorney General of the State of Delaware on October 19, 1949, wherein an answer by the defendant therein, the plaintiff in the present action, was filed the same day; Exhibits B and C attached hereto are certified copies of said complaint and answer, respectively. On Wednesday, the Nineteenth day of October, 1949, said Alexis I. duP. Bayard duly qualified as said receiver by executing and filing in the office of the Register of said Chancery Court a bond in the form and amount as specified in said order, as shown by the affidavit of said Alexis I. duP. Bayard hereto attached as Exhibit D.

Said motion will be based on this notice of motion, the four exhibits hereto attached, and on all pleadings and papers on file herein.

Dated: November 14, 1949.

HERMAN PHLEGER,

MAURICE E. HARRISON,

MOSES LASKY,

BROBECK, PHLEGER AND HARRISON.

By /s/ FRANK C. NICODEMUS, JR.

EXHIBIT "A"

In the Court of Chancery of the State of Delaware
In and for New Castle County

Civic Action No. 131

ALBERT W. JAMES, Attorney General of the State of Delaware, ex rel LAWRENCE O. ROSS,

vs.

THE WESTERN PACIFIC RAILROAD CORPORATION, a Corporation of the State of Delaware.

ORDER

And Now To Wit this 19th day of October, 1949, the complaint of Albert W. James, Attorney General of the State of Delaware, ex rel Lawrence O. Ross, praying for the appointment of a trustee or trustees of said defendant corporation, having been presented, read and maturely considered together with the answer to said complaint, filed on behalf of said corporation, admitting the allegations of said complaint and consenting to its prayers; and

It appearing to the Court that it would be to the best interest of the corporation and the stockholders thereof, that the relief prayed for be granted, it is on motion of the plaintiff found by the Chancellor that there has been a failure of defendant's primary corporate purpose and/or

abuse, misuse or nonuse of its corporate powers, privileges or franchises; and it is ordered by the Chancellor:

1. That the defendant be and it is hereby placed in the judicial custody of this Court for liquidation and dissolution.

2. That Alexis I. duP. Bayard of the County of New Castle and State of Delaware, be and he is hereby appointed receiver of the defendant corporation to take charge of the estate and effects of said corporation and to collect the debts and properties due and belonging to said corporation with power to enter his appearance in and to prosecute and defend in the name of said corporation or otherwise, all suits and proceedings which may be necessary or proper for the purpose aforesaid, including the three causes of action referred to in paragraph 8 of the complaint, and to appoint an agent or agents under him and to select attorneys to represent him and to do all other acts which might be done by said corporation, if in being, that may be necessary for the final settlement and liquidation of the affairs of said corporation.

3. That said receiver herein appointed shall execute and file in the office of the Register of this Court, a bond in the usual form with surety to be approved by the Chancellor in the penal sum of Five Thousand Dollars ($5,000.00) conditioned on the faithful performance of his duties as receiver in this proceeding and for the proper accounting

to the Court for any moneys and property that may come into his hands as such receiver; provided that said receiver shall deposit all negotiable securities and all cash assets in the Wilmington Trust Company of Wilmington, Delaware.

4. That United States Fidelity and Guaranty Company, a corporation of the State of Maryland, be and it is hereby approved as surety upon the bond of the receiver herein appointed.

/s/ COLLINS J. SEITZ,
Vice-Chancellor.

EXHIBIT "B"

In the Court of Chancery of the State of Delaware In and for New Castle County

Civil Action No. 131

ALBERT W. JAMES, Attorney General of the State of Delaware, ex rel LAWRENCE O. ROSS,

vs.

THE WESTERN PACIFIC RAILROAD CORPORATION, a Corporation of the State of Delaware.

COMPLAINT

The complaint of Albert W. James, Attorney General of the State of Delaware, ex rel Lawrence O. Ross respectfully shows to the Chancellor as follows:

1. Relator, Lawrence O. Ross, whose address is 64-15A 186th Lane, Flushing, New York, is the registered holder and owner of 3,600 shares of preferred stock out of a total of 400,000 shares outstanding of the defendant corporation. He is associated with and is working cooperatively with a group of stockholders whose holdings of preferred stock of the defendant corporation are substantial. There are also outstanding 600,000 shares of common stock of the defendant corporation.

2. The defendant, which is not a corporation for public improvement, was duly incorporated under the laws of the State of Delaware on June 29, 1916, for the primary purpose of acquiring all of the capital stock of The Western Pacific Railroad Company, a railroad company owning lines of railroad lying in the states of Utah, Nevada and California, and constituting a single line of railway from Oakland, California, to Salt Lake City, Utah. The defendant has its principal office in the City of Wilmington, County of New Castle and State of Delaware.

3. This is an action brought under Section 68 of the Delaware Corporation Law, which vests in the Court of Chancery jurisdiction to revoke or forfeit charters of corporations organized under the laws of the State of Delaware for "abuse, misuse or nonuse of their corporate powers, privileges or franchises." There is also invoked the general equity power of this Court to take jurisdiction of a corporation, the primary corporate

purpose of which has failed, and which is unable to meet its debts as they mature. The relief sought by this complaint is the revocation of defendant's corporate charter and the appointment of a trustee or trustees to administer and eventually to windup the affairs of the corporation, under the guidance of this Honorable Court.

* * *

6. As a consequence of the two reorganization proceedings referred to above which denuded The Western Pacific Railroad Corporation of its entire stock investment in The Western Pacific Railroad Company and the Denver and Rio Grande Western Railroad Company, the defendant corporation virtually ceased to exist and the corporate purpose for which it was organized failed. Nothing remains for The Western Pacific Railroad Corporation to do other than to collect and distribute its assets to its stockholders.[1] The defendant corporation has not paid the Delaware Corporation Franchise Tax for the years 1947 and 1948 and the tax for several preceding years was accepted by the State of Delaware on a partial basis because of the failure of the corporation to perform the functions for which it was created. It is recognized that defendant's corporate charter, in the absence of

[1]The defendant corporation has outstanding 400,000 shares of preferred stock having a par value of $100 per share. Under no circumstances can the common stockholders hope to receive any liquidating dividend on the 600,000 shares of common stock also outstanding.

earlier action by this Court, would not be forfeited until April 1, 1950, through failure to pay the Delaware Franchise Tax; nonetheless, the defendant has not operated within the purview of its corporate powers for many years. In view of the circumstances hereinabove and hereinafter recited, any additional payment of franchise taxes would constitute a waste of funds available for distribution to its stockholders.

7. After the aforesaid order of the Supreme Court of March, 1943, in Ecker v. Western Pacific Railroad Corporation, supra, the defendant corporation faced with complete financial collapse, fell into a state of corporate coma, and what corporate activities were engaged in by the defendant were directed and controlled by The Western Pacific Railroad Company for its own interests and purposes, and not for the purposes for which the defendant was intended. Defendant's corporate existence was maintained during the critical tax period at the direction and insistence of tax counsel for The Western Pacific Railroad Company which took over and used the tremendous stock loss sustained by the defendant corporation in an amount of more than $75,000,000, as an offset against taxes due on its own substantial operating income. As of the spring of 1943, the defendant corporation was virtually without liquid assets. In June of 1943, it ceased to pay any office expenses or to pay any compensation to its officers and employees. Its officers and employees and all of its office expenses

were paid by its subsidiary company, The Western Pacific Railroad Company. After June 1, 1943, the defendant corporation had only one officer, a Mr. Michael J. Curry, who had been the corporation's chief clerk, and who was paid, as were its other employees, by The Western Pacific Railroad Company. This state of affairs continued until May 1, 1945, since which date defendant's remaining personnel have been compensated by tax counsel for The Western Pacific Railroad Company. Having come to the conclusion that it was possible under the Internal Revenue Law to offset the loss of the holding company against the income of the operating company, it is apparent that the defendant corporation was kept in being by counsel and officers of the operating company solely for the purpose of discharging the tax liability of the operating company through the use of the defendant corporation's operating losses and other tax credits. At no time during this period were the directors[2] of the defendant corporation advised as to what were the rights of the defendant corporation in connection with the filing of consolidated returns.

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[2]From June 1, 1943, until suit by the present defendant against The Western Pacific Railroad Company for unjust enrichment was filed in California in October, 1946, nine persons were at one time or another directors of the defendant corporation. Only three were not employees of The Western Pacific Railroad Company, and one was not only a director of the subsidiary but was chairman of that company's executive committee and one of its trustees in bankruptcy.

After negotiations with the Government were initiated in regards to acceptance of consolidated returns, Mr. Curry, at the request of Mr. James K. Polk, counsel for The Western Pacific Railroad Company, gave him a power of attorney to act for the defendant corporation in settlement negotiations, but neither Mr. Curry nor the directors of the corporation were informed about the ultimate purpose of the power of attorney. Finally, in June of 1946, a stockholders' bill was filed in New York by certain of the defendant's stockholders, as a result of which the directors of the defendant corporation elected in 1944, learned for the first time that the stock loss sustained by the defendant corporation had been utilized by The Western Pacific Railroad Company on consolidated tax returns for the years 1942, 1943 and the first four months of 1944, whereupon on October 10, 1946, suit in the District Court in California was instituted by the present defendant, at the instance of a revitalized board of directors.

8. The only assets remaining in the hands of The Western Pacific Railroad Corporation in addition to a small amount of cash, namely, a sum not in excess of $5,000, are the following causes of action which are now pending as hereinafter set forth:

a) The suit in the United States District Court for the Northern District of California, Southern Division, hereinbefore referred to, wherein the present defendant corporation seeks to recover all or

part of the $17,500,000 tax saving unjustifiably gained by The Western Pacific Railroad Company through a taking over of all of the defendant's stock loss of $75,000,000. On September 6, 1949, Judge Goodman filed an opinion in this cause directing that judgment would be entered for the defendant, The Western Pacific Railroad Company. A copy of this opinion is attached hereto and marked Exhibit "A."

* * *

Until the present time, the present board of directors of the defendant corporation, has diligently sought to protect the interests of all of the stockholders of the defendant corporation and to recover for them some part of the enormous sums lost by them in the bankruptcy of The Western Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company.

9. In each of the above-referred-to actions, however, the defendant corporation is faced with important decisions. In the action pending in the District Court of California against The Western Pacific Railroad Company, there is the immediate problem as to whether an appeal should be prosecuted or whether discussions should be entered into with The Western Pacific Railroad Company with a view to a negotiated settlement. Similarly, in the other two pending actions, the defendant corporation is faced with the problem of deciding whether diligent efforts should be maintained to bring said actions to final conclusion either by trial or negotia-

tion. For all of the foregoing reasons the present board of directors of the defendant corporation having no recent mandate from stockholders of the defendant corporation and being under constant pressure for moneys wherewith to prosecute the pending litigations is in no position to assume responsibility for the determination of these many serious problems without the aid and guidance of this Court. It is likewise unclear in the event that these problems were to be submitted to the stockholders of the defendant corporation for their approval or disapproval, whether the vote of a majority of such stockholders would bind a dissenting minority.

Moreover, the defendant corporation although confident of substantial realizations in some one or more of the pending litigations, particularly the litigation instituted in California on October 10, 1946, as hereinbefore alleged, which counsel believe is strengthened rather than weakened by the annexed opinion of Judge Goodman because of his factual finding that the operating company has been unjustly enriched to the extent of $17,500,000, which unjust enrichment was due wholly to the extraordinary losses and the tax credits of the defendant corporation, it is nevertheless under serious financial handicaps in meeting essential expense in connection with the prosecution of its just claims.

* * *

10. Under the circumstances, there is no alternative to a prompt and equitable solution to these

problems other than the voiding of the corporate charter of the defendant corporation and the appointment of a trustee or receiver to act for the corporation under the aid and guidance of this Honorable Court in disposing of the above-recited matters as well as in effecting a gradual liquidation of said corporation.

Wherefore, plaintiff, ex rel Lawrence O. Ross, prays as follows:

1) That this Court decree that there has been a failure of defendant's primary corporate purpose and/or abuse, misuse or nonuse of its corporate powers, privileges or franchises.

2) That an order be entered directing that the corporate existence of the defendant be dissolved.

3) In aid of the relief above prayed for, that the board of directors or an appropriate committee thereof or such person or persons as this Honorable Court shall select be appointed liquidating trustee or trustees with all of the powers of equity receivers, including, inter alia, the power under order of this Court, to prosecute in the name of the defendant corporation the three causes of action set forth in paragraph 8 of this complaint and all other proper claims and demands whether of a legal or of an equitable nature in any court of competent jurisdiction against all persons and corporations obligated to the defendant, the power to compromise claims of the defendant against all persons and corporations obligated to the defendant, the power to

defend the corporation against claims of alleged creditors and others, and the power to distribute to those entitled thereto, the assets of the defendant corporation as shall be directed by this Honorable Court.

4). That the defendant corporation, its officers, directors, agents, attorneys and employees, be ordered to deliver to said trustee or trustees, all property of every kind and description and all books of account, papers and documents, belonging to or in anywise pertaining to the defendant corporation or its business.

5). That pending final determination of this cause, that a trustee or trustees pendente lite be appointed by order of this Honorable Court to take charge of and to protect and safeguard, pursuant to Court order, the property and assets of the defendant corporation.

6). That plaintiff, ex rel Lawrence O. Ross, may have such other and further relief as the nature of the cause may require or as the Chancellor may deem equitable, just and proper in the premises.

/s/ ALBERT W. JAMES,
Attorney General,
State of Delaware.

/s/ DANIEL L. HERRMANN,
Attorney for Relator.

State of Delaware,
New Castle County—ss.

Be It Remembered that on this 13th day of October, 1949, personally came before me the Subscriber, a Notary Public for the State and County aforesaid, Albert W. James, Attorney General of the State of Delaware, who, being by me duly sworn according to law, did depose and say that the matter contained in the foregoing bill of complaint is true insofar as it concerns his act and deed and insofar as it relates to the act and deed of any other person is believed by him to be true.

/s/ ALBERT W. JAMES.

Sworn to and subscribed before me, the day and year first above written.

[Seal] /s/ JOHN L. MALONE,
Notary Public.

[Exhibit A-1 attached to the preceding document is identical to the Opinion set out on pages 258 to 279.]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO FINDINGS AND CONCLUSIONS PROPOSED BY PLAINTIFF.

I.

Defendants object to each of plaintiff's proposed findings of fact on the following grounds:

1. The proposed findings are not "limited to the issues involving the essential equitable considerations upon which the decision rests." For the most part they relate to "duality of control," which the Court held "is not important," and despite the fact that the Court rested its decision "upon the fundamental issue of the justice and equity of plaintiff's right."

2. The proposed findings are, on the undisputed evidence, erroneous in many particulars, as set forth below.

II.

(a) Plaintiff's proposed finding No. 2 reads:

"2. The consolidated returns for 1942, 1943 and the first four months of 1944, and the claim for refund were filed, respectively, May 15, 1943; July 15, 1944, and June 15, 1945, and March 9, 1945. The return for the first four months of 1944 and the claim for refund were filed by the defendant; the returns for 1942 and 1943 were filed by the debtor."

The first sentence is accurate. The second sentence to be accurate should read:

"The consolidated returns for 1942 and 1943 and the consolidated return which included the first four months of 1944 were each signed and filed by plaintiff's president, and the refund claim for 1942 was signed by plaintiff's president and filed by tax counsel for the affiliated group."

(See as to the signing and filing of the 1942 return, R. 320, 542, 551-52; of the 1943 return, R. 322, 365; of the 1944 return, R. 324; of the refund claim, R. 325, 1307, 1339-40. As to the status of Mr. Polk as counsel for the group, see R. 1287, 1321-22, 1071, 1115.)

(b) Plaintiff's proposed finding No. 3 reads:

"3. At all times herein referred to the plaintiff's president, who signed the said returns and the claim for refund, was defendant's vice-president and employee,* and at the time when he signed the return for the first four months of 1944 and the power of attorney referred to in paragraph 5 below he was in the paid retainer of defendants' tax counsel."

This statement to be accurate should read:

"Plaintiff's president, Michael J. Curry, signed the said returns and the claim for refund. On May 15, 1943, the date of the 1942 return, Mr.

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*In its proposed findings plaintiff has frequently failed to distinguish between the railroad company prior to reorganization, the reorganization trustees and the reorganized railroad company. Only the latter may be correctly designated as defendant.

Curry was both plaintiff's president and a vice-president of the debtor in reorganization. His salary was then paid in part by plaintiff and in part by the reorganization trustees. On July 15, 1944, the date of the 1943 return, Mr. Curry was both president of plaintiff and vice-president of the debtor in reorganization. His salary was paid in its entirety by the reorganization trustees who, pursuant to the request of plaintiff, had agreed to pay the expenses of the New York office. On March 9, 1945, the date of the refund claim, Mr. Curry was both president of plaintiff and a vice-president of the reorganized The Western Pacific Railroad Company and his salary was paid by that company. On June 15, 1945, the date of the 1944 return, Mr. Curry was president of plaintiff. He then held no office with and was receiving no salary from the reorganized The Western Pacific Railroad Company, but he was receiving a retainer from the law firm of Whitman, Ransom, Coulson & Goetz, which had been employed as tax counsel by the reorganization trustees and whose employment for tax purposes was continued by defendant, the reorganized company."

(See as to Mr. Curry's positions and compensation on May 15, 1943, R.P.Exs. 21, 23, 25, 293-4, 499; on July 15, 1944, R.P.Ex. 21, 23, 25, 293-4, 316; on March 9, 1945, R.P.Exs. 21, 23, 25, 293-4; on June 15, 1945, R.P.Ex. 21, 23, 25, 33, 307-8, 310, 646-47; on the employment of tax counsel, R.P.Ex. 39 A/F, 884,

1071, 1115; on the arrangement for the trustees to pay the expenses of the New York office," R. 1082, 1094-95 and P.Ex. 30.)

(c) Plaintiff's proposed finding No. 4 reads:

"4. Plaintiff did not know until June, 1946, that the debtor had used plaintiff's stock loss in the consolidated returns for 1942 and 1943, or that defendant had used plaintiff's stock loss in the consolidated return for the forepart of 1944 or in a claim for refund."

This statement to be accurate should read:

"Plaintiff's president knew that plaintiff's stock loss had been used in the consolidated returns and in the claim for refund on or before the respective dates on which those returns and the claim for refund were signed by him, and as long as plaintiff maintained an office, the tax returns were prepared in that office by plaintiff's employees. The handling of the tax transactions was discussed in the annual reports published by the reorganization trustees for 1943 on May 1, 1944, for 1944 on May 1, 1945, and by the reorganized The Western Pacific Railroad Company for 1945 on April 1, 1946. Copies of the 1943 report were furnished to plaintiff on June 28, 1944, of the 1944 report in mid 1945. Moreover, on February 21, 1945, plaintiff's president wrote to F. C. Nicodemus, Jr., who was then plaintiff's counsel and who is an attorney for plaintiff in this action, explaining the use of plaintiff's stock loss in the returns for 1942 and

1943 and the proposed use of the stock loss in the 1942 refund claim and the 1944 return. The Court finds that nothing was concealed from plaintiff and that plaintiff either knew or had ample opportunity to know all the facts concerning the tax transactions."

(See as to Mr. Curry's information as to the use of the stock loss in the tax returns and refund claim on the dates they were filed, R. 342-43, 365-68, and 604; as to the preparation of the returns in plaintiff's office, R. 320, 540-41, 1291, 921; as to the annual reports, R. 367-68, 891, and their delivery to plaintiff, R. 1130, 1132; and as to the letter from Mr. Curry to Mr. Nicodemus, Exhibit In. 5; see, in addition, D. Ex. 9, 13, 16, 28, 37-A, 56, and R. 809-12, 887-890, 960, 946, 1048-49, as to the information of the plaintiff's officers, directors and counsel.)

(d) Plaintiff's proposed finding No. 5 reads:

"5. In June, 1946, defendant's tax counsel caused plaintiff's president to sign in its name a power of attorney to them to represent it in all matters before the Treasury Department and the Bureau of Internal Revenue relating to any matter involving Federal income tax for the years here involved. This power of attorney was signed by plaintiff's president without consulting plaintiff's board of directors and without its knowledge. After obtaining it, defendant's tax counsel

conducted all negotiations for a settlement in the name of the plaintiff under this power of attorney and on behalf of defendant and with its knowledge."

This statement to be accurate should read:

"In June, 1946, plaintiff's president, at the request of James K. Polk, acting as counsel for the affiliated group, signed on behalf of plaintiff a power of attorney authorizing Mr. Polk and his associates to represent plaintiff in all matters before the Treasury Department and the Bureau of Internal Revenue relating to Federal income taxes for the years here involved. Similar powers of attorney were obtained from all other group members. The power of attorney from plaintiff was signed by plaintiff's president in the ordinary course of business and without consulting plaintiff's board of directors. In September, 1946, plaintiff recognized and approved the activities of Mr. Polk on its behalf in connection with tax affairs. After Mr. Polk and his associates obtained powers of attorney from the group members, they conducted the negotiations for settlement in the tax controversy in the name of the plaintiff, as the Treasury Regulations require, and on behalf of the group. The reorganization trustees, and after December 31, 1944, the officers of the reorganized The Western Pacific Railroad Company, were informed of all important developments concerning the negotiations for settlement."

(See as to the circumstances under which the power of attorney was obtained from plaintiff, R. 326; as to the powers of attorney from the other group members, R. 1313; for the text of these powers of attorney, Exhibits In. Ex. 13, P. Ex. 65; as to the negotiations with the Bureau of Internal Revenue, R. 1308-09, 1312-19, and Exhibits In. 14, P. 64, P. 71; as to plaintiff's September, 1946, approval of Mr. Polk's tax work, Exhibit D-37A.)

(e) Plaintiff's proposed finding No. 6 reads:

"6. The offer of settlement made by defendant to the Commissioner of Internal Revenue, as stated in this Court's opinion, was made in the plaintiff's name but without its knowledge."

This statement to be accurate should read:

"The offer of settlement made by tax counsel to the Commissioner of Internal Revenue to settle the tax liability of the group for the years here in question was made on behalf of the group and in plaintiff's name, as the Treasury Regulations require, and without prior consultation with plaintiff."

(See as to the circumstances of the offer of settlement and its terms, R. 1339-40 and Exhibit In. 14.)

(f) Plaintiff's proposed finding No. 7 reads:

"7. Said offer of settlement was made in February, 1947. Subsequently defendant's tax counsel

first notified the plaintiff thereof. Thereafter plaintiff and defendant agreed upon a stipulation to be entered into in the present case in the form of plaintiff's Exhibit 7. Thereupon the intervenors applied to the court herein for a temporary restraining order enjoining and restraining the plaintiff and defendant from consummating the proposed settlement. Upon the hearing of said application for a restraining order defendant presented to the court the proposed stipulation referred to above, and after the hearing this Court, on August 29, 1947, made and entered its order in the form attached hereto. Thereafter, said stipulation was signed by the parties and filed herein on September 5, 1947."

This statement to be accurate should read:

"Said offer of settlement was made February 11, 1947. On April 2, 1947, tax counsel notified plaintiff in writing of the offer of settlement and advised plaintiff of its right to withdraw the offer at any time prior to its acceptance by the Commissioner of Internal Revenue. Plaintiff threatened to revoke the power of attorney of tax counsel and to withdraw the offer of settlement but following conferences between counsel, a stipulation was agreed upon (Plaintiff's Exhibit 7). The intervenors applied to this Court for a temporary restraining order to enjoin the completion of the settlement. A hearing was held on the application on August 26 and 27, 1947, and an order entered

denying the application. The stipulation of the parties was signed and filed on September 5, 1947."

(See as to the date of the offer of settlement, Exhibit In. 14; as to the date and terms of the notification to plaintiff, Exhibit P. 68, and as to the terms of the stipulation, Plaintiff's Exhibit 7.)

(g) Plaintiff's proposed finding No. 8 reads:

"8. The settlement with the Bureau of Internal Revenue was not entered into in the manner prescribed by Section 3761 of the Internal Revenue Code. In carrying out the settlement the claim for refund was not withdrawn, as stated in the opinion, but the Bureau of Internal Revenue gave notice of its disallowance of the claim for refund and placed the returns for 1942, 1943 and the first four months of 1944 in its closed files. The statute of limitations did not thereafter run until August 26, 1949 (eleven days before the rendition by this Court of its opinion herein) against an action against the Commissioner of Internal Revenue to enforce the claim for refund, but by reason of the settlement agreement no such action was instituted. The statute of limitations did not run against imposition of a deficiency assessment for 1943 taxes until June 10, 1948, or against the imposition of a deficiency assessment for 1944 taxes until June 15, 1948, but by reason of said settlement the Commissioner of Internal Revenue made no deficiency assessment."

This statement to be accurate should read:

"The settlement was effected on the basis of the offer contained in tax counsel's letter to the Commissioner of Internal Revenue dated February 11, 1947 (In Ex. 14), and the tax liabilities of the affiliated group for the period from 1942 to and including the first four months of 1944 were settled and determined on the basis of the returns as filed."

(See as to the terms of the settlement, Exhibit In. 14, P. 7 (Ex. A. thereof.))

The statements contained in proposed finding No. 8 as to section 3761 of the Internal Revenue Code and as to periods of limitation are not statements of fact. They are conclusions of law on questions which have never been presented to this Court for decision. Nor is there any evidence whatever in the record as to why no deficiency assessments were made or proceedings taken on the claim for refund. The settlement made such proceedings unnecessary and defendants suggest that findings should not be made on questions which were not before the Court at the trial, on which no evidence has been presented and which are irrelevant.

(h) Plaintiff's proposed finding No. 9 reads:

"9. Plaintiff at no time had any conferences, discussions or communications with the Bureau of Internal Revenue or any officer or agent thereof

relative to the returns, claim for refund or settlement."

This statement to be accurate should read:

"All negotiations, conferences, discussions, and communications with the Bureau of Internal Revenue in connection with the returns, the claim for refund and the settlement were conducted by tax counsel. All the parties to this action approved the tax settlement."

(See as to the negotiations with the Bureau of Internal Revenue, R. 1308-9, 1312-19, and Exhibits In. 14, P. 64, P. 71; and as to plaintiff's approval of the settlement R. 914 and Exhibit P. 69.)

(i) Plaintiff's proposed finding No. 10 reads:

"10. The evidence discloses no fraud committed by defendant's tax attorneys on the Bureau of Internal Revenue in connection with said tax settlement. The Bureau of Internal Revenue was motivated in agreeing to the settlement by its judgment as to the propriety of the claim for refund and of the tax returns with full knowledge of all pertinent facts."

This statement to be accurate should read:

"The evidence discloses that the Bureau of Internal Revenue was informed as to all pertinent facts in connection with its consideration of the

tax settlement and there is no evidence that the Bureau was in any way deceived or misled."

(See as to the negotiations with the Bureau, R. 1308-09, 1312-19, and Exhibits In. 14, P. 64, P. 71.)

III.

Defendants object to plaintiff's proposed conclusion of law on the grounds that it is entirely inconsistent with the decision of the Court and inconsistent alike with the Court's pre-trial order and the stipulation entered into by plaintiff and defendants, and upon the further grounds stated in defendants' objections to the interveners' motion for reargument and to amend findings of fact and conclusions of law.

Dated: November 18, 1949.

Respectfully submitted,

/s/ ALLAN P. MATTHEW,
JAMES D. ADAMS,
ROBERT L. LIPMAN,
BURNHAM ENERSEN,

Attorneys for Defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

Of Counsel.

/s/ EVERETT A. MATTHEWS,

PILLSBURY, MADISON & SUTRO,

MILBANK, TWEED, HOPE & HADLEY,

Attorneys for Defendant, The Western Realty Company.

Receipt of copy attached.

[Endorsed]: Filed November 18, 1949.

[Title of District Court and Cause.]

ORDER UNDER RULE 25(c) DIRECTING THE JOINDER OF PARTY PLAINTIFF

Upon motion of the plaintiff and of Alexis I. duP. Bayard as Receiver of plaintiff The Western Pacific Railroad Corporation, and it appearing that on October 19, 1949, by order of the Court of Chancery of the State of Delaware, in and for New Castle County, said Alexis I. duP. Bayard was appointed and now is the Receiver of plaintiff corporation to take charge of its estate and effects and to collect the debts and properties due and belong-

ing to it with power to enter his appearance in, and to prosecute and defend in the name of said corporation or otherwise, all suits and proceedings which may be necessary or proper for the purpose aforesaid, including the present action; and good cause appearing therefor,

It Is Hereby Directed that said Alexis I. duP. Bayard as Receiver of The Western Pacific Railroad Corporation be joined, and he is hereby deemed to be joined, as party plaintiff herein, and shall be so denominated in all papers hereafter filed herein.

Dated: November 28th, 1949.

/s/ LOUIS E. GOODMAN,
District Judge.

Receipt of Copy Attached.

[Endorsed]: Filed November 28, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

Plaintiff having proposed findings of fact in addition to the findings contained in the Court's opinion filed herein on September 6, 1949, and the defendant having objected thereto, and the Court being now satisfied that all facts necessary for decision are found in the opinion of September 6, 1949, now adopts by reference all such findings as its formal findings of fact in this cause, for all purposes as if the same were fully set forth herein.

Conclusions of Law.

The Court concludes that the plaintiff shall take nothing herein and that the defendants shall have judgment in their favor for their costs of suit.

Dated: November 28, 1949.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed November 29, 1949.

In the District Court of the United States for the Northern District of California, Southern Division

No. 26508-G

THE WESTERN PACIFIC RAILROAD CORPORATION, and ALEXIS I. duP. BAYARD, Receiver,

Plaintiffs,

and

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., a Corporation,

Interveners,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,

Defendants.

JUDGMENT

The above-entitled cause having been tried before the undersigned Judge of the above-entitled Court, without a jury, the parties appearing throughout the trial by their respective counsel, and the cause having been submitted to the Court for decision,

It is by the Court ordered, adjudged and decreed that the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, be denied all relief, and that the interveners be denied all relief, and that the plaintiffs recover

nothing and the interveners recover nothing from the defendants or any of them.

Defendants are allowed costs against the said plaintiffs and interveners, as follows:

Defendant Western Realty Co. in the sum of $2936.76.

Defendants The Western Pacific Railroad Company, et al., (other than Western Realty Co.) in the sum of $3300.60.

The Clerk is directed to enter this judgment forthwith.

Dated: Nov. 30, 1949.

/s/ LOUIS E. GOODMAN,
Judge.

Entered in Civil Docket Dec. 1, 1949.

The within draft of judgment prepared by counsel for defendants, The Western Pacific Railroad Company, et al.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM ENERSEN,

Attorneys for Defendants The Western Pacific Railroad Company, et al.

Approved as to form, as provided in Rule 5(d).

/s/ MAURICE E. HARRISON,

/s/ HERMAN PHLEGER,

BROBECK, PHLEGER & HARRISON,

Attorneys for Plaintiffs The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, as Receiver.

Approved as to form, as provided in Rule 5(d).

ROGERS and CLARK,

/s/ WEBSTER V. CLARK,

Attorneys for Interveners.

Approved as to form, as provided in Rule 5(d).

/s/ EVERETT A. MATHEWS,

PILLSBURY, MADISON & SUTRO,

MILBANK, TWEED, HOPE & HADLEY,

Attorneys for defendant Western Realty Co.

[Endorsed]: Filed Novemer 30, 1949.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO AMEND JUDGMENT

Judgment was heretofore entered in this cause in favor of defendants and for their costs of suit. Thereafter defendants filed cost bills totalling $25,907.76. The Clerk then proceeded to and did tax the costs at a total of $6,237.36.

Plaintiff and interveners have filed and argued two motions: (1) To amend the judgment by striking out the award of costs to defendants and instead ordering each side to bear its own costs and (2) To modify the Clerk's order of taxation by disallowing all items allowed by him except those totalling a nominal amount.

The items now sought to be stricken consist of (a) cost of original daily transcript of trial testimony; (b) cost of copies of daily transcript; (c) cost of original depositions.

There is substantial doubt as to the propriety of the questioned cost items. Furthermore, after hearing the arguments and studying the memoranda submitted, I am of the opinion that I should not have awarded costs to defendants. It appears to me that, under all of the circumstances of this litigation, it would be more just if each side were to bear its own costs.

Consequently, the judgment may be amended accordingly. It is therfore unnecessary to decide the motion to review the Clerk's taxation order.

Prepare order accordingly.

Dated: January 11, 1950.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed January 11, 1950.

In the United States District Court, for the Northern District of California, Southern Division.

No. 26508

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Plaintiffs,

and

MEREDITH H. METZGER, et al.,

Interveners,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,

Defendants.

AMENDED JUDGMENT

Judgment having heretofore been rendered on November 30, 1949, and plaintiffs and interveners having on December 9, 1949, moved to amend the

judgment, and said motion having been granted, the judgment is amended to read as follows:

It Is by the Court Ordered, Adjudged and Decreed that the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, be denied all relief, and that the interveners be denied all relief, and that plaintiffs recover nothing and the interveners recover nothing from the defendants or any of them.

It Is Further Ordered, Adjudged and Decreed that defendants do not recover costs against plaintiffs or interveners or any of them, and that each party shall bear its, his or her own costs.

The clerk is directed to enter this judgment forthwith.

Dated: January 13, 1950.

/s/ LOUIS GOODMAN,
District Judge.

The within draft of amended judgment prepared by counsel for plaintiffs.

/s/ HERMAN PHLEGER,

/s/ MOSES LASKY,

BROBECK, PHLEGER & HARRISON,

Attorneys for plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, as Receiver.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given this 8th day of February, 1950, that the Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment rendered in this action as amended by Amended Judgment entered herein on January 13, 1950, pursuant to order of January 11, 1950, in favor of defendants and against plaintiffs.

/s/ HERMAN PHLEGER,

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER & HARRISON.

/s/ FRANK C. NICODEMUS, JR.,

/s/ A. PERRY OSBORN,

/s/ MAHLON DICKERSON,

/s/ NORRIS DARRELL,

/s/ LEROY R. GOODRICH,

Attorneys for Plaintiffs and Appellants, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver.

[Endorsed]: Filed February 8, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., plaintiffs in intervention above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment rendered in this action as amended by Amended Judgment entered herein on January 13, 1950, pursuant to order of January 11, 1950, in favor of defendants and against plaintiffs and plaintiffs in intervention.

Dated: February 8, 1950.

/s/ WEBSTER V. CLARK,
ROGERS and CLARK,
/s/ DAVID FREIDENRICH,
/s/ JULIUS LEVY,

Attorneys for Plaintiffs in Intervention and Appellants Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., a Corporation.

[Endorsed]: Filed February 8, 1950.

[Title of District Court and Cause.]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

Appellees, The Western Pacific Railroad Company, and The Western Realty Company, defendants in the above-entitled action, designate the following additional portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled action:

1. Reporter's transcript of hearing on motion of interveners to intervene, April 7, 1947.

2. Reporter's transcript of Pretrial Conference, January 11, 1949.

3. Reporter's transcript of oral argument at conclusion of trial, February 23, 1949.

4. Defendants' Objections to Findings and Conclusions Proposed by Plaintiff dated November 18, 1949, and filed same date.

5. All entries made by the District Court Clerk in the Civil Docket of the U. S. District Court, Northern District of California, Southern Division, pertaining to the above-entitled action.

6. This designation.

Dated: February 16, 1950.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS;

/s/ ROBERT L. LIPMAN,

/s/ BURNHAM ENERSEN,

/s/ WALKER LOWRY,

Attorneys for Defendant, The Western Pacific Railroad Company, et al.

/s/ EUGENE M. PRINCE,

/s/ EVERETT A. MATHEWS,

PHILSBURY, MADISON & SUTRO,

Attorneys for Defendant, The Western Realty Co.

Receipt of copy attached.

[Endorsed]: Filed February 16, 1950.

[Title of District Court and Cause.]

CIVIL DOCKET

1949

Sept. 6—Order Judgment for Defendants as will appear more fully in opinion this day filed.

Nov. 30—109. Filed Judgment that plaintiffs and interveners recover nothing and defendants to recover their costs as determined. Entered Dec. 1, 1949.

Jan. 11—Order judgment may be amended and each side to bear own costs, per order signed this date. (Goodman)

In the Southern Division of the United States District Court in and for the Northern District of California

Before: Hon. Louis E. Goodman,
Judge.

No. 26,508-G

THE WESTERN PACIFIC RAILROAD CORPORATION,

Plaintiff,

vs.

THE WESTERN PACIFIC COMPANY, et al.,

Defendants.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Monday, April 7, 1947

Appearances:

For the Plaintiff:

LEROY R. GOODRICH, ESQ.

For the Defendants:

WEBSTER V. CLARK, ESQ.,

JAMES D. ADAMS, ESQ.,

ALLAN P. MATTHEW, ESQ.,

EVERETT A. MATHEWS, ESQ.

* * *

The Court: In other words, these corporations having been advised that the law permits, or saves

them some money in taxes, now want the Court to decide how the saving shall be divided.

Mr. Clark: Precisely. And without the benefit of any other facts, the matter is passed up to the Court to decide who is entitled to this refund.

Frankly, in that view of the case, on the basis of the allegations in the complaint, it is our opinion that the Court could do nothing but to award the moneys to the operating company in accordance with certain defenses which are set forth in its answer, and in view of the fact that the moneys for which refund is claimed were paid by the operating company and the tax saving was with respect, only in large part, to moneys which it had earned. I say on the basis of this complaint as it is filed in the court, your Honor, the Court, could do nothing but to decide the matter, it seems to us, in favor of the operating company.

* * *

The Court: The applicants for intervention are stockholders of which company?

Mr. Clark: Holding company, the company whose tax loss was used. What could have been done and what the directors should have done, may it please the Court, is to have forced an apportionment by agreement of the tax loss from the subsidiary companies before permitting the use of the loss belonging to holding without any benefit to its stockholders.

* * *

The Court: The plaintiff in the case is asserting

that it is entitled to the benefit of this tax situation?

Mr. Clark: Yes, but it does not allege facts necessary in this complaint to entitle it to a recovery, in our opinion.

* * *

The Court: Mr. Clark, how could it make any difference ultimately as a matter of law with respect to the allocation of this tax refund as to whether or not the James interests had the control in both companies? The Court can't decide how the money should be allocated.

Mr. Clark: I think so, your Honor.

The Court: How could that be?

Mr. Clark: Because if we are going to get into a discussion of the merits, all the declaratory relief complaint says is that these companies were consolidated companies during the years in question, or affiliated corporations within the meaning of Section 141, and that is conceded, because if there is any recovery at all, it must have been. Then, the declaratory relief complaint says there is no statute or regulation apportioning benefits or tax benefits or liabilities among members of an affiliated group. Therefore, we place it in the lap of a court of equity to decide who is entitled to the recovery.

On that state of the matter, may it please your Honor, it must be perfectly obvious, and I think the gentlemen who filed this complaint, it must have occurred to them, so far as the Court is concerned, a fair apportionment of the benefits would be to the

fellow who pays the tax, and that is the position of the railroad company, represented by Mr. Mathews and Mr. Adams.

* * *

[Endorsed]: Filed Nov. 9, 1948.

In the Southern Division of the United States District Court for the Northern District of California

No. 26508-G

THE WESTERN PACIFIC RAILROAD CORPORATION,

Plaintiff,

and

RUSSELL M. VAN KIRK, HENRY OFFERMAN and J. S. FARLEE & CO., INC., a Corporation,

Interveners,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,

Defendants.

PROCEEDINGS ON APPLICATION FOR TEMPORARY RESTRAINING ORDER

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Monday, August 25, 1947

Counsel Appearing:

LEROY R. GOODRICH, ESQ.,

For the Plaintiff;

ROGERS & CLARK, by

WEBSTER V. CLARK, ESQ.,

DAVID FRIEDENRICH, ESQ., and

POMERANTZ, LEVY, SCHREIBER, by

JULIUS LEVY, ESQ.,

Attorneys for Interveners Russell M. Van Kirk, Henry Offerman and J. S. Farlee & Co., Inc.

ALLAN P. MATTHEW, ESQ., and

JAMES D. ADAMS, ESQ.,

For the Defendants.

Mr. Clark: May it please your Honor, this matter involves the presentation to your Honor of a temporary restraining order and order to show cause on the part of the interveners Van Kirk, etc. The occasion which in our opinion, may it please the court, necessitates such action is a proposed settlement between the defendants in intervention and the United States Government, concerning the tax saving and refund claim which, your Honor may

remember, constitutes the subject matter of this action.

May I just briefly review the facts, because this matter was before the court only upon our application to intervene some months ago: The interveners are preferred stockholders of the holding company called Western Pacific Railroad Corporation, which at one time owned all of the stock of one of the defendants in intervention, Western Pacific Railroad Company. As your Honor will remember, the company was in reorganization in this court from approximately 1935, I think it was, until the last of 1943, and in that reorganization the stock of the operating company, the corporation in reorganization, was declared valueless by the United States Supreme Court, confirming the plan of reorganization confirmed by this court. Thereafter, in 1944 the directors of the holding company, we assert, by virtue of domination and control over them by certain interests, caused a consolidated income tax and excess profits tax return to be filed on behalf of itself, the holding company, and all of these defendants as affiliated companies within the meaning of that section of the Internal Revenue Code, and in that return there were set up as a loss on the part of the family of companies the loss of the value of the stock held by the holding company in the operating company, which loss was the result of the reorganization. That loss resulted in a tax saving for the years 1943 and 1944 to the operating company of $10,100,000, and, in 1942, a claim for refund in the amount of $4,200,000.

There was a suit brought in New York by Mr. Levy's firm—and he is here and will present this to your Honor—in which an apportionment of that tax saving on that refund claim was sought to be recovered for the holding company. It had given up its tax loss, received nothing for it, and the use of that loss resulted in that $14,000,000 saving to the operating company out here, and various subsidiaries. The New York action was pending in the Southern District for New York. Motions to dismiss had been overruled when the corporation appeared in this jurisdiction and filed the action which we roughly called an action for declaratory relief during the time we discussed the application to intervene, and in that action the corporation, which company we contend is dominated by the operating company and various other interests, simply stated to the court in the complaint in the declaratory relief action that this loss had been so used that the saving had resulted and it wanted the court, in the exercise of its equitable powers, to declare what apportionment there should be, inasmuch as there was no statute or rule of law which covered the matter, and in that declaratory relief complaint, if it can be properly called such, there was no allegation concerning the domination which had caused the misuse, we contend, of this tax loss to the detriment of the stockholders of the holding company. Therefore, Mr. Levy's firm associated Mr. Friendenrich and myself to prepare a petition for intervention in the declaratory relief action,

which we did, and in that we allege what we think are the controlling facts in the case, and that is the matter your Honor heard, and you granted us the right to intervene, and we filed a complaint in intervention.

Now, so far as the California action is concerned, may it please the court, two of the defendants in intervention, that is, the corporation, being the company on behalf of whom our people seek to intervene as minority stockholders, and another subsidiary called Western Realty Company, represented by Pillsbury, Madison & Sutro, have filed answers. The operating company, represented by Mr. Matthew and Mr. Adams, and their firm, have filed a motion to strike, which is now set on your Honor's calendar for September 15th, and we may possibly ask you to continue that further, pursuant to stipulation of counsel. But meanwhile, all these parties, except the plaintiffs in intervention whom we represent, it seems, have or are about to consummate a settlement with the Government on or pertaining to this very tax-saving refund claim which constitutes the res of the subject-matter of the action, and (Mr. Levy is familiar with this and will describe it to your Honor) the settlement is of such a nature that it will stultify us and place a part of this fund possibly beyond the reach of interveners or the corporation in the event it is consummated, and this restraining order, which we intend to present to your Honor, has for its purpose to restrain these parties from consummating

that settlement, and particularly from giving the Government a release on the refund claim of $4,200,000, which to our mind is a portion, at least, of the res to which certain technical defenses in the suit before your Honor do not apply.

May it please your Honor, I would like to present to your Honor Mr. Julius Levy, of New York, whose firm appears of counsel on the pleadings, and I would like to move the court to admit Mr. Levy in this district for the purpose of this particular litigation.

The Court: Very well, Mr. Levy may be admitted.

Mr. Levy: Thank you, your Honor, for this privilege. I have come a long way from New York, and we have done it only because we consider this particular aspect of the case of great importance, as great in importance as the necessity for our intervention in the corporate action. In fact, it is our opinion, and perhaps your Honor's when you have heard all the facts, that what has been done here is a further step in the course of conduct between these corporations which has evidenced the domination and control of the conflicting interests, at the expense of the corporation for the benefit of the company.

We were aware of the facts which were pleaded in the complaint going to the question of domination and control, and your Honor may recall that one of the strong elements in that chain of factual circumstances has been that throughout the years, when the consolidated tax returns were being filed,

the corporation and the company were represented by one tax counsel of the firm of Whitman, Ransom, Coulson & Goetz, of New York, and for a large period of that time the corporation and the company had one firm of general counsel representing both companies, and since the reorganization has concluded the corporation's president has, by retainer or contract, via Whitman, Ransom, Coulson & Goetz, been working for the railroad company, and another one of the corporation's officers, the secretary, is employed in the firm of Whitman, Ransom, Coulson & Goetz, and in addition to that Mr. Coulson is the trustee of a foundation which owns 40 per cent of the stock of our corporation, but unfortunately most of which is common stock and is so far under water as to be worthless, and at the same time 20 per cent of the railroad company, which, as your Honor may well take judicial notice of, is a fine, going, substantial concern, and it has been the duality of allegiance, as we see it, that resided in tax counsel which supposedly were able to disassociate themselves from their entanglements as to be able to press our claims and at the same time press the railroad company's claims.

One further factor I would like to advert to as background is this: In this very action one of the answers submitted on behalf of Western Realty Company, one of the defendants, is signed by Whitman, Ransom, Coulson & Goetz as their attorney, and it openly and frankly states that the corporation is entitled to no part of these tax savings. With that in mind, and having the feeling that this tax

matter with the United States Government, must sooner or later reach the stage where the parties are sitting across the table and talking about it, we dispatched a letter to Whitman, Ransom, Coulson & Goetz and the corporation and we stated in that letter that because of these background circumstances we felt that the corporation did not have that independent aggressive representation to which it was entitled in the course of those negotiations and, therefore, we suggested that we be permitted to participate in those negotiations, and that at least we be advised at what stage they had reached and what has been going on.

Well, we did get answers to that, and the answers were ultimately a flat rejection of our request, but it produced this much: We were invited to a conference with Mr. Polk, of Whitman, Ransom, Coulson & Goetz' firm, who, by the way, reiterated that his job was that of the tax work, and please don't ask him about what the other end of his firm was doing in connection with the internal quarrel here. We had that conference with Mr. Polk, and we were there advised that a settlement offer had been made by Mr. Polk to the United States Government, and that settlement offer was this: You, the United States Government, sustain the tax returns for 1943 and 1944 under which we, the railroad company, save ten million dollars, approximately, in taxes which we did not pay; at the same time reject the tax refund claim which is made by the corporation.

Now, if you were to view the settlement as being a settlement for ten million dollars of a fourteen million dollar tax claim and that were all there were to it——

The Court: The claim for refund was made by the corporation?

Mr. Levy: The claim for refund was made by the corporation as the parent company, and in the normal course of events, had that claim been allowed, the check would have come to the corporation. I will embellish that a little further as I go along. But at the outset, to make our position clear, I would like to say had this involved nothing more than the question of a ten million dollar settlement of an overall claim of fourteen million dollars, we would probably say, "Well, by gosh, if you can get ten million dollars out of a fourteen million dollar claim, O.K., let's take it and forget the balance. At least that is money in the bank rather than litigation."

That is not what this settlement involves. Our objection is that the form in which it is couched gives to the railroad company an advantage in this litigation which may prove the death knell to the corporation's claim on the merits, and I will try to demonstrate to your Honor how that comes about, how we see it: To begin with, the validity of the tax returns and the tax refund claim are all premised on the same question——

The Court: Is this matter contested? Or are you going to make some order by consent?

Mr. Clark: If it please your Honor, I was down

in Fresno trying a case when Mr. Levy got in touch with me last Friday. I immediately phoned your Honor's secretary to make an appointment to present to your Honor a restraining order and an order to show cause, restraining the consummation of this settlement until it could be heard on its merits, and a preliminary injunction passed upon; and the appointment I got with your Honor was at four o'clock this afternoon. Now, so that we would not be in the position of coming out here and asking your Honor to sign a temporary restraining order and an order to show cause without notice, I telephoned to Mr. Adams and to Mr. Goodrich and to Mr. Matthew and told them we were coming here, so that they would know what was being done, and be able to voice any objection. The thing we are presenting to your Honor is simply a restraining order and an order to show cause, returnable just as soon as your Honor can order it. I put the date next Friday in——

The Court: Does the other side object to the issuance of a temporary restraining order?

Mr. Adams: Yes, your Honor, we do.

The Court: That is all I wanted to find out. If we are going to argue this matter—I had no idea that this was to be a hearing on an application for a preliminary restraining order. My secretary told me it was some matter that could be presented in chambers, as I got it.

Mr. Clark: That is precisely what I suggested to her, that we simply present the restraining order

to your Honor, explain the matter to you, and have the arguments set.

The Court: If the other side is going to object to my issuing a temporary restraining order to stop them from settling a claim that involves ten million dollars, I do not see why you would want to hear it at four o'clock in the afternoon.

Mr. Clark: It is only the urgency of the matter, your Honor, because we understand the settlement is imminent.

The Court: I could have set it earlier this afternoon.

Mr. Clark: Four o'clock in the afternoon was the earliest date I could get from your secretary.

The Court: I had some other matters on, but I thought counsel wanted to come and talk with me about some order in chambers, and so I said, "Come out at four o'clock." I would be reasonably sure of being through with my calendar.

Mr. Levy: I think I can have this presentation over in five minutes.

Mr. Adams: May I say, your Honor, we have not seen the form of order or any papers, but have appeared in response to the courtesy of counsel in designating this time and place, and we should, of course, like to be heard in opposition to the motion, but we would like to see the motion. We have not seen any papers yet.

The Court: I understand counsel are applying to the court for a temporary restraining order, with an order to show cause fixing a date at which the motion for a preliminary injunction may be argued.

Mr. Clark: Precisely, your Honor.

The Court: Instead of applying to the court ex parte for that restraining order they have notified you. Of course, I do not know whether it would even be proper to apply for a temporary restraining order in an action that is pending unless counsel appeared without notice. That is beside the point. You are here now. You wish to oppose the issuance of the temporary restraining order?

Mr. Adams: Yes, your Honor, we do.

The Court: That means you are going to argue the question as to whether the temporary restraining order should issue.

Mr. Adams: We should like to present argument.

The Court: We will go as far as we can until about five o'clock. If we can't finish it we will go over. I have a criminal case starting tomorrow morning.

Mr. Clark: If we could get some expression from these gentlemen, your Honor, as to the imminency of this settlement perhaps we can get together on a time when the whole thing could be properly argued and the application for preliminary injunction passed upon. But as far as I was concerned, I was in Fresno trying a case. Mr. Levy was advised of these facts in New York, flew out here, and we are approaching your Honor at the earliest appointment I could get from your secretary with a restraining order and an order to show cause, bringing up the entire question. Our only purpose is to stop this settlement.

The Court: You want to stop the settlement from being consummated?

Mr. Clark: Until your Honor passes upon our right to preliminary injunction, precisely, because we feel it prejudices us to the extent of some four million odd dollars in the litigation which is before your Honor.

The Court: You mean you are not satisfied with the settlement they are making?

Mr. Clark: Mr. Levy was making that point.

Mr. Levy: I was just about to get to that, your Honor.

The Court: I asked Mr. Levy if it was a corporation's claim for refund that was pending.

Mr. Clark: That is right.

The Court: You are intervening on behalf of the stockholders of the corporation?

Mr. Levy: Correct.

The Court: So it is your own claim for refund, that is, it is the corporation's claim for refund that is now being settled?

Mr. Levy: It is not just that simple your Honor. The overall picture here is that there was a tax saving for ten million dollars for two years. That is an inchoate thing. It was simply a saving of taxes which otherwise would have been assessable against the railroad company out here, but they were never paid, and it was the use of the corporation's loss that I adverted to. In addition to that, if your Honor please, there is a fund, or will be a fund, or would have been a fund represented by a claim for refund for another year for $4,200,-

000. The justification for both the saving and the claim for refund is the same.

The Court: Then what you are objecting to is the settlement of the claim on an improper basis as to amount?

Mr. Levy: May I go on with that, your Honor? I was just coming to that, and that is the heart of this application.

The Court: The only reason I interrupted was, I was trying to find out the nature of this proceeding.

Mr. Levy: Perhaps I was somewhat long-winded in giving you the background. Here is the precise question we are urging to you at this time: We say this proposed settlement will give to the railroad company a "clean bill of health" on their ten million dollar savings which have accrued for the years 1943 and 1944. At the same time, the Government will reject the four million dollar claim for refund. Now, our objection is this——

The Court: Ten million is the claim for refund——

Mr. Levy: No, the ten million is saved by reducing the taxes that would have been paid from ten million to zero, by reason of off-setting these losses.

The Court: I see now what you are getting at.

Mr. Levy: Let us see what the effect of this settlement is. The effect of this settlement is the railroad company, which had ten million, still retains possession of that ten million dollars. On the other hand the corporation, which had a claim

for refund, which had it been paid would have been paid to it by the United States Government, was to receive nothing under this settlement, so that the entire res, after this settlement is consummated, if it should be, will be in the possession of the railroad company; none of it will be in the possession of the corporation.

Now, why is that of any significance? It is significant in this case——

The Court: The corporation claims an interest in that ten million as well as in the four million?

Mr. Levy: Yes, by the litigation, but it has no physical possession of it. And why is that important to this litigation? The railroad company, in response to the corporation's action to recover an interest in that ten million dollars worth of savings that the railroad company has, the railroad company, in its answer, has set up certain defenses. It has said, 1, you are barred from suing us as a result of a bankruptcy order; 2, you are barred from suing us because your statute of limitations has run; and, 3, you are barred from suing us because laches has prevailed. Therefore, if we have to sue the railroad company in order to assert an interest in that ten million dollars, then before we ever get to a decision on the merits, the court may say, "Well, we are very sorry, your equitable claim is a fine one, but you are defeated by three technical defenses, or any one of them." If, however, in addition to the corporation's having ten million dollars worth of savings we had four million dollars worth of refund in our till, then if the railroad

company wished to get that back from us it would have to sue us, and in fact in this very action the railroad company has a counterclaim where they say that this claim for refund is in the name of the corporation; the check would be paid to the corporation, the corporation may run off with it, so we ask that we get judgment against the corporation for the amount of the refund. Now, without possession of that refund money, without possession of the proceeds, the railroad company would never have to sue us and we would then be in a position where our entire action to share in the contested res may well be defeated because of technical defenses going to our right to sue. That is why I say our objection is not to the settling of a fourteen million dollar tax claim for ten million dollars; our objection is to the form in which that settlement is couched. In the normal course, if we had two companies paddling their own canoes, the settlement would take the form as follows: We have a fourteen million dollar claim. We are settling it for ten million. Ten-fourteenths will go to the railroad company and ten fourteenths will go to the corporation, and if you have a fight as to who is entitled to what, take your case to court and let the court determine the matter. That is the position that we say we ought to be in even when there is a settlement. I would like to ask my adversaries here why there could not be this internal shuffling between the parties whereby some part of that ten million dollars, ten-fourteenths of four

million, is paid to the corporation, and ten-fourteenths of the ten million is paid to the company. Why can't that be arranged as the method of settling instead of leaving the entire res with the railroad company and leaving the corporation with nothing? And then to add insult to that, to have the railroad come in in our lawsuit and say, "You fellows are barred from suing us. Now that you have the ten million and we have nothing, you can't sue us." That is why we say we need a temporary restraining order and a permanent injunction here. We say that this court should restrain these parties from so settling this case unless they are willing to reshuffle the amount of the settlement so as to leave with the corporation its proportionate share of this refund claim and leave the company its proportionate share of the tax savings.

The Court: Suppose this is the way the Government wants to make this settlement?

Mr. Levy: If that is the way the Government wants to make the settlement, there is nothing to prevent the parties from doing what the right thing requires them to do.

The Court: Then if that is the case, why do you need a restraining order? Does not a court of equity have the inherent power to look into the transaction, irrespective of the form of settlement and say that they would not have the right to make these technical defenses?

Mr. Levy: When you have a lawsuit that is full of hazards, you hate to add another one. We have

the hazard of whether a court of equity has the right to ignore the statute of limitations or the bar of the bankruptcy order.

The Court: What I mean to say is, can't a court of equity say while a settlement was made in this form, that in reality it was a settlement of 10/14ths of the whole claim, and therefore, that being the case, the railroad corporation is in the same position in a court of equity as it would be had it part of these funds in its possession? If that is the true fact of the matter, if that is the truth of the matter, why would equity be hamstrung by some such technical situation as you suggested might be availed of?

Mr. Levy: I think it would in this respect: Your Honor has to decide a lawsuit. We have a claim against the defendant. The defendant says, "You have no right to sue. You have no right to inquire into the merits." And if we have no right to sue, then we do not have the opportunity to bring into play these equitable doctrines, because we are barred from asserting the claim in this court, and since they have possession of the res, then there is no way by which we can urge them other than by a lawsuit.

The Court: Who represents the corporation in this litigation?

Mr. Levy: Mr. Goodrich.

The Court: Mr. Goodrich represents the corporation and Mr. Matthew represents the company.

Mr. Matthew: And Mr. Adams.

Mr. Adams: Mr. Matthew represents the Western Realty Company.

The Court: Pillsbury, Madison & Sutro represent the railroad company, and you three gentlemen represent the interveners. Is there any objection on the part of the corporation and the company agreeing now, despite the form of the settlement, that they will treat it as if it were a 10/14ths settlement of the whole?

Mr. Adams: May I respond to that, your Honor? I think the statement of counsel, so far as it goes, might have been supplemented with reference to a stipulation, the precise text of which would be of great interest to your Honor, and it should be read. The stipulation (and I say this subject to correction in precise detail) as to its terms provides that as between the parties to the litigation—and this is made between the corporation, on the one hand, and the Western Realty on the other hand, and our clients on the third hand—it provides that this settlement with the Government shall be without prejudice to the respective claims and defenses of the parties to the litigation, except that all those claims and defenses shall now be deemed to relate to a tax saving as reduced by the settlement with the Government. It provides specifically and more particularly that the claim for refund shall be deemed to have been allowed in the proportion which it bears to the net reduced amount tax saving, and that the tax saving for the subsequent years shall be deemed to have been reduced in like proportion. It further provides, and in particular,

ago and stated that they thought that the settlement with the Government, without an agreement of that sort, might prejudice their position. We, on our part, thought that an agreement that the settlement should prejudice neither the one party nor the other, would be an appropriate stipulation to make, and we resisted at all times, and will continue to resist, any effort to obtain or extract an advantage for another party as against our client, but we feel that this stipulation does not have that effect, either as to us or as to the corporation. I have answered your Honor somewhat fully.

The Court: Would the language of that stipulation cover the point that Mr. Levy makes that the corporation would be in the same position as if it had, as a result of the settlement, a part of these funds in its possession in respect to any defenses that might be urged?

Mr. Adams: I might at this time hand up to the court a copy of the stipulation and then read from it, if I may.

The Court: Mr. Levy, do you think that stipulation does not cover the matter?

Mr. Levy: Yes, sir, I think it does not.

Mr. Adams: You saw the stipulation?

Mr. Levy: I saw it.

The Court: That is really the crux of the matter.

Mr. Goodrich: That is the crux of it.

Mr. Levy: May I ask a question? I would like to ask both of my adversaries this hypothetical question: If the judgment of this court after the settlement is consummated should be that we are

barred from suing because of laches, or limitations, or the injunction order, will we get physical possession in our till of ten-fourteenths of $14,200,000, or will the railroad company retain that?

Mr. Adams: Do you wish an answer, Counsel?

Mr. Levy: I do.

Mr. Adams: I will attempt to respond to the question asked, your Honor, by stating that in our view the corporation has not the slightest claim, right, or interest in any of this tax saving. We think it all belongs to the company.

Mr. Levy: Mr. Goodrich, whom do you represent?

Mr. Adams: I am speaking for the railroad company, and my name is Adams.

Mr. Levy: I am sorry.

Mr. Adams: We anticipate such may be the judgment of the court, which is the judgment we shall urge the court to give. We contend that each of the defenses which we make on the score of the bar, laches, and limitations are sound and are not technical, and we contend also that upon the merits and in equity there is no claim before this court to any part of this tax-saving which has the slightest justification, other than the right of our company, the taxpayer. That will be and will continue to be our position, and it has been made clear also to the directors of the corporation, and counsel for the interveners is aware of it. We contend that the corporation is in duty bound and is fiduciary in respect to the matter of obtaining this settlement with the Government.

that the defenses shall not be imperiled, waived, or prejudiced, nor shall the claims be imperiled, waived, or prejudiced except and all thereof now relate to a fixed amount of tax saving or a determinable amount, in consequence with the settlement with the Government. I think your Honor will find that the stipulation, to put it in more brief terms, reads substantially to the text which your Honor has announced from the bench.

The Court: That stipulation has been entered into?

Mr. Adams: That stipulation has been agreed to between counsel for the corporation, Mr. Nicodemus, Mr. Goodrich, and counsel, that is, ourselves, for the company, and I understand counsel for the Western Realty Company will enter into the stipulation. I think, however, that it should be said that that stipulation was prepared and presented to the Board of Directors of the corporation by ourselves, representing the company, that is, through Mr. Goodrich, and that the Board of Directors of the corporation had before it our agreement to make the stipulation before the board approved the corporation continuing with the settlement with the Government. As Mr. Levy has stated, there is no argument between any party to this litigation about the desirability of determining the tax liability with the Government in an amount of about 10/14ths or 5/7ths of the possible total saving, and this stipulation was entered into at the instance of counsel for the corporation, who came to us shortly

The Court: Why was the settlement with the Government made on the basis of the ten-million-dollar claim allowed and the four million dollars rejected? Is there some special reason for that? Mr. Levy seems to think astute counsel for the parties arranged that so that they might anticipate this claim that he is now making.

Mr. Adams: I would like to make a complete disclaimer as to that, and I think the stipulation will satisfy your Honor that no such thought was in the minds of the parties. The tax settlement was made by Mr. James K. Polk, who is an eminent specialist in the tax field, and who has handled tax matters. That is a matter which has not been before your Honor. That is something to do between the taxpayer and the Government. The reasons why the settlement took this form are undoubtedly technical reasons having no relation whatever to the issues involved in this controversy, and as counsel put it, in equity (and as I think the stipulation puts it to the same effect) the settlement in the form in which it is made is not to have the effect assigned by counsel of an exaction on the part of our client as against the corporation, another party; nevertheless, we do contend and will continue to contend that the corporation has not the least vestige of any meritorious claim to any part of this money, and I would like your Honor to feel clear that that is so. We recognized when Mr. Nicodemus——

Mr. Levy: May I say I do not think the question has been answered.

Mr. Adams: That doubtless was occasioned by the nature of the question, Mr. Levy. I will stop shortly. I just want to say we recognized when Mr. Nicodemus and Mr. Goodrich came to us, as they did some while back, and said they were apprehensive that the form of the settlement with the Government might be prejudicial to their clients, while we claim their clients had no rights, they were counsel in court presenting a claim of right, and so we endeavored in the stipulation to deal with them on the basis that they claimed they had a meritorious right which we denied, and that stipulation, as your Honor will see, I think worked the thing out so that their claims of right are not lost in consequence of the form of settlement, but our defenses to those claims were not lost, either.

The Court: Mr. Goodrich, are you of the same view as the interveners?

Mr. Goodrich: We are of the same view as the interveners to this extent, your Honor, that our claim on behalf of the corporation is put forth in complete good faith, that the corporation is entitled to all the tax saving which results from the losses suffered by the corporation. What happened was that the 1942 consolidated return was filed and taxes paid.

The Court: I remember that part of the presentation of this matter which was made before me some time ago, but what I am specifically inquiring about is this: Are you in accord with the interveners' claim that the form of this settlement, no

matter whether it was activated by the exigencies of the settlement, itself, or by a desire to gain some advantage, do you or not agree that the corporation's rights have to be protected by stipulation or otherwise so that the settlement negotiated by the company will not have the effect of depriving the corporation of some legal rights in connection with the litigation itself?

Mr. Goodrich: When we approached Mr. Matthew's office on this matter we raised the identical points that Mr. Levy has raised, namely, that here was a claim for refund of four million two hundred thousand dollars, which if it was paid by the Federal Government would necessarily be paid to the Western Pacific Railroad Corporation, to our clients. On the other hand, as for 1943 and a portion of 1944, no tax was due if the entire loss sustained by the corporation were allowed by the Federal Government; but to safeguard itself from the possibility of paying taxes, the railroad company set up and now has earmarked in a separate fund $10,100,000. We suggested to Mr. Matthew's office, Mr. Matthew and Mr. Adams——

Mr. Levy: When was this, Mr. Goodrich?

Mr. Goodrich: This is not dated. Do you recall the exact date, Mr. Matthew?

Mr. Matthew: About three weeks ago.

Mr. Levy: The date of the form of settlement is February 11, 1946, which was submitted to the United States Government; in other words, the corporation had submitted a form of offer to the United

States of America before it had gotten a vestige of consent from the railroad company that any settlement by them would be entered into.

Mr. Goodrich: May I correct that briefly, Mr. Levy? My understanding is that an offer of settlement on behalf of the group of corporations was made to the Government by Mr. Polk, who was acting as tax counsel for the entire group, and had been for sometime previously. As to whether the Government would accept that offer, or not, was still doubtful, but finally the Government officials in the Bureau indicated that they might be willing, if we waived the claim for refund for 1942, to allow all the losses for 1943 and a portion of 1944. It still remained open for the corporation as to each one of the corporations in this group to consent to the waiver of the claim for refund or not, and as late as several days after we were in Mr. Matthew's office working out this stipulation. It was still possible for the corporation to withdraw its power of attorney to Mr. Polk and withdraw its consent to the waiver of claim for refund. We went to the counsel for the railroad company and presented to them the problem, in a sense, that Mr. Levy has raised here, and we told them that we did not feel that we could recommend to the board of directors of the railroad corporation a continuance of their consent to the proposed settlement unless we could work out some program by which the interests of the railroad corporation, as well as the company, and the Western Realty Company, as to all the

balance of the fund would be preserved proportionately, exactly as it would have been if we had refused to go through with the settlement or the refund had actually been made by the Federal Government. It was on that basis that this stipulation was worked out, and I think it is only fair to the court to say that on both sides counsel worked very diligently and earnestly to try to present to this court that matter clearly. All we could do was agree that this stipulation could be made if the claim for refund was rejected by the Government on our consent. We attempted to work out a stipulation that would be clear and simple for this court, and that would preserve in precisely the same status every position, every right, every defense, every possible cause of action that any of the parties might have, but would preserve it in a fund that was lowered proportionately by the waiving of the claim for refund, so that what we have now, subject to all the rights and all of the defenses that we had before, is a claim for a little over $14,000,000, reduced to a little over $10,000,000. That is my understanding of the meaning of this stipulation. I am perfectly willing to state that at any time to the court, and I think that Mr. Adams will say it is their understanding of the stipulation from the standpoint of the railroad company.

The Court: Does the stipulation meet the precise question Mr. Levy raises, that is, that it is stipulated that the settlement on this basis would have the same effect upon the rights and obligations of

the parties as if 10/14ths of this money were in the possession of the corporation? That is the point, isn't it?

Mr. Levy: I want to concretize it with this question: If this action should be dismissed on any one of the three technical defenses, who will be left with the physical possession of 10/14ths of the $4,200,000? I think that can be answered flatly.

Mr. Adams: If this lawsuit is lost, your Honor, by interveners or by the corporation upon any ground, the railroad company will keep the money.

The Court: There is no doubt about that.

Mr. Goodrich: There never was any doubt about it.

Mr. Levy: Oh, your Honor, on any ground. In other words, what Mr. Adams has just said is that if you sustain the defense of laches, limitations, or the injunction order, we will not have possession of 10/14ths of $4,200,000. Now, had this refund claim been settled as it should have been, so that we would get possession of 10/14ths of $4,200,00, then if this lawsuit were defeated on any one of those three technical grounds, we would be in possession of the 10/14ths of $4,200,000, and the railroad company would have to come and sue us without the benefit of a bar of the statute of limitations, without the benefit of a bankruptcy order. They would have to sustain on the merits that they are entitled to the 10/14ths of $4,200,000, and that is the crux of this discussion, your Honor.

The Court: Do you agree or disagree with that, Mr. Goodrich?

Mr. Goodrich: I do not agree, your Honor, because I think this stipulation means very simply that as to 4/14ths of the remaining $10,100,000, both the railroad corporation and the railroad company are in precisely the same position that they would have been in if the claim for refund had been allowed. As to the remainging portion of the $10,100,000, we are likewise in the same position that we would have been if the claim for refund had been allowed. All that happens is that the aggregate amount is reduced, but proportionately to the balance that is left, which is now $10,100,000, in proportion to the two different segments of that reduced fund. My view of this stipulation is that it says very plainly that the parties agree that as to each part, the 4/14ths and the 10/14ths, the position of the parties is unchanged.

Mr. Levy: That is not Mr. Adams' position. He has been frank enough to so state.

Mr. Adams: If I may state my position again, just to make sure I do not make a misstatement about it, we consider ourselves bound by the Stipulation, all its statements, and all its intendments. I had understood the question to be that if we were successful in this lawsuit in obtaining a judgment against these parties upon any ground, would we keep the money, and of course the answer to that is we would, and we have it.

Now, I had understood Mr. Levy to have asked a question earlier which I did not answer, and I will try to state the question and, Mr. Levy, see if

I am correct: Your question is, whether this stipulation would result in money coming into the hands of this corporation. Is that your question?

Mr. Levy: That was not my question. May I ask it again, your Honor? It is crucial to the issue here.

The Court: I understand it.

Mr. Levy: Apparently Mr. Adams does not, although I thought I had by his answer. The question is this: Under this stipulation, if the court on the trial should determine that the plaintiff, the corporation, is barred from asserting its claim against the railroad company because of laches, limitations, or an injunction order, who would be left with 10/14ths of $4,200,000? Will the railroad company retain it in its possession, or will the corporation say, "We have that 10/14ths. Come and sue us if you want it"?

Mr. Adams: I had better try to answer that in this way, your Honor, if I understand it correctly: The question now presented is whether if this court should determine that the claims of the intervener or the corporation are barred by any of these affirmative defenses in the nature of a bar, who would be left in possession of 10/14ths of $4,200,000? All right, it seems to me, your Honor, the answer to that question fairly is that I am being asked now the effect res adjudicata of a judgment not yet announced by the court. I have no doubt but that this court in this proceeding is going to determine the force and effect, validity or invalidity of all

the several claims of the parties who are before the court. This is a court of equity. I think it is going to determine the whole controversy. I think when it has done so our views will prevail, we shall have judgment; but laying that aside, I think the question asked by counsel just now is academic in the sense that he is suggesting a judgment shall be pronounced by this court which will not be determinative of all the issues.

The Court: No, I do not quite get the situation that way, Mr. Adams. If this litigation concerned only the money having to do with the railroad company's operations, and that is all that was involved, you might be able to defeat that by one of those technical objections, and that would be the end of it. However, as I understand it, this litigation involves not only that $10,200,000, but a claim that was filed by the corporation for $4,000,000. Now, Mr. Levy argued that that is a claim of the corporation, and as a result of this settlement, which is really 10/14ths of $4,000,000, the corporation is waiving its $4,000,000 claim so that he has no res at all, that he would be entitled to get as a result of the settlement, and therefore he argues—I am not attempting to decide it now, but it seems to me it is plausible at any rate—the effect of that settlement that these two companies are going to make would be the company would be advantaged and the corporation would be disadvantaged because it would not have the opportunity to meet the technical defenses, which it could not meet in this entire res

that it claims it is entitled to, 10/14ths. He does not want the form of the settlement to put the company in the position of being able to defeat the action on the ground that it would not be able to defeat it on if the res were divided in proportion to the settlement that is being made. That I take it to be his point.

Mr. Levy: Exactly.

The Court: You say the settlement with the Government eliminates the corporation's claim and that is the way the settlement, itself, came about. You have asserted that. It is evident to me from what has been said, Mr. Levy and his associates are skeptical about that. They think maybe you maneuvered it that way. I do not say that that is so, but I get the impression from the arguments. If this be an equitable proceeding, I think everybody's rights ought to be protected so that no maneuvering or agreements that are made with the Government may bring about the defeat of the claim, without being given the opportunity to be heard. It may still be that that is the way the Government wants to settle it, and that is the advantageous way to do it, and the tax people have evolved this plan, which is a way to get this $10,000,000 settlement out of the Government. On the other hand, I do not feel that I should necessarily restrain the settlement. I think maybe the thing might be worked out by some stipulation being entered into as a condition for not issuing or not stopping the settlement, because it may be an advan-

tageous settlement. I do not know. I do not want to make any agreement for the parties. They should make their own agreements. You might think this over a little bit, gentlemen. I am sorry, but I have to leave at five o'clock today. I have to catch my train. I had no idea this was going to take so long. If you want to come back tomorrow morning at nine o'clock I will hear you from nine to ten, but I have to go on with a criminal case. See whether you can't work the matter out a little further.

Mr. Adams: May I say, your Honor, of course it would not be the position of our clients to have taken any elicit or improper measures in connection with this transaction with the Government by which to obtain an advantage, and that is the furthest thing that was from our mind, and you may be assured, your Honor, that the form the settlement took was a form dictated by the practical necessities of transacting business with the Government. I think your Honor will wish to examine the stipulation, because I think your Honor will find——

The Court: I will take this stipulation home with me and read it over. Do you gentlemen wish to come back at nine o'clock tomorrow?

Mr. Clark: Your Honor, I would like to leave with you the original affidavit by Mr. Levy which forms the basis of this motion.

The Court: Have your opponents got copies?

Mr. Clark: I will give them copies right now once we file it, and I will ask your Honor to read it in connection with the stipulation

The Court: Has each side got copies of what you have handed me? Both sides will have copies of what has been handed to me is that correct?

Mr. Clark: Yes, your Honor.

The Court: Will you be here at nine o'clock tomorrow?

Mr. Clark: If we could have the engagement of these gentlemen that nothing further will be done than has been then perhaps we could set this for some day later in the week, which will be more convenient to your Honor.

Mr. Adams: Your Honor, it would be misleading certainly on our part to enter into such an engagement, when in our view the transaction with the Government is already complete, as in our view it is.

Mr. Clark: We had better go on at nine o'clock tomorrow, your Honor, because that has not been our understanding.

The Court: Maybe you will have further discussions with respect to this stipulation. I will continue the hearing until tomorrow.

(The further hearing of the matter was thereupon continued until tomorrow, Tuesday, August 26, 1947, at 9:00 o'clock a.m.)

August 26, 1947, 9:00 o'Clock A.M.

The Court: Do you want to present this matter further, Counsel?

Mr. Levy: Yes, your Honor, I would like to advert to a few items. Firstly, I would like to state to your Honor last evening my associates and I

drew up what we thought the stipulation in this case should contain. We have presented to our adversaries a copy of it, and I would like at this time to present your Honor with the original for your examination. (Handing a document to the court.)

If your Honor wishes, I will reserve my remarks until you have had an opportunity to examine it.

Your Honor will recall during the course of yesterday's argument I propounded a question to my adversaries, which to my mind represents the crux of this controversy on this application. The question was simply this: In the event this action is disposed of on the technical defenses, will the corporation retain possession of 10/14ths of the claim for refund, approximately three million odd dollars? In checking the transcript we found that either the question has not been answered, or Mr. Adams has answered the question in the negative, that is, that if the action is so disposed of after this settlement has been consummated, and in spite of the stipulations which have been drawn, it will be the railroad company which will have possession of that three million dollars. Now, if on the other hand, after the lapse of an evening, both of my adversaries should agree that the stipulation which they drew at least was designed to accomplish the result so that the corporation would retain that three million dollars, then, as I read it, the stipulation does not accomplish that result, but lawyers can sit down and we can draw a stipulation which will accomplish a satisfactory result to all parties as well as to your Honor, and that stipulation which

I have presented to you we think does it in clear, unequivocal language, so that there can be no further debate in the future as to whether it does or does not.

We stress this necessity for clear, unequivocal language I think not out of an excess of suspicion or caution. We have related the background facts that we think make it necessary for us to be in this proceeding. Your Honor will recall that the corporation never brought an action against the railroad company to share in these tax refunds and tax savings until our stockholders brought the action in the Southern District of New York. Years had elapsed since the consolidated tax returns have been filed, since the claim for refund had been filed; never had the corporation taken any action. It was only after we had launched the action in the Southern District of New York that the corporation took any action, and I believe the record which we have established in our depositions in the action in the Southern District of New York shows that it was our action in New York which caused the corporation to bring this action in California.

Let us carry that a step further: Take the very stipulation which has been submitted by Mr. Goodrich and Mr. Adams. Your Honor will notice that the only parties to that stipulation, although it be a stipulation in this action, are Mr. Adams, Mr. Goodrich, and the other defendants. The plaintiffs in intervention, who have contributed most to the commencement of this action, and the pressing of

this claim, were not advised of the stipulation, were not consulted in its draftsmanship, and were not even to be made parties to it. That makes me suspicious, and that makes me insistent on caution and clear language.

Furthermore, the original offer of settlement to the United States Government was made in February, 1947, and it is not until three weeks ago that the corporation sits down with Mr. Matthew and Mr. Adams in an effort to arrive at a stipulation as to what to do with this settlement in the event that it is accepted, and in that intervening period, before these discussions had commenced, we had written a letter to the corporation and to Whitman-Ransom, stating we felt we should be participants in these negotiations, and at least we ought to be advised of what has occurred. In the face of that record it is our contention that this corporation will be prejudiced by the form of this settlement unless the settlement is so divided that we will retain our share of the proceeds as if the United States Government had paid us directly, as it would have done in the normal course. Then we will be prejudiced, because these affirmative technical defenses of the railroad company can not only defeat our action with respect to what they have retained but will defeat our right to the entire amount of the tax savings since the action will involve only what they possess. We will be left with what the lawyers like to call the right without the remedy, and it is as good a way to be dead as any.

I would just like to point one further thing out to your Honor: In the corporation's complaint in this very action the corporation details the fact that there is a tax saving and a claim for refund, and it says, "We wish to submit to the court the question of allocating both of those as between the parties and determine the rights of the parties should it be found the corporation would be entitled to get the refund proceeds from the Government," and then as part of its relief the corporation says, "We pray that the parties hereto be enjoined and restrained from disbursing any funds in or coming into their custody or possession and constituting the refunds and reserves referred to in this bill of complaint, except upon the order of this court."

Now, what this settlement in its present form is doing is in actual fact transferring from the corporation to the railroad company the claim for a refund as reduced by the settlement. Now, the change of heart that has brought this about we cannot understand, but we can readily see the great prejudice which will result to the corporation if that kind of transfer is permitted, and we submit that the requirement, the damage, the injury is great enough so that this court at this time should sign the temporary restraining order, and we hope will ultimately sign the injunction pendente lite to prevent this transfer and the resulting prejudice.

The Court: I have not heard anything really from the plaintiff in this case, Mr. Adams. I do not wish to be sarcastic about this matter, but I would

think that if I were the attorney for the plaintiff I would be shooting off both barrels of my gun and would not be loath to accept advice from anyone who would help me maintain my cause, and I do not understand why the plaintiff in this action, who has brought the action, and who claims that the corporation is entitled, rightly or wrongly, to some part of this refund is not more enthusiastic about urging that very step be taken that would preserve the status quo, so that equity might properly resolve the rights of these parties. That is a subject that concerns me somewhat in this case. Here comes the intervener and he appears to be fighting both the plaintiff and the defendant in this case, and both parties, plaintiff and defendant, seem to be agreeable that the settlement should be made with the United States by which the claim of the corporation is disallowed and that of the defendant company is allowed, and that is a strange situation.

Mr. Adams: If your Honor desires, I would step down; but I take it my client is the adversary of both of these parties. My client is the party against whom this motion is brought, and it therefore is incumbent upon me, speaking for my client, to state the ground of our position. As far as the corporation is concerned, the corporation is our adversary, your Honor, and if your Honor would prefer to hear from the corporation first, of course, I would gladly step down for that purpose; but I think it should be borne in mind that your Honor has not yet heard argument in behalf of my client, the ad-

versary to these parties. We will, of course, present the argument.

The Court: What is the serious objection to having the matter so arranged, either by order of the court, by injunction, or some other adequate order in equity, so as to preserve the rights of all the parties in such a way that the court might proceed to adequately dispose of these claims, whether they be good, bad, or indifferent in an equity decree? How is anybody going to be hurt?

Mr. Adams: I can answer that question, I think, your Honor, but I think it would be most effective if I were to present my argument, because my argument, and the whole of it, is an answer to that question.

The Court: All right, go ahead.

Mr. Adams: I bear in mind the question which the court has asked is in effect. What is the damage or injury which might be done to Western Pacific Railroad Company, the party for whom I speak, in case the injunction or temporary restraining order now asked by the interveners were to be granted?

First, let us see what is the injunction which is asked, your Honor. These are the papers which were served upon us yesterday afternoon during the court session, and I read from the Temporary Restraining Order in the form as presented to the court: The injunction that is asked is an injunction against consummating with the United States Government the proposed settlement of the tax saving

for the years 1943 and 1944, and refund claim for the year 1942, as described in the aforesaid affidavit of Julius Levy. It is an injunction asked against releasing the United States Government or withdrawing or consenting to the rejection of, on behalf of the defendant in intervention corporation or otherwise its refund claim for the year 1942 in the approximate amount of $4,200,000, or any part of such proposed settlement or compromise, or otherwise, and finally against taking any steps whatsoever to carry out or effectuate such proposed settlement, or the release, withdrawal or rejection of such refund claim.

That, your Honor, is the injunction which is asked in this case, and the answer therefore to your Honor's question becomes, I think, more clear upon looking at the injunction, namely, that $10,000,000 is the damage or loss which our corporation would sustain, my client would sustain from the granting of the temporary restraining order that is asked here in court. I would like to make that clear to you, and for that purpose to state the origin of these tax claims so that the court may have the matter in mind. I think I may have failed heretofore in making that clear. We bear in mind that the defendant, Western Pacific Railroad Company, is the company reorganized right recently in the bankruptcy court in the Southern Division, Northern District of California; that that corporation represents a corporation which has been reorganized, reconstituted, as to which many claims hereto-

fore in existence have been barred, and swept aside. It is a fact (and it so appears from the reorganization plan) that the only parties who participated in and have any interest in the reorganized company were the Reconstruction Finance Corporation, the R. F. C., a Government institution, and the First Mortgage Bondholders. The corporation here in court was the parent company of our client, the reorganized railroad company. During the proceedings, in that reorganization proceeding, which lasted from 1935 to 1945—and in fact the final order was early in 1946—it had its day in court, and it urged in many forms, and repeatedly, the existence of equities belonging to it as against my client, the reorganized company. All of those claims were found to be wanting. The Interstate Commerce Commission found them to be without equity or value. The District Court of the United States in bankruptcy so determined. The United States Supreme Court, in 1943, affirmed the plan and repeated those determinations, and held that there was not enough in the properties of the debtor company, the Western Pacific Railroad Company, to make whole the first mortgage bondholders. That is the company of which I am speaking, and in consequence of the reorganization plan, and not otherwise, the corporation here in court arises out of holders of any equity or interest in this reorganized company. So then when we come into court we are aware of, and we feel, and we think we are correct in feeling we are responsible to the orders, the bars, and the injunctions of the bankruptcy court in respect to this reorganized

company, and it is one of our defenses in this litigation, and one upon which we believe we will prevail, that these claims have been barred, adjudicated, and swept out of existence, if there is any merit in them, by the effect of those reorganization proceedings.

The Court: These claims were during the reorganization proceedings? I notice they refer to the tax years 1942, 1943 and 1944.

Mr. Adams: Precisely. Now, the fact there is this: Beginning in 1920 or thereabouts, and for all the period in which consolidated income tax returns have been permitted, the affiliated group, consisting of the parent corporation, my adversary here in court, the defendant company, my client, and other corporations, members of the affiliated groups, filed consolidated income tax returns. That was the practice. During many of those years there was no income tax shown, no tax payable to the Government. During some of those years the corporation, my adversary, showed on its own account taxable income, but the railroad company, my client, showed on its account tax losses, with the result there was no income tax, no claim voiced then, your Honor, on behalf of our client that the corporation should pay our client on account of tax savings earned through our losses. Oh, no. It is only when the shoe is on the other foot that we hear that suggestion advanced, as we do here in court.

The Court: May I interrupt you to ask you this question: I take it that these consolidated returns covering the years involved, 1942, 1943, and 1944,

were returns that were filed jointly by the corporation and the trustees in reorganization?

Mr. Adams: That, I think, is the legal effect of it. The form in which the returns were filed, your Honor, was in the form of a return by the parent corporation, which is the form the regulations require, and of consents filed by each of the other members of the affiliated group, and as far as our client ever was concerned, informed, that consent was a consent signed "The Western Pacific Railroad Company."

The Court: The company and the corporation filed the joint returns during the period of the reorganization?

Mr. Adams: But I think your Honor's first statement is more accurate.

The Court: Was there any claim ever made during the reorganization proceeding of the same nature of the claim asserted in this suit?

Mr. Adams: That is one of our defenses.

The Court: You say it was?

Mr. Adams: No such claim was advanced. The fact is the trustees of the bankruptcy court were running this property during all the tax years in question, 1942, 1943, and 1944.

The Court: That is one of your defenses. I did not mean to interrupt your argument. I wanted to clarify my mind. One of your defenses is that because of the reorganization proceeding, this claim was washed out as a part of the process of reorganization, as it were, by reason of some fact, either failure to present it or some other ground.

Mr. Adams: Your Honor, this claim which rests before this court for $14,400,000, and will now relate, in consequence to the settlement with the Government, to a claim for $10,000,000, is a claim which could by no possibility survive the reorganization without having been presented to the reorganization court in total, and as to that defense there is no difference whatever between the refund claim and the balance of the tax saving which resulted from no tax being paid.

I would like to state, your Honor, a little bit more about the way these taxes worked out. In 1942 the trustees had taxable income. They ran the railroad and they made taxable income running the railroad for the court, and the trustees paid the $4,200,000 out of assets belonging to them as trustees of the court. It is that money that the Government had. The corporation never contributed one dime, your Honor, to any of this. It is our client's money, the court's money that they are now seeking to make some distinction about. Now, the reason why the corporation is now the nominal party in the claim for refund is that under Regulations 104 and 110 relating to consolidated income tax returns, it is prescribed that the parent corporation, or the former parent corporation, as in this case, is the agent designated for all members of the affiliated group to make claims for refund. But the fact is, your Honor, that the moneys sought to be refunded was all trustees' money, paid by the trustees in discharge of their liability to the United

States for taxes, and claimed back by virtue of the loss relating to consolidated returns.

The Court: I recall this argument being made at the time of the intervention. I do not think there is any dispute about that. As I recall it, it was the intervener's claim that the plaintiff corporation was entitled to get something, because by its joining in and making this claim on the consolidated return, it resulted in a saving to the company which otherwise would not have been made, and therefore it was entitled to get something for that, and hence the invocation of the equity power of the court to decided what would be fair.

Mr. Adams: I think your Honor has stated it fairly, and one of the answers which we believe to be simple and to be most cogent to any such claim may be stated in this fashion. The corporation stands in this court, and the interveners stand in this court, speaking for the corporation, asking for money they never had, which never belonged to them, which they never paid. And upon what ground, your Honor? Solely upon the ground that they claim that they had the right to decide, by filing or not filing the consolidated return, whether or not my client would pay the Government. Now, that claim we contend, your Honor, appeals to no doctrine of equity. It is unconscionable in its nature. It is, in effect, a claim that, by some peculiar quirk of the tax laws, a party who has nothing to gain or lose, received under the tax laws a right to extract a price for determining whether or not

another party should pay the Government. There is no equity in that. Fundamentally, this claim advanced here by my adversaries is unconscionable. That is one of the bases.

Now, your Honor, what is the reason why this claim was never advised until, as counsel for the interveners have said, they, themselves, instituted litigation in New York? I cannot fully answer that, but I can suggest to your Honor that no one ever thought about it, and I can assure your Honor that when the trustees and this court employed Mr. Polk, as they did, the bankruptcy court, and when the bankruptcy court allowed the special employment of Mr. Polk as an expert, and when the bankruptcy court directed the trustees, as it did, to set apart the $7,000,000 as a reserve against possible tax liability to the United States, and that the bankruptcy court did, so that the bankruptcy court was dealing with this important question of possible tax liability, I say when the trustees and the court did that, they never dreamed that the corporation would make such an unconscionable claim as this. No one ever thought about it, because in the nature of things it was not the sort of thing that anyone would expect to hear. In any event, the corporation was presently before the court. It was represented by eminent counsel, Judge Sloss. Judge Sloss carried to the United States Supreme Court the corporation's claims in equity, but he did not advance this claim. Oh, no, this claim is only brought up, your Honor, by stockholders representing, say, 2 per cent, whatever the per cent may be, of the

total amount of outstanding stock, which stock they purchased after this reorganization was well in process, and at prices which are a mere bagatelle. This is an afterthought suggested by the stockholders who now intervent in this court. I appreciate your Honor giving me the time, so to speak, to attempt in a rough way to state our own background of this thing.

I would like to come back to your Honor's question: What harm might be done if this injunction were granted? I stated to your Honor yesterday, and I have confirmed today through telephone communication with Mr. Polk, who is the attorney in charge, that this settlement with the Government is an accomplished thing. It has been done. It is a settlement agreement between the taxpayers and the Government. The Government and the taxpayers have determined their respective rights and liabilities. Those have been liquidated. The Government has kept $4,200,000, an amount which our client or the trustees, as I stated, paid some years ago, and in return the Government has determined that that is all that it will keep on account of the tax liabilities for those three years in question, 1942, 1943, and 1944. I take it that in the absence of the United States as a party to this action any interference at this time with that settlement would be inappropriate. We suggest that to your Honor. But I would like to state in that connection right now, as well as I may, that the form the settlement took, your Honor, was not, as I said yesterday, in anywise

dictated or influenced by the relative positions of the corporation and the company. I think I can make that clear. I will try if your Honor will permit me. I asked Mr. Polk this morning the question, "What are the reasons why this settlement took the form of an agreement on the part of the taxpayer to relinquish the fund claimed and an agreement on the part of the Government to close the returns for the subsequent years as filed, bearing in mind the returns for the subsequent years as filed showed no tax, and that the refund claim was a claim for refund to the moneys previously paid?"

The reasons, Mr. Polk stated, are these: I will state them as well as I can and I think I can be accurate about them. By a settlement which is made in this form, under which the returns as filed are closed by the Government and the claim for refund is denied, the settlement is accomplished after the following procedures by the Government: First, a review by the revenue agent in charge, the agent in the field, supported by a review by his technicians That is the first step the Government took in this matter.

The second was a review by what is called the Post Audit Section in Washington of the Internal Revenue Bureau; and there was a third review by the technicians of the Deputy Commissioner of Internal Revenue. Those were the steps to which the Government's processing of this matter went, and which resulted in the decision which has come down from the Bureau of Internal Revenue.

Now, then, had the settlement, instead of being in this form, been in the form of a proportionate allowance of the refund claim and a proportionate determination of sufficiency for the subsequent years, which is the suggestion counsel advanced, then in addition to that procedure the following would have been required:

First, another review by the opposite General Counsel of the Commissioner of Internal Revenue, followed by a recommendation by the General Counsel to the Commissioner of Internal Revenue with respect to that procedure and those determinations; the issuance of a public letter by the Commissioner of Internal Revenue with respect to those decisions; the rendition of a report to the Joint Congressional Committee on the Internal Revenue—I am not sure I have the precise title, but it is a Joint Congressional Committee. It has a special staff of its own, which then studies and reports to the committee upon the proposal. The report must lie with the committee for 60 days and, of course, at any one of those stages in the subsequent proceedings which would have been required if the settlement had taken the form which counsel suggests there could have been a decision on the part of one or more representatives of the Government that, instead of closing this matter, as it is now closed, it would be preferable for the Government to litigate. In case this claim were to be litigated it involves—I am trying to repeat Mr. Polk's words—your Honor will understand this matter I have

not handled—it would involve important and complex questions both of law and fact. For example, one question as to the date year of the loss of the corporation, which was fully argued and considered by those representatives of the Government who passed upon this matter, and other equally important and complex questions would have been involved. So that if the settlement had not taken this form it might well have been that after five years or more of litigation, extending through the United States Supreme Court, there would be a decision either that the taxpayer had $14,000,000 to pay, or nothing to pay, or something in between.

The judgment has been expressed here by all parties concerned, your Honor, that a settlement of that potential tax liability at a figure of $4,200,000, which is the effect of the settlement, is a wise and judicious thing. No one has questioned that. Furthermore, so far as the Government is concerned, the Government has acted through its several agencies after a full consideration of the matter, and has likewise determined from the Government's point of view it is a wise and prudent thing to appraise all of the chances, possibilities in this matter at the figure which the settlement determines. That is the background, your Honor, upon which I made my statement yesterday, or rather, it is a stronger background upon which I made my statement yesterday that this form of settlement was in nowise dictated by the considerations of the relative interests of the parties in-

volved. It was not. It has been criticized, however, because it may have that effect. But what does the criticism come to, your Honor? I take it your Honor has read the stipulation which we presented to your Honor yesterday. I take it that the stipulation which was presented to your Honor you have seen.

The Court: Yes, I read it last night.

Mr. Adams: Now, that stipulation was the result of some intensive work, occasioned by representatives of the corporation coming to us as representatives of the company, suggesting the very same problems that are now suggested in court by counsel for the interveners, and we think that stipulation answers those problems.

The Court: Has that stipulation been signed, gentlemen?

Mr. Adams: The stipulation is a binding compact in this fashion, your Honor: We prepared the stipulation. We submitted it to Mr. Goodrich, who forwarded it to his associate, Mr. Nicodemus, in New York. The Board of Directors of the Corporation were then meeting with respect to the matter of this income tax claim which was pending. We received from New York a request for a confirmation of our commitment to make the stipulation and we sent this telegram on the faith of which the directors of the corporation then acted. This is the telegram, your Honor:

"Responsive to request of Goodrich for answer to your yesterday's telegram to Matthew, this will

confirm our commitment that if corporation approves and Government accepts pending proposal for settlement tax liability, we will join with you in execution of stipulation in form prepared by us and forwarded to you by Goodrich."

Mr. Levy: May we have the date of that telegram?

Mr. Adams: August 13th. That evidenced our commitment finally. That day the corporation acted upon it, and we are bound, your Honor, just as we are bound to the Government by the settlement of the tax liability made with the Government. So likewise we are bound to the corporation by the terms of the stipulation which we made.

The Court: It is your purpose to sign this stipulation when it comes back signed by the corporation, is that it?

Mr. Adams: Our purpose is to sign this stipulation, and we are awaiting the receipt of a formal document to be attached as an exhibit. That is the only reason it is not now signed.

The Court: I see. Exhibit A.

Mr. Adams: Yes.

The Court: The settlement agreement with the Government.

Mr. Adams: Yes.

The Court: I do not want to interrupt you, but time is running on in this matter. I take it, as I have read these two proposed stipulations, that the difference between the stipulation that the interveners want and the one you prepared is they want

to have this money in their possession. Off-hand, I would think that if they did not put it up they would not be entitled to have it in their possession, and the court would certainly have to adjudicate that they had some right. So I do not know whether I would be willing to go with counsel for the interveners to the extent that they would be entitled to have possession of this money.

Mr. Adams: May I say, your Honor, as to that matter I believe, however, if the interveners desire to press that question they could bring before your Honor in regular course upon motion and upon notice to enable us to prepare for it, any demand of the character suggested, and your Honor would pass upon it, but what we have before your Honor this morning in this quick fashion is a request for an injunction to interrupt the consummation of an agreement with the Government.

The Court: Which both sides agree is an equitable settlement of claims for the Government.

Mr. Levy: There would be no need for an injunction, your Honor, if the proper kind of stipulation was signed. May I address myself to your Honor's observation that since we did not put up the money we ought not to retain possession. To begin with, your Honor, you must keep in mind that we are at present, if there were no settlement, we would be the normal recipients of the Government's check on this refund claim, and then this court in the action which is pending before it would have to determine whether or not we are the owners

as distinguished from the possessors, and in that way, in the normal course we would be in the position of the possessor and the litigation would determine who was the owner.

The Court: Yes, but wouldn't you first have to establish in the equity suit the right to get a part of this money?

Mr. Levy: That is what we want to do.

The Court: Before you would be in the position of being the possessor of the money?

Mr. Levy: No.

The Court: If I were to order this agreement to be made, assuming I had the power to do it, I would be in effect transferring possession of this money before it was decided whether you were entitled to it.

Mr. Levy: No, sir. Let us pretend that there were no settlement. Let us pretend that the United States Government tomorrow said, "All right, gentlemen, we have examined your tax returns for the years 1943 and 1944. They are fine. You did not pay any taxes. You were not supposed to. We haxe examined your claim for refund. You are entitled to it."

Who would get the check? The corporation. So, we are not asking your Honor to do anything other than what would normally occur in the normal course of events when we present a claim for refund to the United States Government. On the other hand, what this settlement does is this: It deprives us of possession of any part of that refund claim, and this is not merely a technical difference,

as your Honor appreciates, because of the technical defenses we could not get to first base in an effort to have you determine the merits, because the railroad company, after this settlement, having possession of the contested res, could defeat us on limitations, on laches, and on the injunction bar, and we would have the right, without the remedy.

The Court: I am not so sure that equity could not go through that in the final determination of this matter, and if the situation is as you say, and a settlement were made in such a form that the money would be paid to the claimant in refund, but because of the form of the settlement it is not made in that form, and then the technical defenses that you mentioned were made, a court of equity in making its ultimate determination of this matter, if it were necessary to pass upon these technical claims—I am not so sure that equity hasn't the power to look through that and say that that technical defense is defeated, if that is the only basis upon which the claim is defeated, and must be defeated because of the form in which this settlement of the claims with the Government was made. I do not think equity is so helpless as to be put in that position.

Mr. Adams: May I address myself to your Honor's question? I would like to read the provisions of the stipulation to which we have agreed. On page 2, paragraph B, is the following:

"More particularly the claim for refund of taxes paid for the year 1942 shall not be deemed to have

been abandoned by the settlement, but on the contrary the refund claim shall have been deemed to have been diminished in the proportion in which the aggregate of the tax savings involved in this action shall have been diminished by the settlement, and as so diminished to have been allowed, paid to the plaintiff as agent for the affiliated group designated in Regulations 110 and by the plaintiff paid into court, and the tax savings for the year 1943 and for the first four months of 1944 shall be deemed to have been diminished in like proportion. Nothing herein contained shall obligate any party hereto to make any deposit or payment into court."

Your Honor, nothing could be clearer than the statement here that it is agreed on our part that this tax settlement with the Government shall not have the effect of an abandonment of the refund claim as between the parties but, on the contrary, it shall be treated as if it had been proportionately allowed. That is all that is expressed there.

Mr. Levy: Mr. Adams, under this paragraph, if this court should determine that the plaintiff is barred by the statute of limitations, or the injunction, or laches, who will become the possessor of 10/14ths of four million two? The railroad company or the corporation?

The Court: That is not the point I just stated.

Mr. Adams: That is not the point.

The Court: The court could not, in my opinion, determine that the plaintiff is barred by these

technical defenses solely by virtue of the manner in which this claim for refund was handled, but if the plaintiff is barred by laches or some other claim in a manner and by virtue of facts and circumstances apart from the manner in which the claims with the Government were settled, then you would be barred. That is all there is to it. It would not make any difference whether you had the money in your possession or not.

Mr. Levy: By gosh, your Honor, here is a lawsuit that has hazards. Here are defendants and a plaintiff who sit down to make an agreement because they have got to make a settlement with the Government that they think is advantageous. Instead of taking the form, at least internally, whereby they eliminate a hazardous question, namely, the power of equity to ignore the statute of limitations, to ignore an injunction bar, they deliberately avoid taking that course. Now, what harm can come to these defendants if they give to the corporation what would normally come to it from the United States Government if this were not settled, or if the settlement took the usual form? Why should the court be burdened with a difficult problem?

The Court: They may be afraid of you New Yorkers and figure if you once get your hands on this money they will have a terrible time getting it away from you.

Mr. Levy: We are depositing it right in court, your Honor. It goes right into this court.

The Court: We might treat this matter this morning in the nature of a pre-trial conference as well as an application for preliminary injunction, and the court might, it seems to me, dispose of this matter, not by the granting of any injunction, because I do not think this court should, for the reasons stated, at any rate, prevent the consummation of what the parties agree is a sensible settlement of the claim to the Government, but I do think that the court can, treating this as a pre-trial matter, make an order in which, on the basis of the stipulation made or about to be made, the rights of the parties, in view of our discussion this morning, may be so protected that irrespective of the form in which the settlement of refund is made, the parties would be in a position, at least the plaintiff would be in a position, at least the plaintiff would be in a position to assert its claim urged in this suit with the same force and effect as against any technical defenses as it would have been able to assert those claims had it been in the possession of a portion of these funds, and in that way it seems to me equity would adequately protect the rights of all the parties. I do not see how you possibly could be not protected.

Mr. Levy: May I show you how, your Honor? I am trying to think along with you and this occurs to me: We are trying to project now what hazards may come during the course of this lawsuit, flowing from an unnatural way of making a settlement rather than a natural way.

The Court: Counsel has made a statement as to some reasons why in the settlement of the tax matter this was a more practical and adequate way of disposing of it.

Mr. Levy: But that did not prevent the parties from sitting down and saying, "O. K. We have both gotten the benefit of this matter. Now, let us give each the benefit of protecting each party to this litigation."

The Court: Doesn't the stipulation and the order of the court in which you are going to adjudicate the equity matters protect you? You would not get any advantage by my enjoining the consummation of this refund matter. You might kill the goose that laid the golden egg by doing that. But if this is the court that is going to adjudicate your rights eventually, and if this court makes a preliminary order in a pre-trial conference and it is backed up by this stipulation of the parties, which serves to eliminate any unconscionable procedural advantages that might accrue to your opponent as a result of the manner in which this refund settlement is made. That is a proper exercise of the powers of equity, and it serves to protect you, does it not?

Mr. Levy: Your Honor, take another look at that stipulation. The paragraph which was read to you creates a fiction. It says, "It shall be deemed this money had been paid," but it is not actually paid to the corporation. And look at the other provisions of the stipulation. It goes on

to say the defendants have all the defenses with respect to the tax savings as reduced by the settlement. In other words, whereas laches previously would not have applied to our right to retain what we had in our possession, under that stipulation it now does apply, because the amalgam of the contested res is reduced to the ten million one. Now, you say, "How can we be damaged otherwise?"

Let me pursue that a moment. Assuming each party had in its possession what it would normally possess if the Government had approved the tax returns and paid the refund, and assuming that this court evolved this theory of law, and it is not unusual, that the parties had no agreement as to how the tax saving should be shared. The railroad company possesses then ten million one. The parties have no agreement as to how the refund should be shared. That has been paid to the corporation by the Government. Now, equity, in view of the fact that the parties had made no agreement, equity says, "We will leave the parties where we find them." That is a possible conclusion of this court that I am hypothecising, and if that were the conclusion of the court the railroad company would be left with the ten million one hundred thousand dollars and the corporation would be left with the four million two hundred thousand dollars. This settlement makes that conclusion impossible because only the railroad company has the $10,100,000. We do not have the $4,200,000. so that to our mind is a hazard.

The Court: Mr. Levy, I am not particularly impressed by that, because in making an adequate determination finally in equity the court is not going to make the kind of decision that has a definite purpose behind it and yet find its purpose defeated by the very thing that you are talking about.

Mr. Levy: But your hands are tied, your Honor.

The Court: I do not think equity's hands are tied in a matter of that kind. The court is going to make the kind of judgment that, if that obstacle presents itself, will take care of it, go through it.

Mr. Adams: I take it this court will command the situation and do justice and equity in its final decree.

The Court: I will say here, and you may treat this as a pre-trial conference and the reporter is taking it down, that both sides have presented their views, and I know what the purpose and object of the interveners is, that their rights may not be prejudiced to the procedural advantage of their opponents by virtue of this settlement. The court will make a pre-trial order, which counsel can prepare, to the effect that the court, in the ultimate equitable determination of this matter, will be guided by what has been said here this morning, by the stipulation of the parties, and that final determination will be made in this matter without giving effect in any manner, procedurally or otherwise, as far as the rights of the parties

are concerned in and to this fund, to the proceedings for refund with the United States. Now, what more would you need?

Mr. Adams: I take it, your Honor, that that order would run equally to the advantage and benefit of each and all of the parties.

The Court: Of course, I am not trying to determine the rights of either party at this time.

Mr. Goodrich: Your Honor, may I add this, that the very thing Mr. Levy has been contending for here is the thing Mr. Nicodemus and I went to Mr. Matthew's office to contend for, and our first request was that an amount of $4,200,000 be laid aside and earmarked especially for us to distinguish possibly between these technical defenses applying to the money that had been paid in to the Government and the technical defenses that might apply to the money that had been reserved but not paid. The railroad company did not feel that it could do that, and we spent three days in the working out of this stipulation, and I think it was the consensus of the attorneys who were present that it had precisely the force that your Honor has expressed here, and that it preserved the situation exactly as it was, leaving it to the court finally to do equity among the contending parties. The fund is diminished by the settlement with the Government but proportionately to the balance that is left under this stipulation, as I understand it, the rights of the parties are precisely what they were before.

The Court: I think I adequately understand this matter. I know counsel might want to pursue it much further, but all that the court has before it is whether or not it should take some action at this time by way of extraordinary equitable order, and I feel that an order denying the application for restraining order upon condition that the stipulation that is represented to me is signed by the parties and is sufficient to protect the rights of the parties hereto, and that that, coupled with the statement in the nature of a pre-trial order that the court has informally made, and which may be reduced to writing, should be adequate to protect the rights of the parties.

Mr. Levy: Your Honor, may I ask whether Mr. Adams consents to that informal pre-trial order?

The Court: I have already made it. I do not think it requires Mr. Adams' consent. I think an order along those lines in the nature of a pre-trial order, reciting briefly the nature of the contentions of the parties and the intent of the court to preserve the rights of all parties, with the same force and effect as if this particular settlement and agreement with the Government had not been made, is sufficient to take care of the matter.

Mr. Levy: I am thinking of an argument to an appellate court based upon some contention that your Honor's order is erroneous, and if Mr. Adams feels it is correct I think he could so state for the record now.

Mr. Adams: The court has made the order and I understand it to be so.

The Court: Have you any objection to that?

Mr. Adams: I am not now certain, your Honor. I take it, though, your Honor's order in this proceeding is an interlocutory order such as other interlocutory orders are, and as the case develops before your Honor, your Honor will make further and additional interlocutory orders, and your Honor's order is an order and not a stipulation, and your Honor's reference to a stipulation is to the stipulation which we have agreed to enter into.

The Court: That is right. I am simply making the condition of the denial of the restraining order the execution of this stipulation.

Mr. Levy: Your Honor has broadened the stipulation.

The Court: I do not think it is proper to ask counsel whether they want to consent to some order the court has made. Somebody else might look at it differently, but it seems to me it is equitable and will protect the rights of the parties.

Mr. Levy: Thank you, your Honor.

The Court: I am sorry I could not give you gentlemen longer, but I have another trial on.

Mr. Clark: May it please your Honor, in that Western Pacific matter which was heard the other day, the parties have agreed upon a form of order which we think meets your Honor's views as indicated at the close of the hearing, and everyone has consented to it and I will pass it to your Honor to sign.

Mr. Adams: Your Honor will bear in mind that in agreeing with counsel as to his statement, when he said "consent," he means we approve the form of order; but your Honor said the order was not one made upon consent of counsel.

The Court: It seems to me to cover the matter.

Certificate of Reporter

J. J. Sweeney, Official Reporter, certifies that the foregoing 68 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ J. J. SWEENEY.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE

Tuesday, January 11, 1949

* * *

The Court: I would like to interrupt you there a moment. From your point of view how important is the evidence concerning the so-called duality and domination issue in determining the legal question?

Mr. Clark: May it please your Honor, the intervener believes that the issue of duality, if not essential to the cause of action, is of the greatest importance because, while it might well be as a

substantive question of law, and considering only the bare fact that the filing of the consolidated return and the use of plaintiff's corporation's stock loss as giving a right in the corporation, nevertheless if the directors representing the corporation were guilty of no dereliction, and that has simply been an arm's-length transaction between two companies properly represented, we think that there might be substantial doubt, may it please your Honor, that the Court could now go back and reappraise a good-faith corporate transaction. In other words, may it please the Court, the substantive question alone is the narrowest basis upon which this case could be decided. The facts are that instead of the holding corporation being represented by an arm's-length board of directors, the majority of its directors at the time of these transactions were employees of the defendant corporation; compensated by the defendant company; general counsel for the holding corporation was counsel for the defendant company; tax counsel for the holding corporation was likewise tax counsel for the defendant company; and each and all of those people were compensated solely by the railroad company. Now, in that view of the matter, your Honor, the holding corporation with respect to these transactions had no representation, and the interlocking directors and counsel between the two created the fact of the interlock resulting in these companies occupying a fiduciary relationship one to the other. And in addition to that,

may it please your Honor, you have these fiduciaries represented by identical counsel who, the evidence will show, advised one of them as to its rights, namely, the railroad company and not the other. Now, the result of that, if it please your Honor, is that on those facts the Court not only has the right but the Court has the duty to reappraise the transaction from the standpoint of fairness, and if the Court should find that transaction unfair, it has the right then to allocate the benefits to the respective company who is entitled to it. That is just on the merits.

The Court: Your point there is that it is necessary to present this evidence in this field of what you call duality of control because without it there might not be a cause of action?

Mr. Clark: Precisely. We believe it is essential to the cause of action, but should it not be, it at least, may it please your Honor, is the broadest ground on which a judgment in favor of the holding company can be supported, and we think it is a necessary ingredient in this case because of those other facts in this case.

The Court: What you are saying now is it was this domination and duality which produced an unfairness in the relationship that had its effect in the form of unfairness in the transaction with respect to these income tax returns?

Mr. Clark: The transaction, if it please your Honor, which resulted was, we contend, an unfair transaction from the standpoint of the holding com-

pany. The duality and domination entitles your Honor now to reappraise that transaction, and if you find it fair, to allocate the tax benefits to the parties in the proportion that your Honor considers fairness requires. The transaction itself is unfair inasmuch as on the filing of these consolidated returns a stock loss suffered by the holding corporation amounting to $76,000,000 was used to offset the income of the railroad company and saved $21,000,000 which it otherwise would have had to pay the Government.

The Court: I understand that. We have had some arguments in connection with this matter before. But I was wondering whether or not the unfairness of the transaction would not principally depend upon the nature of the transaction itself rather than upon who participated in it, why, and under what conditions?

Mr. Clark: Suppose, your Honor, that two independent companies were represented by arm's-length boards of directors and that they had sat down under those very circumstances and for whatever reason, and with full knowledge of the facts, the stock loss, the rights of the holding company not to file a consolidated return, had decided in their judgment—there being no showing of any dereliction on their part—that the proper thing to do was to file a consolidated return for old times' sake, let us say, and confer this benefit upon the railroad company. Now, if that were the case we have very serious doubt, if it please

your Honor, that these people, being competent persons all over twenty-one, acting at arm's length, and no dereliction on their part having been shown, we doubt very much that your Honor could step in at this time and reappraise that transaction.

That goes to the affirmative side of the case. In addition to that there are certain technical defenses here, the statute of limitations, laches, et cetera, to which the duality, let us call it, is the answer. So it also applies defensively as well as, we think, constituting an integral part of the case in chief, because, as opposed to the good faith example I have attempted to put to your Honor, let us take the facts of this case where there were no independent boards. There was almost a 100 per cent interlock right down the line, everybody being compensated by the railroad company. One of our directors, for instance, is a telephone operator in the New York office, director of the holding corporation, on the payroll of the company; with that kind of interlocking directorship represented by those companies, represented by the same tax counsel and the same general counsel, we have the facts respecting the mechanics of how this consolidated return was filed, amounting simply to this: that Mr. Coulson's firm prepared the returns which initiated this tax saving, and which set up the use of the corporation's stock loss, and that return was presented to Mr. Curry, our president, who was at the same time a vice president of the railroad company, who was given no advice whatso-

ever, made no inquiry whatever, simply signed his name; ergo, the railroad company saves for that year some $8,000,000. In other words, the corporation was not represented, your Honor.

The Court: That is not exactly what I was thinking. We are only discovering this now from the point of view of trying to limit the issues and the evidence of the trial itself. Offhand it would seem to me, unless there was a cause of action that arises out of the transaction itself, it can't be transformed into a cause of action because the persons who have dealt with it were not nice people or even had bad motives. A cause of action either existed or it did not exist.

Mr. Clark: Right.

The Court: What you have to say might have some effect when meeting affirmative defenses because there you might have a question of estoppel, waiver or other matters that might prevent the assertion of some special defenses. But it would not be fair and right to allow the holding company to participate in the benefits of this tax refund; would not become right and fair because the people who handled them were grasping or otherwise did not conform to the standards that were considered proper.

Mr. Clark: Your Honor is quite right, and I have not made myself understood, apparently. The function of the duality is to enable your Honor to roll back the curtain and reappraise the transaction as though you were there the minute before.

these returns were filed or accomplished in the manner I have described, and once that is done, then of course there has to be the cause of action or right in the holding company to these tax savings before your Honor can award them to them. The mere fact that there may have been a wrongdoing, duality or what have you, does not create a cause of action. Of course not. Now, once the duality rolls the curtain back so that your Honor has a right to remake the transaction from the standpoint of fairness, then of course our argument comes into play that under the spirit of the tax law the benefits, at least those flowing from the use of the stock loss, were rightfully the holding corporation's and not the railroad company's. Do I make myself clear?

The Court: Yes. I understand what you are getting at. I am not wholly convinced by it yet, but we have lots of time to get at that. It might be too confusing. After all, there are a lot of lawyers here and all of you have spent a lot of time on it and you want to throw a mass of documents and data in the lap of the Court on this question and we might be led astray or diverted into extraneous fields by these matters upon which there might not be any factual controversy at all.

Mr. Clark: No, so far as we are concerned, your Honor, and I have not got to that point——

The Court: Who these people are who were directors and all of that—I notice mention is made of that in some of the briefs—I suppose is no longer

a matter of controversy. They are what they were, and that is all.

Mr. Clark: That is right, and so far as the intervener is concerned, your Honor—I had not got to the point in the statement—it is immaterial to us whether the matter is handled in the way Mr. Phleger proposes, namely, by admissions of fact, which are supported by the documents, and therefore the admissions would eliminate the necessity for the documents, or whether it is handled as Mr. Adams suggests, by the stipulation of these exhibits in evidence. We do not care, because we think either way accomplishes the purpose. I was simply explaining to your Honor my initial reason for my having requested 450 exhibits because I was quite sure the defendant would not make admissions of fact which would result in the elimination of them. Now, I have not examined Mr. Adams' response, but I dare say on many of these issues he is not willing to stipulate, and I just point out that that means that many more exhibits have to go in.

The Court: I wonder if we can't find out whether there is a controversy as to whether or not there was this duality of control. Maybe the defendant does not dispute that.

Mr. Clark: Well; Mr. Adams does not dispute, I think, if it please your Honor, the bare fact of position, but he does very definitely dispute, and has throughout the case, any improper motive and he also has disputed the idea of the domination

or misuse of the control over the holding company by the James interests. Of course, I am attempting to answer for him.

The Court: When you say the "misuse," are you referring now generally speaking or to the matter of this tax problem?

Mr. Clark: With respect to these very transactions, your Honor.

The Court: Is your contention that one of the purposes and objectives of this duality of control was to deprive the plaintiff, the holding company, of its right with respect to possible refund of taxes?

Mr. Clark: With respect to these tax savings, yes, your Honor.

The Court: Was there something else you wanted to add in this preliminary discussion?

Mr. Clark: That is all from us at this time, your Honor.

The Court: What have you to say in this preliminary stage?

Mr. Adams: Your Honor was discussing with Mr. Clark the question, as I understood it, whether the claim of duality, domination and control had any materiality to this lawsuit. It is clear in our judgment that those claims have nothing whatever to do with whether or not the plaintiff has a cause of action. We agree entirely with your Honor's statement that there must first be a claim brought into court.

The Court: Mr. Adams, I was not intending

to indicate that was my view on it. I was trying to explore the matter to see if it does have that effect.

Mr. Adams: May I say that is our view. Perhaps I misunderstood your Honor's question as in effect a preliminary indication of the way your mind was working, but it is clearly the law that there must be a cause of action before there can be a derivative stockholders' suit for the derivative stockholders to come into this court attempting to speak in behalf of the corporation and, of course, the corporation must have a cause of action.

Now, as regards duality, domination and control, I should like your Honor to understand why it is that if there are issues entered in this case of that sort it is necessary for us to ask that the trial of that issue by upon the facts and on no other basis. As your Honor suggested, we have certain affirmative defenses in this lawsuit. One of them is the bar of the reorganization proceedings out of which all these transactions arose, in which all of these transactions of which complaint is made took place. And I understand that the plaintiff in this case, as well as the interveners, joined in the contention that these facts of so-called duality, domination and control afford to them a basis upon which to escape the bar of the reorganization. Likewise we have pleaded defenses of estoppel, of laches, of waiver, and we have facts to back those up, and I understand these contentions with regard to domination and control and duality are brought

forward in order to enable the plaintiff in this case to escape the effect of those defenses. That is my conception of the place that these tendered issues have in this lawsuit.

Now, with regard to those issues, your Honor—and I do not want to take the time to go into detail about this—but I would like to say there is one basic uncontrovertible fact about duality in this case that is wholly and studiously ignored in our adversaries' briefs and in our adversaries' presentation, and that fact is this, your Honor: There is and never was duality between my client, the reorganized Western Pacific Railroad Company and this plaintiff corporation. What our adversaries constantly do and it is illustrated by the statement that Mr. Clark just made when he said that general counsel for the corporation was also counsel for the railroad company, what our adversaries do is wholly ignore the basic difference between the reorganized company that was reorganized in Judge St. Sure's court and was put in possession of properties on the 1st day of January, 1945, as the vehicle for the effectuation of the plan of reorganization, and the old debtor company which went into reorganization on August 2, 1935, and which was at that time suspended, or rather on the 9th of November, 1935, when the trustees were appointed. In 1935 the old debtor company's properties became the properties of Mr. Thomas M. Schumacher and Mr. Sidney M. Ehrman, the trustees in the reorganization proceeding, and for

ten years Mr. Schumacher and Mr. Ehrman had title to the properties, owned the properties, had the income, had the tax liabilities, and the debtor company was a frozen instrument of the equity and represented very properly by the general counsel for the plaintiff corporation here in court, and in that form as a spokesman for the equity.

Counsel constantly referred to the relation that Mr. Nicodemus had to the debtor company, as if that were a relation to the reorganized company, when the fact is that Mr. Nicodemus' employment, as counsel, came to an end with the end of the reorganization. By the same token counsel spoke of duality in the relation to other directors of the holding company, when the fact is that relation was a relation brought into the reorganization in 1935, continued while Mr. Schumacher and Mr. Ehrman were the court's trustees, and was a relation of duality between the holding company and the court's trustees, but not with my client, the reorganized company. I want to make that clear to your Honor because that gives your Honor some view initially of one of the reasons why we contest, and we contest all the way through, any suggestion that there were in fact dual relations between these complainants, our adversaries, and my client, the reorganized Western Pacific Railroad Company.

The Court: Would it be an embarrassing question to ask who controls the reorganized company?

Mr. Adams: The reorganized company, your Honor, is controlled by its own directors and I will state the facts to you.

The Court: No, I mean as to the stockholders. Do the people that these gentlemen complain about, who controlled the operating company before, still control the reorganized company?

Mr. Adams: No, they do not, your Honor. The control of the reorganized company rests—the James Foundation has the largest single stock interest. The control of the Western Pacific Railroad Company rests in stock ownership with the Reconstruction Finance Corporation formerly represented by Mr. Phleger's office in the reorganization proceedings, by the Metropolitan Life Insurance Company, by the James Foundation, and other stockholders in minor capacity.

Now, the board of directors, your Honor, of this company, seven of the board of directors are Western directors selected by Judge St. Sure in the reorganization proceedings as a part of the plan and selected initially and submitted to Judge St. Sure in the reorganization by the reorganization committee, constituted of Mr. Ecker, the chairman of the board of directors of the Metropolitan, Mr. Wright, the representative of the RFC, and Mr. Coulson, the representative of the James Foundation, those being the three largest stock interests. These seven Western directors, according to the plan, were required to be selected here in San Francisco and every one of them is an independent director.

The Court: Are they now the directors?

Mr. Adams: They are, your Honor. There has

been perhaps one change or so, but there is now on the board a representative of the RFC, a representative of the Metropolitan, two representatives of the James Foundation, and the balance the Western directors, just as when the Court——

The Court: What do you mean by the Western directors?

Mr. Adams: The Western directors, consisting of such gentlemen as Mr. J. Ruben Clark of Salt Lake City, Mr. J. W. Meyer, Jr., Mr. Folger, Mr. Bell——

The Court: Do they represent any particular interests?

Mr. Adams: They do not. They represent the Western Pacific Railroad Company and all its stockholders and they do not, any of them, represent any particular interest except in so far as they may be said to represent the community from which they were selected. There is no question about that, your Honor, and I do not think there is any contention made to the contrary in this case. I do not understand so.

* * *

The Court: I was thinking of the intervener, Mr. Phleger. How far part are you two with respect with what you need to present to establish this ultimate fact that Mr. Phleger speaks of?

Mr. Clark: May it please the Court, you have not been advised that the intervener some two weeks ago stated in writing to the defendant the limitation which we place upon the very broad issue of

duality which your Honor has just described, and the limitation which we intend to follow in the brief. On December 29 I wrote a letter to Mr. Adams and served all parties with a copy of it, in which I made this statement. I will hand a copy of it to your Honor so it may form the basis of a pretrial order on this issue, if your Honor so desires. I advise Mr. Adams as follows:

"Except for such brief background as may be necessary for a proper understanding of the relative positions of the various individuals and other facts and circumstances as between the railroad company, the holding corporation and James interests, on and subsequent to January 1, 1943, we intend to limit the entire issue of duality, domination and control to the period commencing as of that date, to wit, January 1, 1943," the reason being, your Honor, that we consider the critical period pertaining to these tax transactions to start on March 15, 1943, so we went back to the first of the year. Now, we have already advised the defendant, then, as to all background beyond that date, except that which is necessary for the purpose of illustration, that we are not going to develop that or rely on it. We are only going to develop the duality and domination which took place during the critical period with respect to these very tax transactions.

Now, we went on and said: "In addition to the duality of various officers, directors and counsel, the railroad company and holding corporation, plus the practical effect and pull under the circumstances

of the James stock ownership and the source of compensation of the corporation officers, general counsel and certain of its directors, as well as its entire office expense after June 1, 1943, we will further contend that during this period the holding corporation was completely dominated and controlled and misused by the James interests through Robert E. Coulson for the advantage of the railroad company and hence James, resulting, among other things, in the tax savings which are in issue here, the said Coulson at the same time being the agent of the railroad company with respect to this very same subject matter. This is the extent of the issue of domination as distinct from duality as we now view it. We do not believe there is any relevancy in whether or not the James interests ever attempted to dominate and control the railroad company or the reorganization trustees, and accordingly we do not intend to raise that issue."

In other words, we have advised Mr. Adams in writing that the only domination that we intend to attempt to prove commences as of January 1, 1943, and is the domination by the James interests per Coulson, trustee and attorney, over the holding company, while Coulson was also at the very same time the agent for the railroad company, the effect of such domination being to advantage the railroad company. I would like to hand this copy of the letter to your Honor.

It is immaterial to us whether this be incorporated in an amendment to our pleading, which is naturally

very broad because it is drawn at a time when we just came into the case and had not developed these facts, or in a pre-trial order limiting the issue, as we suggested in our letter. Now, I take it that that limitation on that issue is entirely consistant with Mr. Phleger's view of it, and with the statement your Honor just made, namely, it is such domination and duality as affected these very transactions of which we complain in this case.

The Court: Why couldn't the issue then be limited to what was done with respect to the preparation and handling of these various tax returns?

Mr. Clark: Plus also, if it please your Honor, the positions held by the parties of stock control——

The Court: You will show, I take it, what actually was done and who handled the matter?

Mr. Clark: Who they were.

The Court: How in general the matter of the filing of these returns was done. Do you have to go beyond that on any general question of duality or control?

Mr. Clark: I do not think we have to except as is necessary to identify these people.

The Court: Obviously it is not the situation or you would not be here, but I was wondering if they might have exercised full powers of control under a duality concept in every other respect than in connection with the tax returns.

Mr. Clark: No, we are concerned solely with these returns, your Honor.

The Court: Your complaint is because these

powers of control were exercised with respect to the tax returns, you have a cause of action?

Mr. Clark: That is right.

* * *

Mr. Clark: There was one further thing with respect to the interveners stock holdings. That is paragraph 2 of this stipulation that sets forth the amount of stock held by the interveners in the plaintiff corporation which qualifies them as interveners in the case. Certain exhibits are referred to which were produced on the New York depositions, and all of these figures have not only been verified by Mr. Adams through looking at the original records, but he uses them in his pre-trial brief, and we would like to have it stipulated to so we would not be put to our proof in bringing the stock certificates out here to prove the stock ownership of our clients.

Mr. Adams: You do not need the stock certificates. As we said last Friday, it will be stipulated that the stock holdings shown at the time of the deposition will be considered to be in force at the time of the trial.

Mr. Clark: That is satisfactory. The plaintiff gives the same statement with regard to that?

Mr. Phleger: We do.

* * *

[Endorsed]: Filed Mar. 11, 1949.

[Title of District Court and Cause.]

ARGUMENT ON MOTION FOR REARGUMENT AND TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW APPEARING IN THE COURT'S OPINION FILED SEPTEMBER 6, 1949, AND ARGUMENT ON MOTION OF PLAINTIFF TO JOIN RECEIVER AS PARTY PLAINTIFF UNDER RULE 25 (c) R.C.P.

REPORTER'S TRANSCRIPT

November 28, 1949

The Clerk: Western Pacific Railroad Corporation vs. Western Pacific Railroad Company.

Mr. Lasky: In that matter, if your Honor please, there are three different matters on the calendar. There are two motions and settlement of findings, I believe. The plaintiff submitted some proposed findings.

I may say that when this was set down for this afternoon last Monday I was a little tangled up and Mr. Phleger was out of the city. I left. I was out of the city last week, and when I finally saw him I discovered he was going to be away this week, but in view of the fact that Mr. Levy was going to be here, we concluded the only thing to do was for me to come out and present the plaintiff's position.

Mr. Levy has a motion here with relation to the findings, which raises one of the two major points which were raised by the plaintiff's proposed find-

ings. Since it is a matter peculiarly within the knowledge of Mr. Levy as to past occurrences in this court before our office came into the case, it seems to us to be appropriate that perhaps Mr. Levy might present his motion first, and then on behalf of the plaintiff I can supplement that discussion. If that meets with your Honor's approval, I am willing to have Mr. Levy go ahead first.

The Court: What motion is it you are speaking of? [2*]

Mr. Lasky: Mr. Levy has a motion; he calls it a motion to amend the findings and for reargument, I believe it is entitled.

Mr. Levy: Yes.

Mr. Lasky: It is not precisely a motion to amend the findings since your Honor has not adopted findings, but it does raise an issue which we have raised on our proposed findings of fact and proposed conclusions of law.

The Court: If you are going to have any argument about findings in this case, I may make my own and just use the opinion. I really do not think there is any occasion for lengthy findings in the case. I put in the opinion that if some counsel have felt there was something that I overlooked or if counsel felt there was some need to make a finding of fact that the court overlooked, I would not deprive counsel of that right, of course.

Mr. Lasky: If your Honor please, we have not

* Page numbering appearing at top of page of original Reporter's Transcript.

proposed lengthy findings of fact. We have submitted, I do not think it is more than four pages, and we adopt your Honor's opinion, or suggest the adoption of it, with a few additions which are material, I think, to the theory upon which the court proceeded; and I think after your Honor has heard the discussion of these objections you will agree that we have not gone out of or disobeyed the intimation of your opinion that we should remain confined to what you though to be material. [3]

The Court: You think Mr. Levy should present his motion first?

Mr. Lasky: I think he should. I think it might be the most appropriate way to proceed.

The Court: Very well.

Mr. Adams: That is entirely agreeable, your Honor.

Mr. Levy: Our motion, your Honor, is a motion for reargument and a motion to amend the findings and conclusions as embodied in your opinion. We have not submitted any additional findings of fact or conclusions of law. Therefore, so far as we are concerned, we regard that opinion as embodying the findings and conclusions, and the only thing that I propose to raise upon this motion is something which is not mentioned in this court's opinion, is completely overlooked, I believe, and is of extreme importance.

As I read the court's opinion, the nub of the determination rests in your Honor's analysis of the transaction in its origin, finding, as you stated, that the tax savings which were the subject matter of

this controversy between this plaintiff and this defendant were erroneous and unjust, in reality the property of the United States government, and that, therefore, this court did not propose to commit the further iniquity of dividing as between these two parties monies which in fact belonged to a third party, namely, the United States government, and the court concluded that, therefore, the parties [4] would be left where he found them, where they were.

We do not propose to reargue any of the premises that are embodied in that conclusion. We have done a great deal of that, and your Honor has come to his conclusion, and for the purposes of this motion we accept all that your Honor has stated. But in determining where the court found the parties, and in concluding that the court was leaving the parties where it found them, namely, the plaintiff with none of the savings and the defendant with all of them, the court overlooked its own pre-trial order which was entered in just a little more than two years ago and which has gone virtually unnoticed in the course of the proceedings and has only become of importance as a result of the grounds upon which the case has been decided. Therefore, we present on this motion just one question: What is the effect of this court's pre-trial order rendered about two years ago in denying the interveners' application for an injunction restraining the settlement?

Before going into the details of the order and its

effect upon this litigation at its present stage, let me set the stage a little by projecting all of us back to that day in August of 1947 when we brought the motion on.

At that time the plaintiff in its complaint requested what amounted to declaratory relief, and it requested declaratory relief with respect to two distinct aspects of the tax [3] savings, namely, if your Honor will recall this, there were X dollars tax savings involved in the '43 and '44 tax returns. Those tax savings took the form of non-payment of tax, hence the defendant railroad company which had the income had in its possession monies which it did not pay.

In addition, another aspect of the tax savings was the refund claim. That was a claim filed by the plaintiff with respect to taxes in fact paid in 1942, and under the law, the internal revenue code, about which I am sure there can be no dispute, when the refund claim was paid or was to be paid, it would be paid to the taxpayer who filed the refund claim, namely, the plaintiff.

Plaintiff's complaint at that time requested that when and if these tax savings, namely, those in the possession of the defendant, and when, as and if the refund claim was paid over by the government in normal course to this particular plaintiff, that the court adjudge and decree that all of those savings or a reasonable portion of them were the property of the plaintiff.

Since as of those dates, the government had done

nothing, was in fact no seal of approval on the savings.

The intervener in turn had its interveners' complaint. The defendant in turn had an answer in in which, with respect to the plaintiff's prayers and claims, it pleaded as defenses to the action, among others, laches, limitations, and the bar [6] of the bankruptcy order, and in addition it contained a counter claim. And in this counter claim the defendants said that this plaintiff has filed a claim for refund for '42 taxes already paid; when, as and if that refund is honored by the United States government, this plaintiff will receive that money, and another thing, the plaintiff may dissipate the money after receiving it; we therefore affirmatively ask for judgment against this plaintiff that when, as and if they receive that refund claim from the United States government, the proceeds belong to us. So that, in reality, you had two lawsuits involving the same cause.

Now along came the settlement or the proposal of settlement, and when we learned of it, your Honor will recall that we came out in great haste with an application for an injunction to enjoin its consummation, and in lieu of submitting the pendente lite restraining order without notice, we submitted it and gave informal notice to all of the parties concerned, and as a result we had a full blown argument on the question of whether or not a pendente lite stay should be granted, which in fact turned into an argument on the whole injunction

problem. Now just what was the settlement? Why did the settlement compel us to come out here and seek an injunction? To begin with, as your Honor may recall, we did not object to the amount for which the claim was being settled; but we did object to the form of the settlement, because the [7] form of settlement, as we viewed it in the light of the litigation, would be prejudicial to this plaintiff's position in this litigation.

Let us analyze that for one moment. The settlement with the government came down to this: so far as the '43 and '44 tax returns, as to which the defendant was in possession of all the money that had been saved by the non-payment of taxes, the government was accepting those returns as filed. Therefore, the defendant remained in possession of those tax savings. The settlement did not alter that part of the status quo. On the other hand, as a part of the same settlement, the claim for refund was waived, so that, so far as this plaintiff was concerned, it was thenceforth, forever and irrevocably denied possession of the funds represented by the refund claim, even though, in the normal course, had the refund claim been honored, the plaintiff would in fact have obtained possession. So that the settlement altered the status quo. [8]

The Court: I don't want to interrupt you, but I think that would have been equally as phony as the settlement that was made with the commissioner.

Mr. Levy: I am accepting your Honor's analysis.

The Court: And for the United States to have returned three million and some odd dollars to the plaintiff who in fact paid it for taxes that should have been paid, would have been even worse.

Mr. Levy: I am agreeing with your Honor 100 per cent on the premises on which you have decided this case, and I want to advert to that subsequently to demonstrate that had that been done, this motion for reargument would beyond peradventure have been granted, and in fact would not have been made. But this much occurred: the settlement altered the status quo to the extent of depriving the plaintiff of possession of any part of the tax savings in issue but gave to the defendant all of the tax savings in issue.

Now focus with me on the question of possession after this settlement was consummated. At that time we were seeking to enjoin it, and our argument was if that settlement is consummated, the entire res in issue in this case is lodged in the possession of the defendant and none of the res in issue in this case would be lodged in the possession of the plaintiff. The form of the settlement altered the normal possessory incidents that attach where you have a tax refund claim and any [9] other type of savings.

We urged to the court at that time that possession in this case was of great importance, and we did it to the limits that counsel could foresee what the future might bring. And we argued thusly: We said that the defendants have affirmative defenses, laches, limitations, the bar of the bankruptcy order.

All of those defenses are appropriate only where plaintiff has to sue the defendant to get any part of what it thinks it is entitled to. On the other hand, to the extent that the plaintiff may have possession of anything which the defendant thinks it is entitled to, to wit: the subject matter of the counter claim, then for the defendant to prevail against the plaintiff it cannot rely upon laches, it cannot rely upon limitations; it must affirmatively sustain the burden that it is indeed entitled to the proceeds which the plaintiff has in its possession. So that we said that possession, therefore, became a matter of the utmost importance in view of the state of the pleadings.

I argued that as vigorously as I knew how to, your Honor, and in the course of giving vent to what I guess was my womanly intuition that no lawyer in any litigation can foresee all of the eventualities, but knowing that never let your adversary get possession of something which you in the normal course would be entitled to have possession of, I argued that there were possibly further prejudicial incidents that would [10] flow from the form of this settlement. I argued that it is conceivable that this court might conclude, on a basis which I stated there and which has no resemblance to the conclusion of the court—it was possible that this court might conclude that it ought to leave the parties where it finds them in and I said, "If that is true, why then should we allow the mere form of settlement to alter the normal possessory incidents that

would attach to this transaction were the settlement made in a more usual form." And as a result of that, I said, "I think the way to cut the Gordian knot is to let the settlement with the government go through in the form in which it was proposed, but that vis-a-vis, the two parties to this lawsuit, because giving the plaintiff possession of a reduced portion of the refund claim just as if the United States government had in fact settled that claim for a reduced amount and in fact paid it to the plaintiff, and when the same suggestion was made that maybe the funds would be dissipated, I said, "Well, fine; pay it to us and we will promptly pay it to the clerk and it will stay in the court."

Now, your Honor, in response to that argument, as I understood it, took the position that interveners were indeed too concerned with formalism, if I may put it that way; we were too worried that the form of settlement might conceivably produce prejudicial results in the litigation. And your Honor properly stated that, as a court of equity, you would have the [11] power to ignore the form of the settlement, view the transaction as if the settlement had taken a normal course, as if plaintiff had possession——

The Court: Where are you getting this from? Some transcript of record?

Mr. Levy: Yes.

The Court: I thought that the parties had agreed pretty much on the form of the order that was made at the time.

Mr. Levy: On the ultimate form of the order, but not on the substance of the debate. I will come to that.

Let me pass that for the moment.

Your Honor reiterated that point of view, though, and then finally came to this conclusion: as far as you were concerned, you wanted to deny the injunction motion conditioned upon the execution of a certain stipulation which the court approved and the defendants were willing to enter into and which we said was insufficient.

The Court: Mr. Levy, I don't want to interrupt you. At that time you were arguing some preliminary motion in the case. I didn't know very much about the case then except that you were engaged in a question of discussing whether the status quo should be maintained or not, and I may have made some comments in connection with that matter that haven't any relationship to the final questions to be determined at the trial of this case.

Mr. Levy: No. I may have overly embellished what went on at that time, but only for the purpose of refreshing all of us. It is two years. We are not relying on the off the bench comments that the court made. That is not the basis of this reargument motion. What we are relying upon is the order that we made on this motion, and perhaps a short cut to all of this is to read the relevant portions of the order. Now here they are.

"It is hereby ordered:

(1) That the application of interveners for a

restraining order be and the same is hereby denied upon the condition that the defendants shall enter into a stipulation with the plaintiff in the form annexed hereto marked exhibit A; and upon the further condition that said hearing upon said application of interveners shall be deemed a pre-trial hearing on the aforesaid issues as if properly noticed as such so that the court may make and enter an appropriate pretrial order pursuant thereto; and

(2) That the aforesaid settlement with the United States government shall have force and effect in this action and as between the parties hereto solely to the extent that it reduces pro tanto the total amount in controversy herein and that in all other respects this court shall and does hereby preserve [13] the respective rights and positions of all parties and shall determine the issues and give judgment herein, in the same manner as if said tax saving had been allowed and said refund claim allowed and paid by the United States government in the ordinary course and manner prescribed by law and as proportionately reduced by said settlement."

Now what is the effect of that pre-trial order? As I read it, it states that, for all purposes of this litigation, the position of this plaintiff shall be that of the possessor of the reduced refund claim proceeds just as if the United States government in the normal course had paid it to the plaintiff.

The Court: If you were entitled to it.

Mr. Levy: I am talking now of possession, your Honor; I am not talking about who ultimately may have title to it.

The Court: I don't see the relevancy of that. That was merely some order that was made so that if there were a result that would be favorable to the plaintiff, it would not be thwarted by the plaintiff being unable to realize upon it, so in order to put the parties in a position where if you did obtain a recovery you could not be defeated in that because of the fact that you lacked some possessory or other right in the matter, you entered into this stipulation.

Mr. Levy: Exactly. [14]

The Court: That presupposes. If it is determined that you are not entitled to it, what difference does that stipulation make?

Mr. Levy: Your Honor, as I read your opinion, has decided not that we are not entitled to it, not that the defendant is not entitled to it, but rather that the United States government is entitled to it, and as between these two litigants you are going to leave them where you find them.

The Court: That is not true. I think I also placed the decision on the ground that I couldn't see any reason why the plaintiff would be entitled to it anyhow.

Mr. Levy: That brings us to another point at which we quarrel.

Let us assume for the moment that your Honor did decide that you are going to leave the parties where you find them because this transaction was

so contaminated in origin that, as far as you were concerned, equity would not aid either party, or, as you put it, you would not commit further inequity by distributing it among these parties when in fact it belongs to the United States.

Now, as clearly as language could say it, in my humble judgment, the court said just that in its opinion. And just as clearly, it seems to me, that when a court of equity states that for grave and sufficient reasons the litigation, or the origin of the pot in controversy, it is so contaminated that [15] equity won't touch it but it will leave the parties where it finds them, that is a conclusive determination of the case, and it excludes as completely irrelevant any other considerations about who would in fact be entitled to this pot if the court felt that it could go and look at the equities as between the two parties.

Your Honor will probably recall from away back in law school days in the famous Hornbook cases of the old highwayman when thieves would fall out as to the devision of the loot and one thief would have the temerity to come to a court of equity and sue his partner in crime for a division of the swag other than that which had already occurred, and the court of equity said, "A plague on both your houses. A court of equity will not lend itself to the distribution of what originates in crime."

Now I know that isn't quite this case, but the conclusion in this case is an extension of it, and that is exactly what you held here. And I say that, having held that, then it becomes important to de-

termine where did you find the parties. And in determining where you found the parties no reference was made to this pre-trial order, and it is this pre-trial order which tells us where the parties were found on the day they walked into this court house to try this litigation. And if it doesn't do that, then it is hardly worth the paper it is written on. [16]

The Court: Well, I again have to say to you all that depends upon whether you are entitled to get it, and that is all, and I held adversely to you on that. I don't see how you can be helped by the pre-trial order, Mr. Levy. I have listened to what you have had to say about two years ago, but the ultimate result was that the court held that you were not entitled to it. If you are not entitled to it, then the fact that there was a pre-trial order that held that which you were quarreling about in a certain form does not help any, because that was not intended to be a determination of whether you were entitled to get it at all. I don't see how it can be converted into that as a result of any of the reasoning on which the court's decision was based.

Mr. Levy: Let me try to test that with the hypothetical. Let us assume that this plaintiff did indeed get the proceedings of the refund claim from the United States government. And your Honor's observations about how utterly preposterous any such thing would be would be just an appropriate had we received the refund claim as the settlement. Now the plaintiff has the proceeds of the refund

claim and the plaintiff is perfectly content to keep them as its share of the tax savings. Let us hypothesize that.

The Court: Even if the defendants agreed that you were to have them, it would not be up to the court to interfere with that agreement? [17]

Mr. Levy: That is just the point.

The Court: That is a different situation.

Mr. Levy: What happened next in my hypothetical is that the defendants did not recognize that plaintiff is entitled to keep them.

The Court: Then the plaintiff is only a stakeholder and he doesn't get any greater rights because he is made a stakeholder.

Mr. Levy: I am afraid, your Honor, you are not giving me an opportunity to pose my hypothetical.

The Court: Go ahead.

Mr. Levy: I want to come to grips with what I think is the fundamental issue.

Plaintiff says, "I am willing to keep that money; it is mine. I don't care; you can keep what you have." But the railroad company says, "Why, I should say not; you are not entitled to the proceeds of the refund claim." And then instead of what is now the plaintiff corporation suing the railroad company, the railroad company comes into this very court and sues the plaintiff corporation to get back the proceeds of that refund claim. That could just possibly have been the way in which this lawsuit was posed to your Honor. Indeed, so far as the pleadings were concerned, the counterclaim of the

If the court please, it seems to me, and I respectfully submit, that that must be the conclusion that follows from the reasoning of the court's opinion, analyzing and following it through. If the money had actually been paid to the plaintiff, as it must be deemed that the refund was, would your Honor, under your opinion, now order the plaintiff, under the defendants' counter claim, to turn that $3,300,000 over to the defendant because in equity the defendant was entitled to receive it? Of course your Honor could, if that is the basis of your determination, make such a judgment, but on the basis of your opinion that you would not intervene, it seems to me that that cannot be the basis of the judgment.

The Court: I think I might say there that the basis of the court's saying that it would not intervene was a little bit broader and was based upon broader grounds than the mere technical situation, I suppose, that might have been created by the pretrial order in the case. It is that, under the circumstances under which this whole tax situation developed and the results of it, as against that background the broad view that the court took was that the parties would be left where they were.

I don't think that the argument that you make in that [28] regard has changed the situation, because what you were trying to accomplish by this pre-trial order, as I recall it, and as I understand from statements that have been made, was to protect the plaintiff against any argument that might be

later made that the plaintiff did not have the right of possession of this. In other words, I did not make the decision as to leaving the parties where they were rest upon the mere possessory rights to this money or these tax returns as they may have been created by the parties, but against the background of the actual situation created by the so-called tax savings refund by the government. Perhaps I am not expressing myself clearly.

Mr. Lasky: I understand what the court is saying. I want to make two suggestions in response to it.

No. 1. The settlement with the government was not entered into with the formality required to be binding upon either side, which would have required approval of the Secretary of the Treasury. It became binding only because the government neither levied a deficiency assessment, nor did the plaintiff, in whose name suit for a refund would have to be filed, file another suit.

The statute of limitations on a suit brought by my client against the government did not run out until ten days before this court's opinion in this case. If the court had declined to approve that pre-trial stipulation under the pre-trial order [29] and had the court entered its opinion earlier than it did, the plaintiff could still have filed a suit against the government, and if it had prevailed on the tax claims the refund of $3,300,000 would come to the plaintiff, not to the defendant; it would take the affirmative decision of this court or a court to make the plaintiff turn it over to the defendant.

However, if your Honor feels that the theory upon which you entered your opinion does not lead to the conclusion for which we contend, still there are the facts which we seek to have you find on, namely that the pre-trial stipulation was entered into and that your Honor entered your order on the basis of it. Those are facts which are material to the theory we propose to present to the Appellate Court.

The Court: I think you could have written this up, Mr. Lasky, without my making any finding in connection with it. As a matter of fact, I don't see how I could do that, because I am taking into consideration the pre-trial orde in rendering the decision in the case. If you contend that that pre-trial order would have that effect, I think you should bring that up as part of the record, but I don't see what good it would do for me to make a finding that there was a pre-trial order made which I did not take into account. What advantage would that be to you?

Mr. Lasky: It will be a convenient and handy way to [30] present it to the Appellate Court. May I say that the plaintiff's finances are so restricted that it has got to think of the most convenient way of getting the record before the Appellate Court.

The Court: Well, the pre-trial order isn't very long. Can't you include that in your record?

Mr. Lasky: I suppose we could.

The Court: If you need any order from me to include it in the record, I will make the order.

defendant was just that: they wanted to get back the proceeds of the refund claim. Having come in before the court with Mr. Adams representing the plaintiff railroad company in its suit to get back the proceeds of the refund claim, the same debate occurs and the same trial is gone through, and the same evidence is presented to the court and the court writes the same opinion, only this time what the court says is this: "The whole payment by the United States government is eliminated for reasons A, B, C, D, E and F. I therefore will not commit the further inequity of distributing to this railroad company what this corporation has; it really belongs to the United States government; I am going to leave the parties where I find them." Where would you leave the parties then? You would have left this railroad company with $10,000,000 and you would have left this corporation with $4,000,000, and that would have been your decision.

Now, to my mind, that is exactly what you have before you in this case; no difference. The mere fact that the corporation is the plaintiff asking to get back from the defendant what the defendant has, and the defendant is counter claiming to get back from the plaintiff what the plaintiff has does not disturb the essential clarity of the hypothetical that I gave you. In each case the parties are coming to the court saying, "Give us a judgment that we are entitled to a distribution." In each case the court is just as appropriately saying, based on your Honor's reasoning, that you must leave the parties

where you find them. So that it becomes crucial to find out where the parties were left, where you found them. That is the importance of the pre-trial order, because when I argued to this court on our injunction motion that the way to cut this Gordian knot is to place this money, physically transfer X dollars and to put them in the clerk's custody, your Honor's response to that was, by your pre-trial order, "You will have all of the incidents that attach and you will indeed be in the same position as having in your pocket or in the clerk's pocket the reduced proceeds of that refund claim."

Now if that is what the order says—and I submit that language could hardly be chosen which would say it more clearly—then your Honor, by concluding that the parties must be left where you find them, should give effect to the pre-trial order and say that you find this plaintiff in possession of X dollars.

Now let me come to the next problem. Let us take the highwayman case, just to make more graphic what we really have involved here. Supposing the highwayman's case when one thief sues another for distribution of the proceeds, the plaintiff thief comes into court and says, "Here is the contract that I have with my co-thief in which for good consideration complying with all the perquisites of the law of contracts, he has promised to give me 50 per cent of whatever swag we steal." There isn't any doubt in your Honor's mind [20] that you have a good contract there, you are entitled to recover. But the court says, "Oh, hold on; I am not

concerned with whether your contract is good, bad or indifferent. You are in no better position in this court than if you did not have a contract and you came into this court of equity asking for a fair distribution of the swag, because, as far as I am concerned I stop my inquiry short of analysis of the equities between the parties or their legal rights or equitable rights and I stop it short because this court of equity will not assist either of you in achieving relief against the other. I will leave you where I find you, and if you are unfortunate enough to be left with nothing and he is left with all, even though you have got a good contract otherwise, that is too bad; you don't get a decision; I am going to leave you where I find you." But alternatively you do have a situation there which is mutually exclusive, your Honor. A court of equity that goes to leave the parties where it finds them would be extremely careful that it would not in the same breath turn around and give judgment to the defendants to recover any part of the same swag of the plaintiff. The court is going to truly leave the parties where it finds them.

And that, I say, is the situation we have here. We have only, to my mind, one issue on this motion; that is, does the pre-trial order leave this plaintiff in the same position as if it had physical custody, possession, the right to [21] possession of the proceeds of the refund claim as reduced. It is utterly immaterial what the court would do were it disposed or empowered or authorized to look into the relative equities as between the parties.

The Court: But the refund claim, though, was abandoned.

Mr. Levy: Exactly. The refund claim was abandoned under [21A] the form of settlement as submitted, and we said that was prejudicial; that the settlement should have been so formed, or if that were not possible, that, by agreement of the parties, plaintiff should be given possession of the pro tanto reduction of the refund claim.

To put it more concretely, what you really had at issue was twenty-one million worth of taxes from the government. The settlement took the form of approving the two tax returns that were filed adding up to $17,000,000 savings and rejecting the refund claim for the $4,000,000. So, in fact, you had the settlement of $21,000,000 savings by the payment of $4,000,000 worth of taxes. Now the form that it took was that the claim for refund was waived.

The Court: Wasn't that exactly what you have done in the form in which it was handled? The net picture was that the defendant was liable to pay $21,000,000 in taxes and it was satisfied to escape the payment of $17,000,000. That was the net result.

Mr. Levy: Exactly. The purpose of our injunction——

The Court: The claim for refund may have been something else; it could have been some other item that was taken into account in determining the amount of the tax liability or non-tax liability of

the defendant. It was merely material that was there that was availed of and made use of in determining the extent to which the defendant did not pay these taxes. [22]

Mr. Levy: Exactly. That would be true if there weren't this litigation and if there weren't claims and cross-claims between this plaintiff and defendant.

The Court: I don't think the United States government paid any attention to that—at least I hope not—when it made the settlement of this matter.

Mr. Levy: None whatsoever, but we paid attention to it, since we were representing the plaintiff here, and our point was that since in normal course any refund coming would be paid to the plaintiff, and plaintiff would have possession of it subject to your Honor's determination; and in that normal course if the tax returns for '43 and '44 were approved they would have possession of those savings subject to your Honor's judgment. Our argument was in view of the pleadings and the defenses and the possible arguments, the settlement should not alter the position, the status quo of the parties. That was the argument we made. We were not asking your Honor to prejudge the case and we argued that we were entitled to keep the refund.

The Court: Suppose, Mr. Levy, there wasn't any tax paid, there was no refund made, the total amount of taxes due the United States was twenty-one million and it was settled by the taxpayer pay-

ing four million and not having to pay $17,000,000. Would that have been any different than what was done? [23]

Mr. Levy: It would as far as the rights of these parties are concerned on the basis upon which the court has decided it.

The Court: Wouldn't the tax liability and tax savings have been the same?

Mr. Levy: So far as the United States government is concerned, it is just the same. Let me again revert back to the hypothesis of the highwayman. Suppose the man from whom they stole the money, all he knows was that his money was stolen, but as between one thief suing the other thief——

The Court: I don't think you should emphasize that——

Mr. Levy: I am making the argument because that is the origin of the whole doctrine. I don't think any of us needs to have a guilty conscience. I make the hypothetical because it emphasizes the nature of the problem. That is the way this problem comes into court for judicial determination more often than not.

To get back to the hypothetical, as far as the person from whom the swag came, of course it is immaterial what the pot is, it has all been taken away from him, and wrongfully, too. But when one of the co-venturers in this illegal venture sues the other co-venturer and the court decides, "I am going to leave the parties where I find them," then

it becomes important indeed to see who is sitting with what.

I am not appealing to the court to resolve who is entitled to what, and it indeed does not resolve who is entitled to what. It says, "I don't care who is entitled to what; I will not let a court of equity be used to further the rights of either party; I will leave them where I find them."

And to our mind the pre-trial order is what leaves us where this court should find us as of the date of this trial and as of the date of the decision.

The Court: That is the basis of your motion for reargument to amend the findings of fact?

Mr. Levy: That is indeed, your Honor.

The Court: There is another motion, is there?

Mr. Lasky: There is another motion which I would like to urge later because it has nothing to do with this subject matter. The plaintiff has submitted some proposed findings of fact. Finding No. 1 adopts the court's opinion and it is supplemented by six or seven specific findings and to make them specific, and raises the same issue which counsel has just discussed. I would like to supplement that since it is the subject matter you have been hearing about.

The claim for refund, if the court please, was not abandoned. What happened under the settlement was that the government rejected it. If a refund had been paid, it would have come to the plaintiff subject to your further orders as a court of equity as to what should happen to it.

Plaintiff declined to permit the defendants' counsel to consent to the rejection unless a stipulation was entered into. That stipulation which was filed in this court states in so [25] many terms that it must be deemed that the refund so allowed was paid to plaintiff as the agent for the affiliated group, and by the plaintiff paid into court.

After that stipulation was worked out which provides that it must be deemed a refund which had been paid to my client, Mr. Levy came in and objected that even that might not be clear enough, and on the basis of it he obtained your Honor's pre-trial order which provides in so many words that the case shall be decided "as if said refund claim had been allowed and paid by the United States Government in the ordinary course and manner prescribed by law."

That meant to the plaintiff, and in our proposed finding No. 7 we request the court to make a finding as to that, that that stipulation was entered into, adopting it by reference, and that the court order, the pre-trial order, should be entered.

Now whether or not the court believes that from those facts follow the conclusion for which Mr. Levy has argued, and in which we concur with Mr. Levy, I think it is pertinent to your Honor's theory and the facts should be succinctly found in the findings so that they can be presented to the Appellate Court.

I think Mr. Levy is correct when he is apprehensive, for this reason: Your Honor's basic reason-

ing—you may not have put it in your opinion, but at least the basic theory was that [26] here were parties taking part in something that was improper, the money did not belong to either, therefore a court of equity would not intervene.

Hence, if the $3,400,000 must be treated for the purpose of this case as if it had been paid to the plaintiff, then, under your Honor's theory, it seems to me that the court would have to leave it also where it found it. Our proposed conclusion upon this amendment reads as follows:

"By virtue of the stipulation filed herein on September 5, 1947, and this court's order of August 29, 1947, the sum of $3,385,000 must be deemed to have been refunded to plaintiff by the Treasury Department in the ordinary course and manner prescribed by law and by the plaintiff paid into this court."

I may interrupt to say that that seems to follow inevitably from the stipulation and court order.

"Said sum is now held by defendant as agent of the court. Defendant should be directed to return said sum of $3,385,000 to the clerk of this court, and the clerk should be directed to deliver said sum forthwith to the plaintiff in accordance with this court's opinion that the funds or tax savings resulting from the settlement with the government should be left with the party receiving the same; [27] and the court further concludes that defendant should not be required to account to plaintiff for any tax savings not represented by refunds."

Let me ask one more question. [38]

The Court: All right.

Mr. Levy: Let me pose this question to you: Take my case of the thieves having fallen out and one suing another, and take my case where, not that they did not have any agreement but they indeed had a contract between them,—a unique kind of thief—and under the contract the plaintiff came into court merely stating a cause of action for breach of contract, the contract being annexed, and in addition saying, "The defendant has the proceeds; we are entitled to 50 per cent by reason of the contract." That is his cause of action. The defendant comes in and espouses any number of defenses. Then the case goes to trial, and your Honor, before you have heard more than one witness on the stand—the gentleman testifies that the way in which the fruits of this venture came about is, "I, Jones, the witness, held up Pete Smith," I could visualize where in that instant the court would say, "I have heard enough," and decide the case at that point without knowing who had what right to the proceeds or what right to the title and decide the case and say, "I leave the parties where I find them." That makes only one thing important to the litigants, and that is, where do you find them? Where do they find each other? Possession may not be important to the court; title is of no importance to the court, but so far as the judgment is concerned and these two parties, it is all-important to know who sits holding what. [39]

The Court: Mr. Levy, you are really making a motion for a new trial in this matter, and I hope I am not going to have to hear it all over again.

Mr. Levy: No.

The Court: I don't see how it possibly arises in connection with findings, because as part of the record you could bring it up to the Appellate Court and make your argument there.

Mr. Levy: That is why we moved to reargue and to amend the findings of fact. That was our reason. We felt that it would require an amendment of only the last line, but it happens to be the all-important one.

The Court: Well, for the sake of the record, I will deny your motion, Mr. Levy, and on your record I will protect you on your right to bring up these matters in connection with the settlement, with the making of the pre-trial order so that you may have those matters before the court on which you base your appeal.

Mr. Lasky: Shall I proceed with the other matters?

The Court: Yes.

Mr. Lasky: There are two other matters, and one of them I would say is a formal matter and ought to be non-controversial. Whether it is going to be objected to, I am not sure.

It is a motion to bring in the receiver as a party plaintiff. On October 19 of this year the Chancery Court of [40] the State of Delaware appointed Mr. Alexis DuPont Bayard as receiver of the plaintiff corporation.

Under section 68 of the Delaware Corporation Law, a court of chancery may revoke a charter for anyone of a number of causes, and under the general equitable law, your Honor, a court may take jurisdiction of a corporation where its primary corporate duties fail and may make such necessary adjudication as it deems proper.

In view of the outcome of the Western Pacific reorganization and the outcome of the Denver & Rio Grande reorganization, nothing remained for the plaintiff corporation to do but to collect such assets as it had and distribute them to its stockholders. So the Attorney General of the State of Delaware filed a bill in equity in October, and on October 19 a receiver was appointed and was directed to take charge of the corporation's assets, and the order, which is part of the moving papers here, particularly specifices that he shall enter his appearance in this suit and prosecute it and select attorneys to represent the receiver, and he authorized us as attorneys for the plaintiff to appear in his behalf.

Rule 25(c) of the Rules of Civil Procedure provides, as your Honor knows, that——

"in case of any transfer of any interest, the action may be continued by or against the original party, unless the court upon motion directs the person [41] to whom the interest is transferred to be substituted in the action or joined with the original party."

In other words, it seemed to us that we were in duty bound to advise the court before judgment

was entered, that the receiver had now taken over plaintiff's assets and to apply to this court, in its discretion, to either substitute the receiver or join the receiver as a party plaintiff. And it seems to us the record ought to fully disclose the real relationships of the parties in interest in this case. So what we have asked the court to do upon this motion is to make an order that Mr. Bayard as receiver shall be joined as a party plaintiff for all further purposes of the case. It seems to me to be a perfectly formal matter to get the right parties before the court.

Mr. Clark: The intervener has no objection to that motion.

The Court: Have you any objection to that?

Mr. Adams: Yes, I have, your Honor. I will state it very briefly. Rule 25(c) is a rule under which it is discretionary for the court to permit the joinder of a new party as transferee of the interest of a party. The rule follows state court practice, particularly that of New York and California. The rule is that the court is not required to take in the new party upon its application. It is entirely proper, in other words, under the practice and the rule for that litigation to go forward in the names of the parties to the litigation when [42] the fact, as in this case, is that the new party stands in the shoes of the original plaintiff, it doesn't seek to appear as a party having any different or individual interest different from that of the corporation itself, the plaintiff. Now, as I say, it is entirely dis-

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Vol. II

TRANSCRIPT OF RECORD

(Pages 445 to 910)

Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DUP. BAYARD, RECEIVER, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN AND J. S. FARLEE & CO., INC., PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 150—PETITION FOR CERTIORARI FILED JUNE 23, 1952
No. 160—PETITION FOR CERTIORARI FILED JUNE 26, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAIROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Transcript of Record
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Appeals from the United States District Court,
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

Mr. Adams: No order is required for that purpose.

The Court: You are entitled to have anything you want to rely on in the record. That stipulation is an exhibit in the case, isn't it?

Mr. Adams: Yes, it was an exhibit.

Mr. Clark: The pre-trial order is.

Mr. Adams: The pre-trial order is an exhibit, there will be no question about it.

The Court: If there is any question, that pre-trial order can go in as part of the record.

Mr. Lasky: That may serve our purpose as far as proposed finding 7.

The Court: If there should be any question about it, I will order it included in the record.

Mr. Levy: If the court please, I had some other proposed findings. There were only five or six of them. [31]

Mr. Adams: Do I understand that this matter is disposed of, your Honor? I would suggest that we stay with this one subject.

Mr. Levy: That was what I was about to ask the court, whether the court wished to proceed with the other motions before the court or wait.

The Court: As Mr. Levy has come a long way to present this matter, I don't want to take sort of snap judgment on it, but I feel, in my opinion, that that does not affect the basic grounds upon which the opinion is based. Anything that you want in the record so that you can properly present that up above, the court will make such an order as

will enable you to bring up any of these records that you wish.

Mr. Levy: I have in mind, if your Honor would permit me, I would like to make a few further comments with respect to our different lines of thought unless you think that no point will be served by it.

Mr. Lasky: I will defer my other matters until this has been disposed of.

The Court: I don't want to shut you off. Is there anything else that plaintiff wishes to present?

Mr. Levy: Just this one observation: Your Honor seems to think that the pre-trial order had importance only insofar as it might reflect upon some procedural disabilities that might occur in the course of the litigation. I think you so [32] expressed yourself just a moment ago.

I don't see any difference—let me withdraw that and state this: I think that in so narrowing the effect of that pre-trial order, you set a premium and in effect penalize counsel who urged the necessity for an injunction at the time that they did so, because, believe me, had I had the foresight and mental powers and perspicacity to anticipate specifically what your Honor decided in this case, I would have stated to the court that "one of the reasons why I want this corporation to have physical possession of the reduced amount of the refund proceeds is because this court may conclude that the transaction with the government was such that it would leave the parties where it finds them."

And had I had any such notion in mind, I would have so stated to the court.

Now in lieu of that, this is what I did state to the court—and I quite frankly say lacking the brain to anticipate what the course of the long litigation could produce where possession would become an all-important factor—and this is what developed; I am reading from the transcript of that argument.

"The Court:" ——let me jump that and come to this. I may paraphrase. You, that is, the court, say:

"How can we the plaintiff be damaged otherwise by the form of this settlement?"

And I went on to state how. [33]

"Let me pursue that a moment. Assuming each party had in its possession what it would normally possess if the government had approved of the tax returns and paid the refunds, and assuming that this court evolved this theory of law, and it is not unusual, that the parties had no agreement as to how the tax savings should be shared. The railroad company possesses then ten million one. The parties have no agreement as to how the refund shall be shared. That has been paid to the corporation by the government. Now, equity, in view of the fact that the parties had made no agreement, equity says, 'We will leave the parties where we find them.' That is a possible conclusion of this court that I am hypothesizing, and if that were the conclusion of the court then the railroad company

would be left with $10,100,000 and the corporation would be left with the $4,200,000. This settlement makes that conclusion impossible because only the railroad company has the $10,100,000. We do not have the $4,200,000, so that to our mind is a hazard."

That is the way in which we were thinking when that request for an injunction and the pre-trial order were submitted. We could not be expected to anticipate every respect in which possession might become of crucial importance in the determination of a long lawsuit, but our intuition was sound, and that [34] is, that we ought to have possession of what in the normal ordinary course we would have possession of but for the mechanics of the settlement adopted by the defendant and its representative vis-a-vis, the United States government.

The Court: How would you get the possession without some judgment or order?

Mr. Levy: Very simply.

The Court: How could you get possession of the $3,000,000?

Mr. Levy: You mean right today?

The Court: No, no, at the time this happened, how were you going to get possession?

Mr. Levy: Your Honor answered that before. The United States government was not concerned with any internal squabble between the parties, a consolidated family, substantially.

The Court: You were coming in asking this court to issue an injunction, weren't you?

Mr. Levy: Certainly, to restrain settlement.

The Court: And this pre-trial order was made in lieu as a settlement of the application for injunction.

Mr. Levy: Exactly.

The Court: Now, it, the railroad company, was not admitting that you were going to get this three million some odd dollars——

Mr. Levy: From the U. S. Government?

The Court: Yes. [35]

Mr. Levy: The defendant railroad company itself cannot deny that were the government to pay the refund claim or to settle it separately, the plaintiff in this case would have had possession. Of that there is no dispute.

The Court: If you could have got it, but I don't suppose the defendants' representatives would have stood by and let you collect that.

Mr. Levy: Exactly. That is why we resorted to this court and that is exactly why we say——

The Court: It was a fight over who was going to get it. It would have taken some sort of judgment to determine that. You couldn't by some act of your own have determined that matter in pretrial.

Mr. Lasky: The government would only recognize the plaintiff upon the settlement.

Mr. Levy: We are not talking about the same thing. Let me go back one step. The regulations and the statute provide——.

The Court: I understand that; the refund goes to the man that pays it.

Mr. Levy: Oh, no, that is in error.

The Court: The refund goes to the taxpayer.

Mr. Levy: That is it exactly, which is the parent corporation in our family. I am not saying that by the government's act of paying to the parent, ergo, ipse dixit, the [36] parent has title. I am not saying that. What I am saying is that there can be no dispute that the refund claim in normal course would have been paid to this plaintiff. This plaintiff would have had possession with a cloud and the cloud would have been resolved only by this lawsuit. And I say that this court, had it resolved the cloud and said, as a matter of the fundamental rights of the parties here, the defendant is entitled to a judgment, this pre-trial order would have become academic and just as the pre-trial order would have become academic if the court had decided there is nothing to the defense of laches or limitations. But the court did not say that. What the court said was that "we will not inquire into the matters; we will leave the parties where we find them because the transaction in origin was contaminated." Therefore, possession is not academic. This is one of the few instances where a lawsuit winds up with nothing being more important than who has possession rather than who has title.

The Court: Personally I think that was a lot of anxiety and effort over nothing, because, whether you entered into a stipulation or not, if this court decided that the plaintiff was entitled to all this money, there would have been a judgment against

the defendants for that amount of money and they would have had to pay it. So it doesn't loom very large in my mind what the effect of this pre-trial order and stipulation is. What difference does it make? If as a result of [37] this litigation it was found that this money should have belonged to plaintiff, there would have been a judgment against the defendants to pay that amount of money.

Mr. Levy: May I pose a question to your Honor? I am trying to throw some light on this problem; I am not looking for a fight, so to speak, just a point of great interest and great importance in this lawsuit. Let me say nobody need have any guilty feeling about this——

The Court: You weren't worried about that, that if you won this case you wouldn't have gotten judgment for the amount of the taxes?

Mr. Levy: No, but what I was worried about was that possession might be the determinative factor.

The Court: That brings me back to what I said in the very bognining. The only point of that was that if it was determined on the merits that you were entitled to this money, that you would not have been up against some technical obstacle that you were not entitled to get it nevertheless because you did not have possession.

Mr. Levy: Not at all. It is just as appropriate that what we were worried about was that a court should stop short of inquiring into the merits and merely rule on something which makes possession all important, which is what you have done.

Mr. Lasky: That is why our proposed finding, I thought, was better than their sustitute. Their substitute asked for an affirmative finding that the evidence shows disclosure. Our proposition was simply that it did not disclose any fraud, and it certainly does not.

The Court: No, but that isn't an issue in the case.

Mr. Lasky: It seemed to us that it became related to the basis of the opinion.

The Court: It is sort of insinuated into it.

Mr. Lasky: Yes, the unclean hands doctrine, parties to a wrong, the court would not interfere because the taxes should have gone to the government and they have not; it invited a kind of scrutiny the court could not give it. The implication was that there may have been something wrong about it, consequently this court would have nothing to do with the situation. That is certainly the implication we got out here. If that is so, certainly the evidence did not disclose it, and the evidence certainly discloses that the tax operations, however they may be characterized, were conducted by the defendant and its tax counsel, not by the plaintiff.

The Court: There is no question about that.

Mr. Lasky: And that is the whole purport of the findings. Let me take them up again.

Proposed finding No. 1 adapts the court's opinion.

Proposed finding No. 2 states those dates merely for [56] convenience.

Proposed findings 3, 4, 5, 6, 7 and 9 have to do

with what your Honor stated the evidence clearly shows, and proposed finding No. 8 had to do with the way and the nature in which the settlement was carried out with the government, which we took directly from documents.

As for any details of language——

The Court: I see that counsel for the defendant rephrased every one except the first.

Mr. Lasky: Yes. In doing so——

The Court: Do you object to his form?

Mr. Lasky: Yes, because it is not rephrased at all. What he has done is to say, "Your finding ought to be rephrased," and he has gone off on a different subject and repeatedly finds what your Honor in your opinion has held to be otherwise.

The Court: Let's see.

Mr. Lasky: I am prepared to submit our phrasing and counsel's phrasing and let your Honor determine that as you see fit, because I think it is rather unprofitable to stand in a court room and kind of bicker around about whether there should be one word or another. Your Honor is thoroughly familiar with the law.

The Court: I just want it clear, Mr. Lasky, your purpose in these findings is not in connection with the issue of duality [57] but for the purpose of having a finding in the record as to the non-participation of the plaintiff in the so-called tax settlement.

Mr. Lasky: To sum it up briefly, correct. You expressed your views on duality in the opinion and we are not trying to alter or touch that subject at all.

The Court: Why couldn't one finding be sufficient to cover that, then; that the court finds that in the preparation of the documents, in the conferences and in all matters having to do with the settlement arranged with the Bureau of Internal Revenue, the plaintiff did not participate? Couldn't you simplify that by making one finding?

Mr. Lasky: Possibly we could do so.

The Court: I mean, if that is your sole objective there.

Mr. Lasky: Your Honor's opinion of course also referred to the signing of various papers by the plaintiff's president. Of course Mr. Curry was the plaintiff's president, and our point here was that while he signed them, that really was not the plaintiff's act.

The Court: Didn't I say too the Board of Directors were not——

Mr. Lasky: I think you may have said it with respect to some matters but not others. I don't think it was said with respect to the power of attorney.

The Court: I see. [58]

Mr. Lasky: Perhaps I can suggest this to the court: The court knows what our point here was. Perhaps we could just leave it with the court to phrase it in a way you think appropriate.

The Court: Can you come to some agreement as to what form you want the findings in? In other words, would it be satisfactory to both sides if the court were simply to say the opinion, insofar as

cretionary with the court whether it shall make any order; but when the new party seeking to come in does not have a position in the litigation different from that of the transferor party, then the ordinary, and I think the best, practice, is for the court to order a substitution, if it is going to make any change, of the transferee in place of the transferor as a party. That has not been applied for here. This application is an appleiation for the receiver to be an additional party. And we already have, as your Honor well knows, two spokesmen on the other side for the corporation's interests, and this is an effort to get a third.

Now we are somewhat apprehensive that while the receiver now appears through the corporation's own counsel, and thus indicates for the time being that his interest is the same as that of the corporation, that the fact may develop that for some reason he may take still an independent position. We don't know that.

Now may I say this: While it is entirely in the discretion of the court to act one way or the other where there is a transfer of interest, it is not clear upon the record [43] presented to your Honor with respect to the appointment of this receiver that this receiver is in fact the transferee of the corporation's interest.

It is a remarkable set of papers. When you take the set of papers and try to tally them with the Delaware law, you will find that the application for receiver refers to section 68 of the Delaware Cor-

poration Law as one of the grounds. That statute provides that upon the dissolution of a corporation a receiver may be appointed, but this set of papers shows that this plaintiff corporation has not yet been dissolved.

The application is also grounded upon the general equity practice of Delaware courts, and I wouldn't pretend to be familiar with the equity practice of the Delaware courts, but I do notice that the order of appointment of the receiver recites as its foundation that either the case is one for the appointment of a receiver under section 68, or, in the alternative, under the equity practice, so that your Honor cannot tell from these papers which it is.

It is the Delaware law that a receiver appointed pendente lite does not take title to the corporation's assets, and it would only be in case this receiver were one appointed under section 68 after dissolution of the plaintiff corporation, as I apprehend it, that this receiver would have title.

Now that is about all I want to say about this, except to [44] suggest to your Honor that, in view of the character of the papers presented at this time and in veiw of the immediate status of the litigation and the doubt as to whether this receiver is a proper party, perhaps the best thing to do would be to deny this application without prejudice, because there can be no possible prejudice from the denial, and wait until time develops that this receiver can show in fact that he is what section 25(c) requires, namely, the transferee of the interest of the corporation.

And I would like to say just one further word: that it will appear from the record upon the application that this receivership proceeding taken in Delaware was taken with the consent of plaintiff corporation; the receivership proceeding, in other words, was a friendly proceeding. I am not suggesting that there is any impropriety in a friendly proceeding, quite the contrary; but it is a significant fact that right intermediate between your Honor's decision of his case and the motions now before your Honor we are met with an application of this character and; as I see it, a somewhat dubious situation as to the title of the receiver.

Does your Honor wish to hear from me with regard to plaintiff's proposed findings?

The Court: Mr. Lasky has not presented those yet.

Mr. Lasky: With respect to this matter, if the court please, it seems to me that the position is somewhat captious. [45] Counsel criticizes and raises questions whether under the Delaware law a receiver should be appointed at this time or take title; but after all, the court must give due faith and credit to an order of the Delaware court, and the order of the Delaware court is quite specific. It commands the receiver to take over all the assets and to prosecute this suit. He is appointed and he has qualified. He now has command of the litigation, and whether he becomes a party of record or not, he is the real party in interest. If the court denied the motion he would be operating under the

name of the plaintiff. It seems to me that the records of the case ought clearly to show who is prosecuting it.

The danger that the receiver will take one position on appeal and the company plaintiff take another position has no merit because whatever position the receiver takes, there is nothing the plaintiff can do about it. The plaintiff has no funds that have not passed into the possession of the receiver.

Our experience has always been that when there has been a substitution or transfer of interest, that ought to be noted of record.

We had a rather sad experience some time ago in a case that was tried in this court, I think it was Bliss vs. Lowery.(?). We had a long battle and very parlous moments.

It seems to me the receiver ought to be made a party plaintiff, and it ought to be done rather than to substitute [46] him, so that there can be no doubt whatever of what is going on here.

It seems to me counsel has no point except he is fearful there may be another party represented by a new attorney, and he would have to answer three instead of two. Heretofore he hasn't had much trouble answering two instead of one.

We are going to continue to represent the receiver just as we have represented the plaintiff. If the receiver bounces us out, there will be no funds to continue us in and to present a third point of view.

I think the motion ought to be granted really as

a matter of routine. The form of order which we propose has been attached to the moving papers. Does the court have the papers in front of him?

The Court: Yes, I think they are all attached to the motion.

Mr. Lasky: In fact I think the plaintiff might have been subject to some criticism had it not called to the court's attention what had occurred.

The Court: The only thing that occurs to me is that in the form of order as you have prepared it, it is stated that "Bayard was appointed and now is the receiver of the plaintiff corporation to take charge of its estate and effects and to collect the debts and properties due and belonging to it with power to enter his appearance in and to prosecute and defend [47] in the name of said corporation or otherwise, all suits and proceedings which may be necessary or proper for the purpose aforesaid." If that is the case, how can the plaintiff remain in the case?

Mr. Lasky: Rule 25 (c) says the case may be continued in the name of the plaintiff or the new party may be substituted, or they both may be continued together. The only good reason why they both should be continued——

The Court: This motion is made both by the plaintiff and the receiver?

Mr. Lasky: Jointly.

The Court: Then he is your client?

Mr. Lasky: That is right. We appear as attorneys for both the receiver and the plaintiff, and we both ask that he be joined.

The Court: I don't see that there can be any harm in this, Mr. Adams. I am inclined to agree with Mr. Lasky, and I don't think you could have any more trouble than you have heretofore had. All right, I will grant it.

Mr. Lasky: Have you the form of order which was submitted?

The Court: I will sign the order.

Mr. Lasky: It brings us now to the matter of proposed findings, and in proposing findings we were very careful to heed the admonition of the opinion that proposed findings should not stray away from the basis of the opinion. And so if your [48] Honor has our proposed findings——

The Court: Yes.

Mr. Lasky: Proposed findings No. 1, as you see, adopts the opinion and its statement of facts as our proposed finding.

The Court: Let me interrupt you. Does the defendant object to all of your findings?

Mr. Lasky: Apparently to all of them.

The Court: All right.

Mr. Lasky: Every one of them.

Now our findings were to serve four purposes. One purpose your Honor has already ruled on.

The Court: Let me ask you another question, if I may. Has the defendant proposed any findings?

Mr. Adams: We have served, your Honor, and there is in the files our objections to the plaintiff's findings. We do not propose any, but we filed the objections to plaintiff's in which we have taken each one up in turn.

Mr. Lasky: As a matter of fact, counsel served us with a notice some time ago that they would not propose findings. That is correct, is it not?

Mr. Adams: That is correct.

Mr. Lasky: We waited until they had so advised us.

We had four purposes in mind with our proposed findings. One of them your Honor has already heard discussed, because it was the subject matter of Mr. Levy's remarks. [49]

The Court: I have been at law and motion from ten o'clock until about quarter to one, and I think the reporter ought to have about five minutes recess.

(Recess.)

Mr. Lasky: As I was saying before the recess, the purposes of our few findings are four-fold.

One of the purposes was in connection with the refund. We have discussed that, and that disposes of that.

There was one other main purpose, and that is this: Your Honor's opinion in major part, as we understand it, decided the case on the basis that the taxes ought to have been paid the government; that the settlement, to quote from the opinion, "invited a type of scrutiny that the court could not give it," and that if you were able to do so, you would set it aside. "The tax escape was erroneous and unjust." More of that quotation. And consequently, the court of equity would decline to intervene.

As has been indicated so far this afternoon, that

sounds on the principle that the court will not interfere between wrongdoers, or possibly like the doctrine of unclean hands.

So the first group of requested findings, three, four, five, six, seven and nine are directed to this. In essence, they go to the fact that the plaintiff is not in pari delicto; that the plaintiff did not itself conduct the tax transaction.

In their objections defendants' counsel have said that [50] these findings relate to the subject of duality, but they are not directed to duality at all. Your Honor has indicated your views with reference to duality in your opinion, and we say nothing about them. This merely goes to the point that the plaintiff itself did not conduct the tax operations, had nothing to do with them until the time of settlement, so that if there is some wrongdoing involved there we were not in pari delicto on it. The facts we present are all true. They cannot be contested on the grounds of accuracy, although counsel does in his objections.

We believe we are entitled to have those as part of a set of findings so the whole subject can be properly appraised above.

Counsel in his objections picks out some of these findings and says this, that or the other is untrue. I respectfully submit that the proposed findings are true.

In the court's opinion, the court finds and discusses the doctrine of the fax transaction, and we accept that finding for whatever it may be worth.

I do not know that we can profitably spend time going through these six or seven findings with respect to the detail. It does seem to me there was no dispute on the detail.

Another purpose of the proposed findings may be found in proposed finding No. 2.

It seemed to us, if the court please, that time [51] relationships may well be important. The court's opinion had some dates in it; other dates it did not have in it. For example, I do not think the date on which the claim for refund was filed was there, and it seemed to us it would be very convenient if those dates could be before the Appellate Court in quick, compact form. That is the purpose of proposed finding No. 2.

The fourth purpose of the findings was perhaps to correct certain respects in which it seemed to us the opinion was inadvertently erroneous.

For example, there is the statement that the claim for refund was withdrawn. Actually it was not withdrawn. It was rejected by the government and no suit was brought thereon.

The Court: Well, I suppose I considered the two which you have mentioned more or less synonymous because of the fact that that was part of the arrangement of settlement. As I understood, the evidence was that, whether the claim was rejected or abandoned, it was not allowed, and the returns for 1943 and 1944 were allowed. So if you wish to substitute some other language in that that is more accurate, that will be all right.

Mr. Lasky: That was in fact covered in proposed finding No. 8 which takes up the settlement in precisely the form in which it occurred.

The Court: Where do you take that from? What part of the [52] record does that finding No. 8 come from?

Mr. Lasky: Proposed finding 8?

The Court: Yes.

Mr. Lasky: The exhibits show what was done. There was a letter written to the Commissioner and there was a letter in reply.

The Court: You took it directly from the letter?

Mr. Lasky: That is right. There is nothing showing that the Secretary of the Treasury ever approved, and the fact that the statute of limitations ran and the date is shown by a letter written by Mr. Polk which is in the file. It is referred to in our brief. As a matter of fact, it is stated that the statute ran by such and such a date. It seemed to us that those facts could well be stated in compact form.

Those were the several purposes of the findings, but the principal purpose, as I have said, would be to show that the tax settlement was conducted by defendants' tax counsel, so that the plaintiff itself, if there were any impropriety, if there were wrongdoing, if this doctrine of unclean hands applies, then we do not come in; we were not in pari delicto.

I think all the facts here are correct. Counsel has picked out some of these facts, and I am prepared to proceed with them in whatever way your

Honor thinks is appropriate to take care of them or just to submit them.

The Court: As to No. 10, I was not attempting to find why the Bureau did it; I just simply said that I did not think [53] it was right, that was all.

Mr. Lasky: Frankly, our purpose was this——

The Court: I don't know what motives the Bureau of Internal Revenue had.

Mr. Lasky: Here is a specific finding that there was no fraud. Of course we disagree with the conclusions your Honor arrived at. And unless there was fraud, we do not see how the court should decline to determine the equities in this case on the ground that the tax belonged to the government, the Internal Revenue Department, if the government had all the facts before it. Certainly counsel for the defendant agreed that all the facts were before the government, and the finding that they substitute for No. 10 is perfectly agreeable to us.

The Court: There is a substitute for No. 10?

Mr. Lasky: Yes, counsel has criticized these findings and has proposed some substitutes, and the one proposed for No. 10, so far as we are concerned, is just as good as No. 10 itself. He proposes for No. 10:

"The evidence discloses that the Bureau of Internal Revenue was informed as to all pertinent facts in connection with its consideration of the tax settlement and there is no evidence that the Bureau was in any way deceived or misled."

The Court: Do you want me to make that as a finding? [54]

Mr. Lasky: I would be glad to have that as a finding.

The Court: There is no evidence in this case at all concerning that matter. I am not going to make any finding about what the Bureau of Internal Revenue did concerning this matter. The only evidence before me in this case was the documents concerning this settlement.

Mr. Lasky: We have stated it the other way.

The Court: There was some evidence by the attorney of the fact that he had conferences with them, in his report, in the letters which he wrote, but I do not feel that it is incumbent upon me to make any finding. I am not passing on whether the Bureau had all the information in front of it or whether they were deceived or misled or not. My holding in the case is that these taxes were owing to the United States and they should have been paid; and I think the decision of the Bureau was wrong, and that is all I said in my opinion. And I did say that I think it should be scrutinized further, but the conclusion I came to was that, under the statute or any pertinent regulations, that the Bureau of Internal Revenue was entirely wrong in approving this settlement.

Mr. Lasky: Then proposed finding 10, as we——

The Court: I only said that in connection with discussing the equities, the principles which would apply in fairly determining this litigation. I do not feel that I would want to make any finding on that subject at all. [55]

it states any factual matters, constitutes a finding of fact, and, in addition, the court finds as a fact that he plaintiff corporation did not participate in the matters that we have just referred to? Would that be sufficient?

Mr. Lasky: On those dates, I think. It might be convenient to include dates.

The Court: Is there any dispute about that No. 2 finding?

Mr. Adams: Does your Honor wish to hear from me?

The Court: Yes, I was just wondering whether we couldn't shorten the matter by having some comment.

Mr. Adams: I would like to make one or two general comments.

In the first place, your Honor's opinion stands as findings under the rule. Of course there is no technical requirement of any further order from this court; the opinion shall stand as findings.

Your Honor in his opinion stated, however, that if the [59] parties desired, they might present findings upon the essential equitable considerations upon which the decision is based. These findings are not of that character. They do not deal with any of the essential equitable considerations, and, as we view it, as we think, contrary to what Mr. Lasky's impression of the matter is, that these findings have to do with duality of control and nothing else.

Mr. Lasky, however, suggests they may also have

to do with the extent of participation of the plaintiff corporation in the tax transactions with the government. That idea had not occurred to me, and I would like to respond very briefly to it, and respond to the text of the finding that he proposes so as to show your Honor the characteristic objection we have to the proposed finding in that regard.

The plaintiff's proposed finding No. 2 is a finding that the returns for the first four months of 1944 and the claim for refund were filed by the defendant, meaning of course the reorganized railroad company. Of course the fact is, and there is no dispute about it, that the returns and the refund claim were filed, as the law required, by the plaintiff as the parent corporation in the affiliated tax group and signed by the plaintiff's president. But what plaintiff's counsel have in mind is their assertion that that conduct was in fact the conduct of the defendants through duality and not otherwise. Then it is further—— [60]

The Court: Didn't I make a statement in the opinion that the returns were filed by the tax counsel?

Mr. Adams: Your Honor, I would like to address myself to that particular point, because I believe your Honor did say so.

I would like to recall to the court's mind that as early as the year 1946 when this litigation first began—and, in fact, before this lawsuit was filed out here,—the plaintiff corporation was fully advised that Mr. Polk, who was tax counsel, was acting

as tax counsel for the affiliated group of taxpayers in presenting the matter to the government, and ever since the very beginning and prior to the initiation of this litigation, that has been the understanding of the plaintiff, that Mr. Polk was acting vis-a-vis the government for the account of whomsoever made objections.

I would like to direct your Honor's attention to defendant's exhibit 30A, which is a letter addressed to Mr. Polk's firm under date of September 27, 1946, which contains this statement:

"Appreciating that your firm has acted as tax counsel for both the company and the corporation in the filing of the consolidated tax returns and in the proceedings pending before the Internal Revenue Department, we would of course not wish to take any steps which would in any way prejudice the claims [61] made in those returns."

I would like to ask counsel if I may borrow the transcript of the hearing before his Honor in August, 1947, the first half.

(The transcript was handed to Mr. Adams.)

Mr. Adams: Thank you very much.

Mr. Levy: I have no further use for it.

Mr. Adams: I am just going to read very briefly from a statement by plaintiff's counsel at page 26 of the record there. Mr. Goodrich said—this your Honor will bear in mind was in 1947:

"May I correct that briefly, Mr. Levy? My understanding is that an offer of settlement on behalf of the group of corporations was made by

the government to Mr. Polk, who was acting as tax counsel for the entire group, and had been for some time previously."

From the record, your Honor, in this case, there is no doubt but what it was thoroughly understood by the plaintiff corporation ably represented by counsel at the time, that Mr. Polk's position was that of one holding powers of attorney from all the members of the affiliated group in dealing with the United States government in that capacity. So that for plaintiff at this time to now suggest that what Mr. Polk did was not done for plaintiff corporation but only for defendant reorganized railroad company is shown by the record to be [62] mistaken.

I should state—I think I did, perhaps,—that the letter to Mr. Polk's firm, the one from which I read, exhibit 37A, was addressed to his firm by Mr. Curry, the president of the corporation, but at the time with the advice of counsel who were then representing the corporation, actually looking towards the filing of the litigation in this controversy, which was filed in October, the next month.

Your Honor, we have filed objections to plaintiff's findings which are referred to by counsel as picking at their findings. I don't want to take your Honor's time to run over these specific objections.

The Court: You do not ask that the court make any special findings?

Mr. Adams: Your Honor, we came to the conclusion that no findings were required and so notified

counsel, under the arrangement which was that we had some time to propose findings if we thought any were necessary. We gave them notice that we proposed none. They then had time within which to propose findings. We consider that none are necessary. We consider that those proposed are not within the direction of the court as to the findings that might be tendered.

The Court: I was not attempting to state to counsel that—I will put it this way: I do not think the court has the power to say, "I won't make findings." The court under [63] the law must make findings. However, the rule does provide that the court can include the findings in an opinion, although perhaps —and this is what I wasn't too sure about, and I mean I think counsel should have an opportunity to make their own decision in that regard. I did not separately state findings in the opinion, although I think the opinion is perfectly sufficient to indicate the findings on factual matters upon which the decision rested. So that is why I put in the opinion that if counsel felt that findings should be set up some special way, that I didn't want counsel to think that I was saying that, "I am not going to make any findings in the case," because the court has a duty to make findings; it is just that I thought that what was in the opinion was sufficient unless counsel thought otherwise.

Mr. Lasky: I felt in major part it was sufficient. There are only a few things that we thought ought to be added to it.

The Court: Don't you think that most everything you have mentioned is really in the opinion some place or another? You are right, perhaps in proposing it in orderly concise form.

Mr. Lasky: I doubt it, if your Honor please. I made a careful study of it.

For example, your Honor did find that their claim for refund was filed in the name of the plaintiff, but you did not [64] state who did it or how it was done. When you spoke of the returns, you said they were filed by defendants or defendants' tax counsel.

The second sentence in finding No. 2 was designed to treat the claim for refund in the same way your Honor had treated the filing of the previous returns. I think we treat the power of attorney in the same way.

Your Honor had spoken rather indiscriminately of the filing by the debtor, and we thought that it became the debtor after a certain date. That is the whole purpose of finding No. 2.

It may well be—I think your Honor's suggestion of a while ago about a finding about participation in major part covers everything that we have in mind. If we could have finding No. 2, the finding your Honor suggested, and finding No. 8, I think that perhaps covers it, together with finding No. 10, your Honor, that the evidence disclosed no fraud committed by defendants' tax counsel on the Bureau of Internal Revenue. I know that the defendants do not object to such a finding. I can't see why they would.

The Court: You say finding No. 2?

Mr. Lasky: Finding No. 2.

The Court: Except that your opponent objects to the second sentence, I notice.

Mr. Lasky: That objection, I submit, has no merit, [65] because all we have done there is to treat the claim for refund in the same manner as your Honor in the opinion has treated the filing of the tax returns. Your Honor found the tax returns were filed by the defendants but you did not mention who filed the claim for refund, although you said in your opinion that it was filed in the name of the plaintiff. We felt that that ought to be treated in the same manner as the tax returns.

The Court: Your opponent is not satisfied with just your language that they were filed by the defendants, filed by the debtor. I suppose that assumes nothing more than the presentation of the document to the government.

Mr. Lasky: We certainly intended more than that. We meant the preparation of it, the whole task, the job of getting it ready and submitting it to the government, and it is certainly true in the same sense as it was true when your Honor put in as to the returns.

The Court: You are satisfied with No. 2 and with the general finding we have discussed about non-participation?

Mr. Lasky: Yes, your Honor.

The Court: What was the other one?

Mr. Lasky: The other one, I think, would be

that finding No. 8 ought to be there, and I am hopeful of something in the nature of finding No. 10.

The Court: I do not understand the purpose of that [66] No. 8. What has that got to do with the case?

Mr. Lasky: Finding No. 8, if your Honor please, is related to our argument we made earlier today upon the refund.

Your Honor disposed of our request for No. 7 by saying, "Well, the stipulation is in the record and the pre-trial order is in the record." And so they are. But the facts stated in No. 8 are not succinctly in the record, and it seems to us they could well be succinctly stated.

The Court: What is meant by the statement here that "The settlement with the Bureau of Internal Revenue was not entered into in the manner prescribed by section 3761 of the Internal Revenue Code"?

Mr. Lasky: This is what I meant by it: The only kind of a settlement which the law allows which is binding upon the government and upon a party so neither can break it is one which has been approved by the Secretary of the Treasury. There was no such settlement here. This was a letter written to the Commissioner asking a refund and the Commissioner rejects the refund. This merely fails to levy the deficiency assessment. If the Commissioner so desired to levy the deficiency assessment, he could have done it and he would not be

barred by this letter. If the plaintiff had filed a claim for refund, it would not have been barred by virtue of this letter. It never was carried out by him in the manner required by law.

Mr. Adams: That I disagree with. [67]

The Court: The Secretary of the Treasury does not have to approve every tax refund claim that is filed.

Mr. Lasky: Yes, your Honor, any settlement must be approved by the Secretary of the Treasury or it is not binding. That very matter was decided by the Supreme Court in the case of Botany Worsted Mills vs. U. S., 278 U. S. 282. Unless the Secretary of the Treasury, or I think counsel for the Treasury, approves in writing, that is not a binding settlement, either party can escape from it. And that is the final proof in this case, that that settlement never went through in the manner prescribed by law.

Mr. Adams: I would like to answer that.

Mr. Lasky: It was effective only because neither party did anything further. Plaintiff did not sue for a refund; the government did not levy any deficiency assessment, and the settlement became effective only because the statute of limitations ran against the parties doing anything more.

Mr. Adams: Your Honor——

Mr. Lasky: Let me complete my thought. The evidence shows just how the settlement was made. A letter was written to the Commissioner. The Commissioner replied. It does not show that the Secretary of the Treasury approved that in the manner

required by section 3761 of the Code, and the case of Botany Worsted Mills vs. United States, 278 U. S. 282 holds that the only way a settlement can be made is in the manner [68] required by that section.

The Court: What is the importance of my making a finding in this case as to whether or not the settlement did not go through in the manner prescribed by the Code?

Mr. Lasky: It bears upon our right to the refund. We claim in fact a kind of an estoppel. Had it not been for the pre-trial stipulation that it should be deemed that this money had been refunded to the plaintiff, we would have been in a position up until a week or two before your Honor's opinion to have sued on that claim for refund. We did not. No such suit was ever filed, because we were relying upon the stipulation. Maybe our arguments as to the conclusions we contend for are not sound, but certainly we propose to make those arguments and the facts are there.

The Court: Mr. Lasky, what question would you be precluded from raising treating the opinion as findings of fact in this case in the higher court that this particular finding as you suggest would permit you to raise? I am not clear on that point.

Mr. Lasky: Your Honor is referring to finding No. 8?

The Court: No, all these findings. Can't you raise anything that you suggested here today as a mistake or error of law on the part of this court

that you have talked about today treating the opinion as a finding of fact?

Mr. Lasky: I think, your Honor, that since all the facts [69] we are speaking of are undisputed, whether your Honor found or not, we could search the record and find them. The question I am talking about is a practical problem. If certain facts are so, it makes it convenient and within the financial reach of the plaintiff to get them before the court in the form of findings rather than to dig up that record.

The Court: The trouble with that is that counsel always says, "These are the undisputed facts." And the other fellow gets up and says, "No"; then we spend long hours in trying to work out some language in the findings.

Of course there can't be any objection to those dates; but that one sentence does not save you any time or there isn't any expense involved in the matter. You could state that in your appeal brief and your opponent is not going to dispute that the consolidated returns and so forth were filed on those respective dates, May 15, July 15, June 15 and March 9.

Mr. Lasky: We don't know whether they would or not. If we want to write a brief we want to be able to quote for every sentence we put in our brief a reference to something. If we do not have it in the form of a finding, then we have got to refer to some document.

The Court: I could append that to my opinion,

put those dates in. As to those other matters, I do not think there is any question there that makes any great difference as far as [70] the record on appeal is concerned or your raising these questions.

Mr. Lasky: Well, perhaps the way it can be handled is to take our finding 2, the dates, append them to your opinion, together with the statement along the lines that your Honor mentioned before about participation in the tax operations, and that does it. I do agree that the dates that we have here should be appended to the opinion.

The Court: Suppose I look over this and see whether there is any serious omission here that I think should be corrected, so that you won't have to incur too much expense in printing something, and digging it out of the record yourself, I don't think there is very much to this, Mr. Lasky, but I will look through it to be sure.

Mr. Lasky: Very well, we will be very happy——

The Court: There can't be very much from what I have read of these proposed findings.

Mr. Lasky: We have tried to cut it to the bone in what we have submitted here.

The Court: The only thing is I like to do this work, but I think somebody ought to have prepared a form of findings, and you have to have a judgment in the case. There has to be a written judgment so that the other side can appeal. I will write it out if nobody else wants to do it.

Mr. Lasky: Of course we would be glad to do it.

The Court: A form of judgment should be prepared which recites that the court has set forth all

the findings of fact necessary for the decision in the opinion.

Mr. Lasky: Couldn't there be a form of findings which merely recites, Finding 1, the court adopts the opinion as rendered; Finding No. 2, such other findings as your Honor sees fit and you will have a set of possibly three findings. Then we have a formal document and we know when the time starts to run.

The Court: I don't like to be placed on the spot. Perhaps I had better do it myself.

Mr. Adams: Your Honor will bear in mind that the successful party will be quite willing to undertake the preparation of the necessary documents. I suppose that would be in order when the time comes for the preparation of it.

The Court: I would like to sign the findings and judgment and get through with this.

Mr. Adams: Yes.

The Court: It has been pending a considerable length of time. You can't tell when one of these cable cars might knock me down.

Mr. Adams: May I make this suggestion, your Honor: that the argument has now resolved itself down to whether or not your Honor shall append some dates. Your Honor decided, I take it, this afternoon that he was not going to make [72] a finding like No. 10?

The Court: No, I won't give that finding.

Mr. Adams: That is settled.

As regards finding No. 8, I take it a finding of

that character would be quite out of order for the reasons your Honor stated; and not only that, but it is not supported by the record and we think contains a misstatement of fact as to the date on which the statute of limitations expired. Certainly there is an attempt to make a finding on a matter that was never brought up before your Honor on the trial.

I suppose the point we have reached is whether or not the court is going to make a finding of some dates mentioned in No. 2. That seems to me to be utterly unnecessary. Those are settled dates.

Mr. Lasky: Then there should be no objection.

Mr. Adams: Nobody has ever quarreled about them. The objection is that it is merely finding something that the record shows beyond peradventure and it can be stated without possible argument.

The Court: Would you submit the two findings that you desire, the finding on the dates and the finding that you did not participate in the tax refund operations?

Mr. Lasky: I will endeavor to do so. I am leaving for Chicago at 7:00 o'clock in the morning to be gone for two weeks. [73]

The Court: I will prepare it myself.

Mr. Adams: Your Honor, could I say one word, not indulging too much on your Honor's time? You will understand, of course, frankly, in my judgment, any finding which he seeks discriminating between the one party and the other in its participation in the transactions with the government is utterly out of keeping with the record. The record shows upon

this point that the parties, if there were any controversy, willingly—I say willingly—agreeably to both parties, Mr. Polk continued to transact the tax business with the government for the account of whoever might be concerned. And under those circumstances I do not see how it can be said that the one party as against the other was any more or less involved in the negotiations with the government. I read your Honor the record on that, and the record shows that beyond the possibility of a doubt.

The Court: Of course after the litigation started something seems to have been overlooked in connection with the settlement with the government until after the trial.

Mr. Adams: The record here shows that plaintiff considered the withdrawal of Mr. Polk's power of attorney before that settlement came to the point where the letters were exchanged. All that record is before your Honor. The plaintiff corporation could have asked Mr. Polk to protest that settlement or it could have withdrawn his power of attorney, [74] so clearly Polk was representing every member of the affiliated group as it appears by his signatures in his relations with the government. I do not think this record could possibly be construed in any other way.

Mr. Lasky: I think the court is thoroughly familiar with what went on. I think nothing is gained by chewing that over again further.

The Court: No, I think perhaps not. I will

make up some kind of an order in this matter myself, gentlemen, and will have the clerk send you copies.

Mr. Adams: In that case will your Honor desire that either party be designated to prepare the form of judgment?

The Court: As long as I am doing it, it is very simple; I will draw that up, sign it and file it myself. The clerk can send you copies of it. Then if you wish to reargue any of these matters on a motion for a new trial, you have that right.

Certificate of Reporter

I, W. A. Foster, Official Reporter, certify that the foregoing 75 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed Dec. 29, 1949. [75]

In the Southern Division of the United States District Court for the Northern District of California

No. 26,508-G

THE WESTERN PACIFIC RAILROAD CORPORATION,

Plaintiff,

and

RUSSELL M. VAN KIRK, HENRY OFFERMAN, and J. F. FARLEE & CO., INC., a Corporation,

Interveners,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,

Defendants.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

Tuesday, February 1, 1949

Appearances:

MESSRS. BROBECK, PHLEGER & HARRISON, by

HERMAN PHLEGER, ESQ., and

MOSES LASKY, ESQ.;

LEROY GOODRICH, ESQ.;
MAHLON DICKERSON, ESQ.;
A. PERRY OSBORN, ESQ.;
F. J. NICODEMUS, JR., ESQ., and
NORRIS DARRELL, ESQ.,
For the Plaintiff.

MESSRS. ROGERS & CLARK, by
WEBSTER V. CLARK, ESQ.;
JULES LEVY, ESQ., and
DAVID FRIEDENRICH, ESQ.,
For the Interveners. [1*]

* * *

The Court: It is your theory that if the parent company, absent any question of so-called duality or lack of representation, had joined in a consolidated return without any agreement as to the interest it might have in any recovery, that the law and equity would step in and say there was a right to participate?

Mr. Clark: That may or may not be so, your Honor, but if that had been posed at the proper time, may it please the Court, it is our belief that the theory of the tax statutes and the theory of equity under the circumstances of this case would have entitled the parent corporation to at least that portion of the savings which directly flowed

* Page numbering appearing at top of page of original Reporter's Transcript.

from the use of its stock loss which made those savings possible. Now, without commenting on the assertion of the basic right at this time, may it please the Court, this thing that we have called the duality does no more than to allow your Honor to look at the transaction as it existed at that time, and if you find it unfair, you have a right to right that wrong.

The Court: You say "unfair." You do not mean the transaction of filing a consolidated return?

Mr. Clark: Not with respect to the Government, your Honor, but I do say this: that where a parent corporation is caused to file a consolidated return, in those years, it having the election to have filed a separate return if it wanted to, and where in that return there is set up the parent's loss in the stock of the [17] subsidiary as an offset against subsidiary's income, thus saving subsidiary some $21,000,000, we say, may it please your Honor, that the result in this case to date, namely, that the parent, who had the election to file the consolidated return and whose loss made the saving possible, gets not one penny of the transaction and the railroad claims it all, we say that is an unfair result.

The Court: What you are saying is really that the unfairness consists of depriving the holding company of participation in the fruits of the consolidated return.

Mr. Clark: Right.

The Court: You are not complaining that the procedure of filing the consolidated return was unfair?

Mr. Clark: No, your Honor. It is the failure to recognize the right of the parent in the result of having filed the consolidated return in which the parent's stock loss of $75,000,000 was set up as an offset, and which resulted in the saving to the railroad company.

The Court: Then it does come back to what I asked you just a moment ago, that irrespective of any question of so-called duality or lack of representation upon the parent company, that there is a contention on your part that where the holding company does participate, no matter what the circumstances of the filing of the consolidated return, that there is in law an obligation of some kind to share the fruits? [18]

Mr. Clark: Right. [19]

* * *

Mr. Phleger: The first item, your Honor, is the tax return. I will first offer in evidence the corporation income and declared value excess profits tax returns for the calendar year 1942 of the Western Pacific Railroad Corporation, which I ask be marked Plaintiff's Exhibit 3-A. [61]

* * *

The Court: We will proceed on the theory that as the exhibits are offered they will be admitted unless there is an objection as to materiality.

Mr. Phleger: The first exhibit, Plaintiff's Ex-

hibit 3-A, is also identified as Interveners' Exhibit 188.

(The income tax return referred to was marked Plaintiff's Exhibit 3-A.)

Mr. Phleger: I will now offer, and request that it be marked Plaintiff's Exhibit 3-B, the corporation excess profits tax return for the calendar year 1942 of the Western Pacific Railroad Corporation, the plaintiff. That is also identified as Interveners' Exhibit 187. [63]

* * *

(The document referred to was marked Plaintiff's Exhibit 3-B.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 4-A, identified also as Interveners' Exhibit 190, the corporation income and declared value excess profits tax return of the Western Pacific Railroad Corporation for the calendar year 1943, which I ask be marked Plaintiff's Exhibit 4-A. [69]

* * *

(The documents referred to were marked Plaintiff's Exhibits 4-A and 4-B respectively.)

* * *

Mr. Phleger: I have here the returns for the corporation for the year 1944, which includes the returns of the subsidiary corporations for the first four months, a separate return having been filed by the Western Pacific Railroad Company, the subsidiary, together with its affiliates for the last eight months. These returns were filed on June 15, 1945, which is some six months after the property came out of the bankruptcy court. I will ask that the

income tax return for the year 1944, the Western Pacific Railroad Corporation, identified as intervener's 192, be received and marked Plaintiff's Exhibit 5-A, and that the excess profits tax return for the same year, identified as intervener's 191, be received and marked Plaintiff's Exhibit 5-B.

(Whereupon income tax return for year 1944 and excess profits tax return for 1944 were received in evidence and marked respectively Plaintiff's Exhibits 5-A and 5-B.) [72]

* * *

I now offer in evidence the claim for refund of the Western Pacific Railroad Corporation, covering taxes paid during the calendar year 1942. It is identified as intervener's exhibit 193. I ask that it be marked Plaintiff's Exhibit No. 6.

(Whereupon claim for refund, 1942, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 6.) [75]

* * *

I will now ask that there be received in evidence and marked Plaintiff's Exhibit 7, a copy of the stipulation filed in this Court on September 5, 1947, entitled "Stipulation and Agreement between Plaintiff and Defendants relating to Agreement with the Bureau of Internal Revenue." That, may it please the Court, is [76] the stipulation which was the subject of some discussion this morning.

Mr. Adams: May the record show, too, that there

was an order entered by the Court upon that stipulation?

Mr. Clark: Yes, there was a pre-trial order requiring that stipulation be filed, your Honor.

(Whereupon copy of stipulation filed September 5, 1947, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 7.) [77]

* * *

Mr. Phleger: I will now read into the record the admissions of the defendants to plaintiff's request No. 2: "That from 1916 to April 30—," and this is the request No. 2, your Honor— "—1944, the corporation owned all the stock, both preferred and common, of the company." The subsidiary company's response admits that "from some date in 1916 to April 30, 1944, the plaintiff owned all the stock, both preferred and common, of the debtor in reorganization." The response of the Western Realty Company is: "admits that's from some date in 1916 to April 30, 1944, plaintiff owned all the stock of the debtor in reorganization except directors' qualifying shares." [75]

I will now offer in evidence paragraph 2 of page 3 of the defendant's brief as an admission:

"Plaintiff, herein called the holding company, was organized under the laws of the State of Delaware on June 29, 1916. It acquired and held the capital stock of the Western Pacific Railroad Company up to May 1, 1944. On that date the stock was transferred to the reorganization committee."

I will now offer the admissions of plaintiff's request No. 3. The request reads (reading):

"In 1935 the company went into bankruptcy under section 77 of the bankruptcy act in proceedings in the United States District Court for the Northern District of California, hereinafter referred to as the bankruptcy court, before Judge A. F. St. Sure, entitled 'In the Matter of the Western Pacific Railroad Company, Debtor, No. 26591S,' and it was placed by the court in the hands of the trustees in that year."

The response of the subsidiary company is (reading):

"Admit that on August 2, 1935, the debtor in reorganization filed a petition under section 77 of the bankruptcy act in the United States District Court for the Northern District of California and that all of the assets and property of the debtor in reorganization were vested in reorganization trustees on or about November 9, 1935."

The response of Western Realty is in substance the same. I [80] take it you won't require us to read it.

Mr. Adams: No.

Mr. Phleger: I will now direct the attention of the Court to the plan of reorganization of the subsidiary company. I will not offer it in evidence, because I take it that the Court may refer to it without it being placed in evidence, and we don't wish to unduly burden the files. That is recorded in 233 ICC at page 409, and is dated June 21, 1939. It contains the following statement and finding:

"The capital stock of the debtor is found to be without equity or value and the stockholders shall not be entitled to participate in the plan."

I will now offer in evidence as Plaintiff's Exhibit 8 a copy of the order of the court, of the bankruptcy court, in the matter of the Western Pacific Railroad Company, approving the plan of reorganization for debtor. It is dated August 15, 1940, and contains the following finding, which is shown on page 5 of the exhibit (reading):

"Fourth: The finding of the Interstate Commerce Commission, at the time of the finding, the interests of unsecured creditors of the debtor and the equity of the holders of the debtor's preferred stock and the debtor's common stock have no value and that the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the [81] debtor under said plan of reorganization is hereby affirmed, and said plan of reorganization shall not be submitted to said unsecured creditors or shareholders for acceptance or rejection."

(Whereupon copy of order approving plan of reorganization for debtor referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.)

* * *

Mr. Phleger: I will now offer in evidence as Plaintiff's [82] Exhibit 9 the opinion of the Court, the United States Circuit Court of Appeals for the

Ninth Circuit, the foregoing order was reversed, but on March 15, 1943, the United States Supreme Court reversed the Circuit Court of Appeals and affirmed the order of the District Court. Ecker v. Western Pacific Railroad Company, 318 U. S. 449."

* * *

I will now offer as Plaintiff's Exhibit 10 the order of the bankruptcy court, dated October 11, 1943, confirming the plan of reorganization. The decision of the Supreme Court that [83] I mentioned is March 15, '43, this order confirming the plan is October 11. This order confirmed the plan of reorganization as proposed by the Interstate Commerce Commission, and appointed a reorganization committee. I will read the language in paragraph second of the order (reading):

"Second: The designation of Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson as members of the reorganization committee provided for in article R of said plan of reorganization is hereby approved."

Ask that this be received as Plaintiff's Exhibit 10.

(Whereupon order confirming plan of reorganization referred to above was received in evidence and marked Plaintiff's Exhibit No. 10.) [84]

Mr. Phleger: I will now offer as Plaintiff's Exhibit 11 a copy of the agreement between the Western Pacific Railroad Corporation, the plaintiff corporation, the Chase National Bank of the

City of New York, the Central Hanover Bank and Trust Company, the James Foundation of New York and Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson, as the reorganization committee of the Western Pacific Railroad Company. That agreement is dated November 22, 1943. [85]

* * *

Mr. Phleger: Yes, this is a copy of the executed agreement. The agreement is executed in behalf of the Western Pacific Railroad Corporation by M. J. Curry, President; attest, John F. Wienken, Secretary, The Chase National Bank of the City of New York, by W. Arthur Grotz, Second Vice President; attest, William Morhmann, Central Hanover Bank and Trust Company [86] by R. G. Coombe, Vice President; attest, C. F. Parker, Jr., Assistant Secretary, James Foundation of New York, Inc., by William W. Carman, President; attest, Charles E. Andrews, Assistant Secretary; Reorganization Committee of the Western Pacific Railroad Company, by F. H. Ecker, Frank C. Wright and Robert E. Coulson. [87]

* * *

(The agreement referred to was marked Plaintiff's Exhibit 11.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 12 a petition filed in the bankruptcy court under date of August 23, 1944, by Whitman, Ransom, Coulson & Goetz and Pillsbury, Madison & Sutro as counsel for the petitioners, the petition of

the reorganization committee for an order approving the use of the debtor company in carrying out and making effective the plan approving the proposed amendments to the articles of incorporation and proposed new by-laws, and approving forms of preferred and common stock certificates and directing action with reference thereto. I will read three paragraphs. [88]

* * *

Mr. Phleger: I will now offer an order of the Bankruptcy Court filed on September 25, 1944, approving the use of the debtor company in carrying out and making effective the plan, approving proposed amendments to the articles of incorporation and proposed new by-laws of debtor company and approving forms of preferred and common stock certificates and directing action with respect thereto, and I ask that it be marked Plaintiff's Exhibit 13.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 13.)

* * *

Mr. Phleger: I will now offer in evidence as Plaintiff's Exhibit 14 the order of the Bankruptcy Court, which we call the revesting order dated November 27, 1944, order directing the revesting of properties of the debtor in the debtor company, fixing the date for consummation of the plan and authorizing and directing the carrying out of the plan.

Attached to the order and referred to therein are copies of the proposed form of deed of convey-

ance from the trustees to the company, and also a form of assumption agreement.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 14.)

Mr. Phleger: I now will offer defendants' admission to plaintiff's request 9:

"Pursuant to an order made and entered by the Bankruptcy Court on November 27, 1944, entitled, 'Order Directing the Revesting of Properties of the Debtor in the Debtor Company, fixing the Date for Consummation of the Plan and Authorizing and Directing the Carrying out of the Plan,' the reorganization trustees on December 29, 1944, transferred to the company all of the property vested in, possessed, held or used or controlled by the reorganization trustees."

The responses admit the facts. That is the date shown here, December 14, 1944, as being the date of the termination [92] of the bankruptcy proceedings.

I will offer as Plaintiff's Exhibit 15 the document we call the assumption agreement. That is an agreement signed by the Western Pacific Railroad Company, by Charles Elsey, President, and C. L. Droit, Secretary, dated December 14, 1944, which assumes certain obligations of the trustees in bankruptcy. I will read paragraph II of that agreement.

* * *

(The document referred to was received in evidence and marked Plaintiff's Exhibit 15.)

Mr. Phleger: I will now offer the following admission from the defendants' brief, the top of page 5:

"The holding corporation issued preferred and common stock which was listed and traded on the New York Stock Exchange and widely held by purchasers of railroad securities."

I will next offer as Plaintiff's Exhibit 16 the annual report of the parent corporation for the year 1941. This has been identified as Defendants' Exhibit 130; December 31, 1941. The testimony which will later be introduced will show that this was the last printed public report sent out by the corporation.

Mr. Adams: We intended to establish that fact ourselves.

Mr. Clark: I think that can be stipulated to, your Honor.

Mr. Phleger: I am chary of asking counsel for stipulations. I will direct the attention of the Court to the facing page of the report, which shows the officers as of December 31, 1941. They include H. Brua Campbell, Robert E. Coulson, Michael J. Curry, A. Perry Osborn, Thomas M. Schumacher, Willis D. Wood.

The executive committee consisted of the following: Robert E. Coulson, William M. Kingsley, Thomas M. Schumacher, Finley J. Shepard, Willis D. Wood, and the officers are shown to be Thomas M. Schumacher, President, and Michael J. Curry, Secretary and Treasurer, and Pierce & Greer, counsel.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 16.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 17 a sheet identified as Interveners' No. 50 headed "The Western [94] Pacific Railroad Corporation Schedule of Preferred and Common Stockholders of Record, September 11, 1935, to September 16, 1947. That would be Plaintiff's Exhibit 17.

I will direct the Court's attention to the fact that this exhibit shows holdings by the James interests in the parent corporation, proving the statements shown on the chart, that it held 8.8 per cent of the preferred stock as of November, 1943, and slightly less thereafter, and 61 per cent of the common stock at all times.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 17.)

Mr. Phleger: I will offer now the response to plaintiff's request 33:

"From 1925 until his death in 1941 Arthur Curtis James, individually and through certain wholly owned subsidiaries owned 8.8 per cent of the corporation's preferred stock and 61 per cent of its common stock together with substantial amounts of the corporation's secured bonds."

The railroad company's response admits, except they deny that the plaintiff ever had any secured bonds, and they deny that A. C. James individually or through any subsidiaries owned any

such bonds. The response of the Western Realty is the same. They did not own any bonds of the parent corporation.

Mr. Clark: There were no bonds outstanding, isn't that the [95] fact?

Mr. Phleger: Yes.

I will now offer as Plaintiff's Exhibit 18 a compilation identified as Interveners' Exhibit 342, headed "Securities of Western Pacific Railroad Company for the Period 1935 to 1947," which I ask be received and marked Plaintiff's Exhibit 18.

Mr. Adams: Mr. Phleger, this is limited to a statement of the securities owned by certain named persons.

Mr. Phleger: I will just point that out. I gave the heading on it. The heading I have read. The exhibit itself shows the holdings in the company of the so-called James interests. Not only its stock, but of bonds and collateral notes. They show as of 1945, or '46, whichever the date was, the conversion of 4½ per cent income mortgage bonds of the reorganized company, amounting to $3,544,000, into common shares of the Western Pacific Company. That is, after reorganization, the James interests were the owners of 3½ million dollars' worth of bonds of the reorganized company, and at the time mentioned they converted those bonds into common stock. The exhibit I have just mentioned proves the basic facts which are shown on this chart. The bonds that I referred to are these bonds which, after the date of this chart, were converted into common stock.

"Pierce & Greer, counsel, 40 Wall Street, New York." I think I overlooked reading it. [106]

Now, I would like to read and call your Honor's attention to a statement appearing on page 6 of that report with respect to taxes:

"Owing to an unusual situation resulting from the recent final confirmation of the Plan of Reorganization, no accrual was set up in respect of Federal income and excess profits taxes for 1943.

"Since 1916, Federal tax returns of this company have been made through a consolidated return filed by its parent holding company, The Western Pacific Railroad Corporation, which parent owned all of the capital stock of its subsidiary, The Western Pacific Railroad Company. The confirmed Plan of Reorganization for the railroad company characterizes the capital stock owned by the holding company as being 'without equity or value.'

"A consolidated tax return for 1943 can and will be filed by the holding company. Tax counsel has advised that the holding company's loss on its stock of the railroad company will result in elimination of any liability of the holding company for Federal income taxes for the year 1943 and therefore indirectly eliminate such taxes for the subsidiaries of the holding company. However, pending a final settlement with the Treasury Department, the Reorganization Trustees, [107] by authority of the court, have set aside a contingency reserve tax fund of $7,100,000 invested in United States Government Treasury savings notes—Series

C. The credit tax accrual of $9,886.13 results from an over-accrual in 1942."

Mr. Adams: And may the record show that this again is a report published by Schumacher and Ehrman as trustees?

Mr. Phleger: That is correct.

The Court: That was in the end of 1943?

Mr. Phleger: December 31, 1943.

The Court: After the plan had been confirmed?

Mr. Clark: The evidence will show, your Honor, that that report came out in about May of 1944, about the year 1943.

Mr. Phleger: Yes. I think it was May of '44.

Mr. Clark: It was just about a month before the consolidated return for 1943 was signed by Mr. Curry as president of the holding company.

Mr. Phleger: Now I will refer to Plaintiff's Exhibit 20-C, which is a similar report for the year ended December 31, 1944. I direct the Court's attention to the fact that the directors, as of December 31, 1944, do not include any of the gentlemen residing in New York, whose names I have read. They are local people, for the most part. Well, they are local and Eastern people. But they do not include Schumacher, Osborn, Wood or Curry. Under the list of officers, however, are the following: [108] Charles Elsey, President; M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer.

I direct your Honor's attention to a note appearing on page 6, under the heading "Taxes":

"Prior to the period of reorganization, which be-

gan August 2, 1935, and through 1943, the company's tax returns had been made by the then parent, The Western Pacific Railroad Corporation, a holding corporation which owned all of the company's preferred and common stock, except directors' qualifying shares. The holding corporation filed a consolidated return for itself and its various subsidiaries, of which The Western Pacific Railroad Company was one.

"The plan of reorganization for The Western Pacific Railroad Company was confirmed on October 11, 1943, and found the preferred and common stock (owned by the holding corporation) to be 'without equity or value.' As a result of this loss, the consolidated return indicated no liability for 1943 Federal income or excess profits taxes. To provide against the contingency that liability of the railroad company for some taxes in respect of 1943 might be subsequently asserted by the Commissioner of Internal Revenue, the Reorganization Trustees obtained authority of the Court to set [109] aside a reserve fund of $7,100,000 invested in Government securities."

". . . This entire reserve will be held intact to protect the cash position of the company in the event it should be later necessary to make any payment of taxes or interest resulting from an administrative or judicial ruling adverse to the company's contention that it was not liable for any Federal income or excess profits taxes for the calendar year 1943 and the first four months of 1944."

I call your Honor's attention to the fact that the return for '44 was not filed until June 15, 1945, which was six months after the company came out of bankruptcy; and that the reserve fund for $3,000,000 was not set up until March 26, 1945, which was approximately four months after the property came out of bankruptcy.

Mr. Clark: Three months.

Mr. Phleger: You are right. [110]

* * *

Interveners' Exhibit 410(d).

Mr. Phleger: I will now direct the Court's attention to Plaintiff's Exhibit 20-D, which is the annual report for the year 1945.

By the way, I might mention that the preceding exhibit, for the year 1944—never mind.

The report for 1945, 20-D, contains no reference to the trustees in bankruptcy. The facing sheet does not list as officers any of the persons whose names I have previously read. It does not include Mr. Curry or the other gentlemen. [110A]

Mr. Phleger: On page 6 there is the following statement with respect to taxes:

"Detailed information was given in last year's report of the reorganization trustees relating to the situation of the company with respect to Federal taxes for 1943 and the first four months of 1944. To provide against the contingency that liability of the company for some taxes in respect of 1943 might be subsequently asserted by the Commissioner of Internal Revenue, a reserve fund of $7,100,000 was

The Court: That is Exhibit 1?

Mr. Phleger: This is Exhibit——

The Court: No, no, I mean the chart is Exhibit 1? [96]

Mr. Phleger: The chart is Exhibit 1, yes.

I now offer the admission from defendants' brief, page 6, reading as follows:

"Arthur Curtis James and his wife were the owners of all of the capital stock of the Curtis Southwestern Corporation, a New York corporation, and of Curtis Southwestern Company, a Delaware corporation, which in turn owned all of the capital stock of the A. C. James Company. Curtis Southwestern Company was the owner of 5 per cent collateral notes of the holding corporation."

I now offer as Plaintiff's Exhibit 19 a statement headed "The Western Pacific Railroad Corporation, Stockholders Meetings, 1935 to 1948," which is identified as Interveners' Exhibit 42, and shows the date of stockholders' meetings of the parent corporation during that period, and the dates on which there was a quorum present, the dates on which there was no quorum present, the number of shares represented at those meetings.

We will show later by the deposition of Mr. Coulson that there was never a quorum present during the period 1938 through 1944, unless the James stock was represented.

(The statement referred to was received in evidence and marked Plaintiff's Exhibit 19.)

Mr. Phleger: I will now offer as a group, as Plaintiff's Exhibit 20, the published annual reports of the Western Pacific [97] Railroad Company, a subsidiary company, as follows: 1942, 20A; 1943, 20B: 1944, 20C; 1945, 20D; 1946, 20E; and 1947, 20F.

(Annual reports, Western Pacific Railroad Company, referred to above, dated 1942, 1943, 1944, 1945, 1946 and 1947 were marked, respectively, Plaintiff's Exhibits 20A through 20F, in evidence.)

* * *

Mr. Phleger: Now I would like to call the Court's attention to certain statements and recitations in these annual reports. First is the report for 1942, No. 20A. The cover shows, "The Western Pacific Railroad Company, T. M. Schumacher and [98] Sidney M. Ehrman, Trustees in Reorganization." It is for the year 1942, and shows as officers as of the date December 31, 1942, among others, H. Brua Campbell, New York, Michael J. Curry, New York; A. Perry Osborn, New York; Thomas M. Schumacher, New York. It gives the executive committee as follows:

Thomas M. Schumacher, Michael J. Curry, H. Brua Campbell, Charles Elsey, and A. Perry Osborn. This is the railroad company.

Mr. Adams: Your Honor, at this point, if I may take a moment to state an objection to the score of materiality, so that I shall not have to repeat, once stated? Counsel has just read from the annual

statement the names of certain gentlemen designated upon the annual statement as directors and officers of the Western Pacific Railroad Company in the year 1942. Now, if your Honor please, from the year 1935, late in that year, to the end of the year 1944, those properties were in the possession of the trustees of the reorganization court, Mr. Schumacher and Mr. Ehrman. They had the title to the properties, they owned the properties, they operated the properties, and under the orders of Judge St. Sure the entire railroad organization was acting as employee and agent of those trustees. Mr. Elsey, by direction of Judge St. Sure at the beginning of the reorganization, was the agent for the trustees in the operation of those properties. But, your Honor, in 1935, Judge St. Sure issued his order enjoining this debtor railroad company, its officers and [99] directors, from having anything further to do with the operation of that property. That was in the hands of the trustees from then on, and these gentlemen whose names are called off as officers and directors,—as if that were significant in 1942—had in truth no functions, of any significance. They had no discretion, no power. They were nothing more or less than persons whom the court might direct in the pursuance of the court's operation and management of this railroad.

Nor was there, nor can there be, any duality shown by pointing to the names of these gentlemen at that time, as if this were a case in which these gentlemen had policies or powers or discretion of any sort, because they had not.

Mr. Phleger: I will be very glad to stipulate that during this period no meetings of either the executive committee or the directors were held. But I do think the fact that they held these positions, while it might not have given them any power, might have imposed upon them some duties.

The Court: Well, this is a published statement of the company?

Mr. Phleger: Yes, correct.

Mr. Clark: Well, just a moment; so the record may be clear, the intervener is not willing to concede that there were no meetings of the directors of the railroad company during this period of time, because I think charts which will come in evidence later will show that various people took office as directors [100] for the railroad company during the period of the railroad trusteeship that we are talking about in 1942.

Mr. Phleger: Yes, they took office in the fall, one, in 1944.

Mr. Clark: Well, some in 1940, too. Mr. Curry became a director of the railroad company in 1940, which is during the reorganization. So there must have been meetings during that time. And I think Mr. Adams will concede——

Mr. Adams: I think Mr. Clark's recollection is correct; as to this being a report of the company, your Honor, this is one of the reports that is put out during the period of trustee operation and management. It carries the names of the trustees and was a part of their function, the making of the report.

The Court: These directors were all holding office with the consent of the trustees?

Mr. Phleger: Obviously.

Mr. Clark: Apparently.

Mr. Adams: Yes, your Honor.

Mr. Clark: And they were holding meetings, your Honor, and the only purpose of my statement is—I don't want the intervener in the case bound by the concession which Mr. Phleger was apparently willing to make.

Mr. Phleger: I probably am in error in that, but during certain periods they did not hold meetings.

I will call the Court's attention to the fact that this is, [101] of course, a report of the trustees in reorganization also, and as a published report, also is binding on the trustees. So the trustees, by the publication of this report, must have approved the statement that I have just read as to who held the offices.

Mr. Adams: Nor can there be any doubt that the corporate function, the function of the Board of Directors of the company during the period of reorganization, was enjoined and frozen and suspended by order of the reorganization court, and that the entire function of management, controlling the operation of the proceeding during that period was the court's function and the trustee's function and not the function of the directors, who had no power.

The Court: Well, I suppose that as long as the

directors didn't do anything but that which had to do with the actual operation,——

Mr. Adams: The only function they had was to do what the trustees desired them to do and that the bankruptcy law required of them.

Mr. Phleger: Of course, during all of this period, as the reports and evidence will show, all of the transactions, with minor exceptions, were conducted in the name of the corporation by its corporate officers. Mr. Elsey always acted as president of the corporation. The consolidated tax returns were filed by Mr. Elsey as president of the corporation.

Mr. Clark: That is the railroad company? [102]

Mr. Phleger: That is right.

Mr. Clark: Not the Corporation.

Mr. Adams: Yes, and that was done pursuant to the explicit direction of Judge St. Sure, by his order of November 9, 1935.

The Court: Well, that all indicates that the corporate directors, or the officers, were delegated by the bankruptcy court. They were just prohibited from performing any functions having to do with the property and assets and the business of the company. But apparently the reorganization court wanted to make use of them as a part of the corporate entity in order to carry out some functions.

Mr. Adams: Your Honor, the reorganization court's orders would be the best evidence, of course, of the court's purposes; and they were cited, and the trustees are directed to engage Mr. Elsey, who

was the president of the railroad company, to act as their agent, the trustees' agent in the operation and management of the property. And they direct the trustees to take into their organization the going railroad organization. So that all the acts, all the records, all the reports, were carried on in the form as theretofore.

The Court: Well, that must have been with the approval of the trustees.

Mr. Adams: It was, with the explicit approval of the court itself, by direction of the court, your Honor. The trustees, of course, went to the court asking for such order. [103]

The Court: Well, I guess we are getting pretty far afield now. You say that is not material?

Mr. Adams: My point is that these gentlemen are spoken of here as directors as if they had some position adversary to the other corporation, the plaintiff; because Mr. Phleger was mentioning certain gentlemen who held relationships to the plaintiff. [103A]

The Court: Well, of course, it seems to me that whatever objection there might be there is all with reference to the weight that might be given to that, rather than to its admissibility at this moment.

Mr. Adams: I spoke of materiality, and I don't want to repeat myself frequently on this; but it is a very significant and important thing in our judgment that the duality which we have here spoken of so constantly is not a duality between two different companies, it is a duality between the plain-

tiff's corporation, which brought about this reorganization proceeding initially, and the court's trustees. That was the object, the main object, of my remark at this moment.

The Court: Well, this is just one isolated bit of testimony, which I can't evaluate separately until I have it all. Then maybe it won't have any weight and maybe it will have some weight. But I don't think that I should rule on it now—then I don't know whether at a later time, if it were entitled to have any weight, how I could reinstate it.

Mr. Adams: Well, I would assume, since the objection stated was as to materiality, I take it that objections on that score are not waived in any court.

The Court: Well, they might be, but there are some things that we could rule out as being immaterial if the immateriality is just obvious, right on the face of the document, or other evidence that is sought to be introduced. But it is not so [104] clear that I could make that kind of a ruling now. I think that what we have said in the record now is such that any rights that you may have are reserved. I will overrule the objection.

Mr. Adams: Very well, your Honor.

Mr. Phleger: I think I was reading the list of the executive committee. It consists, according to this report, of Thomas M. Schumacher, Michael J. Curry, H. Brua Campbell, Charles Elsey, and A. Perry Osborn.

I will recall to your Honor's attention that Schu-

macher, Curry, Campbell and Osborn were directors of the parent company.

Now, here is a list of the officers as of December 31, 1942: T. M. Schumacher, Chairman of the Executive Committee, New York; Charles Elsey, President, San Francisco; and M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, New York. As the evidence will show a little bit later, Mr. Curry, during this entire period, was conducting affairs and handling matters in his name as holder of the office of Vice President, Assistant Secretary and Assistant Treasurer.

Mr. Clark: Of the railroad company.

Mr. Phleger: Of the railroad company. [105]

* * *

I will now refer to Plaintiff's Exhibit 20-B, which is the report for 1943:

* * *

Mr. Phleger: The facing sheet on that report also contains a list of the corporate officers as of the end of 1943. It shows as directors: Michael J. Curry, A. Perry Osborn, Thomas M. Schumacher, and as executive committee Thomas M. Schumacher, Michael J. Curry, Charles Elsey and A. Perry Osborn. It shows as officers T. M. Schumacher, Chairman of the Executive Committee; Charles Elsey, President; M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer; and Pierce & Greer, counsel, 40 Wall Street, New York. The preceding annual report also contained the name

to the fullest extent in expediting the reorganization."

* * *

Mr. Adams: Would you read the last paragraph so that the [130] whole text may be there?

Mr. Phleger: (Reading.)

"At the risk of possible repetition of what I have said to you personally I think your firm will render a distinct service if it insists on the preparation of trust indentures of a somewhat different character than those that have been used in recent reorganization."

* * *

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 31.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 32 a document also identified as interveners' document 316. It consists of a letter and also a telegram identified as interveners' 317. The first is a letter dated April 21, 1945, on the letterhead of the firm of Whitman, Ransom, Coulson and Goetz, signed by Robert Coulson and addressed to Mr. Charles Elsey, President of the Western Pacific Railroad Company: [131]

* * *

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 32A, and the telegram marked 32B.)

Mr. Phleger: I will next offer as Plaintiff's Exhibit 33 a letter also identified as interven-

ers' exhibit 38. It is a letter dated June 6, 1945, on the letterhead of Whitman, Ransom, Coulson and Goetz, 40 Wall Street, New York, signed by Robert E. Coulson and addressed to Mr. M. J. Curry, 10 Perth Ave., New Rochelle, New York (reading):

"Enclosed is the check of this firm for $750 which represents a quarterly payment on your retainer by this firm for services in connection with the pending tax matters with which we are dealing in behalf of The Western Pacific Railroad Company. As agreed, this retainer is to be on an annual basis of $3000 and this quarterly installment covers the period from May 1 to July 31, 1945.

"You will note that there are no deductions from this check on account of taxes or social security premiums since you are in no sense an employee of this office or The Western Pacific Railroad Company but are merely [137] retained as an independent contractor to make studies and reports and perhaps subsequently act as a witness in connection with the pending tax problem.

"Sincerely yours,

"ROBERT E. COULSON."

(The letter referred to above was received in evidence and marked Plaintiff's Exhibit 33.)

Mr. Phleger: I will now offer defendant's response to plaintiff's request No. 23. The request reads:

"For many years and till May 1, 1945, Miss Valouch was a clerk in the employ of the company. She received from the company compensation in 1943 of $2500, in 1944 of $2960, and in 1945 of $953. On and after May 1, 1945, she became an employee of Coulson's firm to assist them in their tax matters."

The railroad defendant's response is:

"Admit that Miss Valouch received compensation from the defendant, the Western Pacific Railroad Company, in the amount of $953 in 1945, and on and after May 1, 1945, became an employee of the firm of Whitman, Ransom, Coulson and Goetz."

The response of Western Realty is in substance the same. I will now offer as Plaintiff's Exhibit 34A, B, and C, three documents which are respectively identified as interveners' exhibits 404, 405, and 406. [138]

34A consists of a letter signed by Mr. M. J. Curry dated January 24, 1945, on the letterhead of the Western Pacific Railroad Company, 37 Wall Street, New York, New York, M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, to the Western Pacific Railroad Company and to its Board of Directors (reading):

"Dear Sirs:

"I have been an officer of the Western Pacific Railroad Company (Vice-President, Assistant Secretary and Assistant Treasurer), as well as an officer of the Western Pacific Railroad Corporation, in New York, continuously since April 1, 1927.

"Having reached the age of 65 on September 30, 1944, I am desirous of retiring from the service upon the discontinuance and closing of this office and therefore submit this as my application for the granting to me of a pension.

"Yours very truly,

"M. J. CURRY."

The next sheet, 34B, consists of a similar letter signed by T. M. Schumacher, similarly citing his retirement (reading):

"Dear Sirs:

"I have been chairman of the Executive Committee of the Western Pacific Railroad Company since July 1, 1926, as well as an officer of the Western Pacific [139] Railroad Corporation. From November, 1935, to January 1, 1945, I was one of the two reorganization trustees of your company. The reorganization of the Western Pacific Railroad Company was consummated on January 1, 1945, and my status as reorganization trustee was continued (by order of the United States District Court which appointed me) until May, 1945, for the purpose of preparing and filing a closing report of said trusteeship.

"Inasmuch as I have, as of February 1, 1943, resigned as an officer of the Western Pacific Railroad Corporation and it appears that my duties as trustee of the Western Pacific Railroad Company will be completed on May 1, 1945, it is my desire that I retire, as of that day, or as soon thereafter as

established in 1944. On March 26, 1945, the board of directors authorized the increase of this fund to a total of $10,100,000 to cover such a contingency for 1943 and the first four months of 1944. The entire fund is invested in Government securities and will be held intact to protect the cash position of the company should it be necessary to make payment of taxes or interest as a result of an administrative or judicial ruling adverse to the company's contentions."

I now call your attention to the report for the calendar year 1946, Exhibit 20-E. That contains the statement on page 11 with respect to taxes:

"As previously stated, the company's income for 1946 was in no degree attributable to the carry-back [111] provisions of the excess profits tax law. Information has heretofore been given in the reports for 1944 and 1945 as to the situation existing in connection with Federal income taxes for 1943 and the first four months of 1944 and the $10,100,000 reserve fund which has been set aside to cover the contingency that liability of the company for some taxes during those periods might subsequently be asserted by the Commissioner of Internal Revenue. The question has not yet been settled and until the discussions with the Income Tax Bureau have been definitely concluded, the reserve will be maintained. The subject of payroll taxes has been heretofore discussed in connection with wage costs."

And on page 12 the following statement under the

heading of "Litigation." This is the report for the year 1946. I will call your attention to the fact that this suit was filed on October 10, 1946.

"In October, 1946, another action was brought by the former parent company in the United States District Court for the Northern District of California, Southern Division, against the Western Pacific Railroad Company, and its subsidiaries. The complaint asserts a claim by the parent company based on savings in Federal taxes which may be realized by the defendant companies under consolidated tax returns for the years 1942 and 1943 and for the first four months of 1944, and a refund claim for the year 1942. The defendant companies have filed an answer denying liability, as well as a counterclaim seeking determination that the plaintiff corporation has no interest in any such prospective tax savings. The case has not been set for trial. In March, 1947, certain stockholders of the plaintiff corporation applied to the court for leave to intervene in this action. At the date of this report the application had not been heard by the court."

I now refer to the report for the last year, 1947, Plaintiff's Exhibit 20-F, page 12:

"Information has been given in previous reports as to the situation existing in connection with Federal income taxes for 1943 and the first four months of 1944 and the $10,100,000 reserve fund which had been set aside to cover the contingency that liability of the company for some taxes during those periods

might subsequently be asserted by the Commissioner of Internal Revenue. The Treasury Department has notified the company that the tax returns for the periods prior to May 1, 1944, have been accepted as filed. The $10,100,000 fund, [113] previously reserved against contingent tax liabilities and invested in U. S. Government bonds, has since been retained as a reserve fund for contingent liabilities in litigation, awaiting the outcome of law suits now pending. Tax returns filed for the periods subsequent to May 1, 1944, have not as yet been audited by the Treasury Department."

Under the heading of "Litigation."

"Reference was also made in the report for last year to another action brought in October, 1946, by the former parent company in the United States District Court for the Northern District of California, Southern Division, against the Western Pacific Railroad Company and its subsidiaries, asserting a claim by the former parent company arising out of savings in Federal taxes which may be realized by the defendant companies under consolidated tax returns for the years 1942 and 1943 and for the first four months of 1944, including therein a claim for refund of taxes paid for the year 1942. The stockholders of the former parent company who had petitioned for leave to intervene at the time of the last report were subsequently allowed to intervene and they are actively supporting the plaintiff's claim. The taking of certain [114] depositions in this action commenced in New York City

on February 9, 1948, and will probably continue throughout a period of several weeks."

I will now offer as Plaintiff's Exhibit 21 a sheet headed "The Western Pacific Railroad Company, Schedule of Officers, August 1, 1935, to February 9, 1948." That sheet is also identified as Interveners' Exhibit 26.

Mr. Clark: That is of the corporation, the holding corporation, isn't it?

Mr. Phleger: Western Pacific Railroad Corporation.

Mr. Clark: I thought I heard you say "Company." I am sorry.

Mr. Phleger: No, it is the corporation. I will not stop to read the list of officers, but the list of officers shown supports this chart as to the period covered by the chart; Schumacher, President; Curry, Secretary; Curry, Treasurer; Curry, President; Wienken, Secretary; Valouch, Vice President and Secretary. [115]

* * *

Wednesday, February 2, 1949—10:00 A.M.

* * *

Mr. Phleger: The last exhibit admitted in evidence yesterday was Plaintiff's Exhibit 21. I will now offer as Plaintiff's Exhibit 22 a sheet headed "The Western Pacific Railroad Corporation, Schedule of Directors, August 1, 1935, to February 9, 1948." That is also identified as Interveners' Exhibit 27. The schedule shows that these directors shown on Plaintiff's Exhibit 2, Schumacher, Curry,

Valouch, Sheehan, Wienken, Osborne, Wood and Hatton, served during the periods shown upon this chart, this chart covering the period June 1, 1943, to October 10, 1946.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 22.)

Mr. Phleger: I will next offer as Plaintiff's Exhibit 23, also identified as Interveners' 44, schedule headed "The Western Pacific Railroad Corporation, Schedule of Payments Made to Officers, Counsel and Employees during the Period August 1, 1935, to December 31, 1946." May it please the Court, this exhibit supports the facts shown on Plaintiff's Exhibit 2 with respect to the fact that the officers and directors shown on it under the heading of "Officers and Directors of the Plaintiff Corporation" received no compensation for services during the [116] period shown by this chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 23.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 24, also identified as Interveners' Exhibit 5, a sheet headed "The Western Pacific Railroad Corporation, Schedule of Payments made to Pierce & Greer or H. Brua Campbell January 1, 1942, to December 31, 1945." The firm of Pierce & Greer are shown on the chart, Plaintiff's Exhibit 2. The members of that firm, as will appear from the evidence, consist of Mr. Nicodemus and Mr. Camp-

bell. The evidence already introduced shows that during this period they were general counsel for the plaintiff corporation, and as shown by the reports of the defendant company in evidence, they were shown as counsel for the company through 1943. We will show by subsequent evidence that they were counsel for the company and received compensation for a later date. I direct attention also to the fact that this exhibit shows that there was no compensation received by Pierce & Greer from the plaintiff corporation for services rendered after May, 1943, through December 31, 1945. That is, while counsel for the plaintiff corporation they received no compensation during the period shown on that chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 24.)

Mr. Phleger: I will now offer in evidence as Plaintiff's [117] Exhibit 25 a sheet identified also as Interveners' Exhibit 45 headed "The Western Pacific Railroad Company, List of Corporate Officers and Terms Thereof, January 1, 1935, to February 12, 1948." I direct the attention of the Court to the fact that this exhibit supports certain of the statements contained on Plaintiff's Exhibit 2. It shows that M. J. Curry, the president of the plaintiff corporation, was the vice president, assistant secretary and assistant treasurer of the defendant railroad company during the period January 1, 1935, through to April 30, 1945, during the entire period covered by the chart up to the date just

mentioned. It also shows that T. M. Schumacher, who was a director of the plaintiff corporation and holding various positions with the defendant corporation, was chairman of the executive committee of the defendant railroad company during this period starting in 1935 up to December 28, 1944.

(The document referred to was marked Plaintiff's Exhibit 25.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 26 four sheets identified as Interveners' 96, 97, 98 and 99, consisting of copies of the ballots of the James interests used in elections of the Western Pacific Railroad Company, the defendant company, at special meetings of the stockholders held on March 26, 1945; June 27, 1945; June 26, 1946, and June 25, 1947. The exhibits show that at the meeting of March 26, 1945, the [118] James Foundation of New York and the A. C. James Company, by Robert E. Coulson, cast a ballot of 134,738 shares of stock for the directors listed, which included Robert E. Coulson; that at the annual meeting of June 27, 1945, the James Foundation of New York and the A. C. James Company, acting by Robert E. Coulson, proxy, cast a vote for 134,738 shares of stock for the directors listed, including Robert E. Coulson; that at the meeting of June 26, 1946, the James Foundation of New York, by Robert E. Coulson, proxy, cast a vote of 208,892 shares of stock. That shows the additional shares which resulted from the conversion of the debt into common stock mentioned the other day

for the list of directors, including Robert E. Coulson; and, finally, at the meeting of June 25, 1947, the James Foundation of New York, by Robert E. Coulson, proxy, cast——

Mr. Adams: Mr. Phleger, will you read the names of the proxies, please?

Mr. Phleger: Excuse me. Robert E. Coulson and Stuart Jenkins, proxies for the James Foundation of New York, voted 208,892 shares of stock for the list of directors, including Robert E. Coulson and Stuart Jenkins.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 26.)

Mr. Phleger: I will next offer in evidence as Plaintiff's Exhibit 27 a document consisting of four sheets, otherwise identified as Interveners' 222-A, headed "The Western Pacific [119] Railroad Company, Statement Showing Funds Supplied by the Western Pacific Railroad Company to Mr. M. J. Curry, Assistant Treasurer, for Use in Meeting the Expenses of its New York Office," and a detail of expenditures made from such funds by Mr. Curry for the period March 15, 1943, to May 1, 1945. I call the Court's attention to the fact that our chronology shows that on June 1, 1943, all of the employees in the New York office were taken over as full-time employees of the trustees. This exhibit shows that there was paid during the period stated by the defendant railroad to Mr. Curry for the maintenance of that office and the payment of salaries the total sum of $107,183.62. It also

contains the information which supports the showing of Plaintiff's Exhibit 2 of the receipt of compensation by those who occupied positions both with the corporation and with the company which are indicated by the red lines running to the company and the trustee. For example, Mr. Greer's salary which was paid by the company during this period to May 1, 1945, is shown as $11,700 a year. Miss Valouch ranged from $2,640 a year to $2,860 a year; and Sheehan between $1,980 to $2,344 a year. All are shown by this exhibit to have been paid out of funds supplied by the defendant corporation to Mr. Curry as an officer——

Mr. Adams: I object to that statement, your Honor. The showing is that these funds came out of moneys in the hands of the court and were provided for the court's trustees. [120]

Mr. Phleger: I think the statement that I read——

The Court: I think I understand it. I do not need discussion.

Mr. Phleger: The title of the document is "Supplied by the Western Pacific Railroad Company." That supports the showing of the receipt of compensation shown on Plaintiff's Exhibit 2.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 27.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 28 a sheet also identified as Defendants' Exhibit 889, which is a one-sheet memorandum dated "San Francisco, June 2, 1943," with the initials

E. W. E., which I take it stand for Mr. Englebright, who is assistant to the president for the defendant company——

Mr. Adams: That is correct, and it is Mr. Engelbright's initial that appears below those typewritten initials.

Mr. Phleger: The document is headed "Memorandum for File Supplementing Information on the Memorandum of Conference Dated June 2, 1943, Relating to the Assumption of Certain Salaries and Expenses of the New York Office by the Trustees, the following details are of record:" and then in columns it shows the amount previously paid by the trustees, the amount previously paid by the W. P. Corporation, the total now to be paid by the trustees, that is, on a monthly [121] basis, and the annual total.

As the evidence will show, previous to this date of June 1 the employees shown on Plaintiff's Exhibit 2 were paid jointly by the corporation and by the company or trustees. After that date the entire compensation was taken over by the company or trustees and this exhibit shows the amounts paid previously by the two parties and the amounts thereafter paid by the defendant company or trustees, showing that that amount was the aggregate of the amounts previously paid by both parties. The employees listed are M. J. Curry, who was the president of the corporation; H. Brua Campbell, who was a member of the firm of Pierce & Greer, and Campbell was a director of the plaintiff corpora-

tion; Mary C. Valouch, who was a vice president, secretary and director of the corporation from May 1, 1945, and was secretary to Mr. Schumacher and assistant secretary of the company; John F. Wienken, who was the stenographer but who was a director and secretary of the plaintiff corporation; Lillian O'Neill, who was not a director or officer of the corporation but a telephone operator, and Catherine C. Sheehan.

Mr. Adams: Your Honor, I object to plaintiff's characterization of Mr. Wienken as a stenographer. There is nothing in the record to indicate that.

Mr. Phleger: We will show his functions and duties.

Mr. Clark: There very definitely is, your Honor; there [122] is direct testimony to the effect that Mr. Wienken is Mr. Curry's stenographer.

Mr. Phleger: We will later prove that, and it is shown in the depositions.

This exhibit further substantiates the statements contained on Plaintiff's Exhibit 2 as to the sources, amounts and duration of the compensation of the officers whose names are shown upon that chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 28.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 29 a sheet also identified as Interveners' Exhibit 373. It is one sheet of paper dated New York, January 27, 1943, signed by T. M. Schumacher, addressed to Mr. Curry. It reads [123]

* * *

(The document referred to was received in evidence and marked Plaintiff's Exhibit 29.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 30 a memorandum consisting of two pages and a letter, which I will now describe, which are also identified as Interveners' 292 and Interveners' 4-A. The two-sheet memorandum is headed as [124] follows: "Memorandum of Conference June 2, 1943." It is signed by Charles Elsey, who is the president of the defendant railroad company. It reads as follows: [125]

* * *

I will next offer as Plaintiff's Exhibit 31 a document also identified as interveners' document 106, which consists of a letter dated November 9, 1943, addressed to Colonel Robert E. Coulson, 40 Wall Street, New York 5, New York, by Mr. F. C. Nicodemus, Jr., with a copy to Mr. T. M. Schumacher (reading):

"Dear Colonel Coulson:

"This will acknowledge receipt of your firm's letter of November 8, 1943, enclosing the report of the Reorganization Committee of the collection of officers and counsel and the designation of mailing address and adoption of by-laws.

"This also seems very formal and excessively regular but nevertheless I wish to write informally to congratulate the Reorganization Committee on the selection of your firm as its counsel. As counsel for the debtor as well as for the Western Pacific Railroad Corporation I stand ready to cooperate

Pacific Railroad Company, I am looking to you to cooperate with Mr. Matthew, general counsel for the Trustees, in protecting the trust estate in the preparation of the final return."

39-B consists in Mr. Nicodemus' reply to that letter. It is dated March 23, 1943, the same date, addressed to Mr. T. M. Schumacher, Trustee, The Western Pacific Railroad Company, 37 Wall Street, New York, New York:

"Dear Mr. Schumacher:

"This will acknowledge your letter of today's date re income tax returns for 1942.

"The preparation of the final return involves many new and difficult questions arising under [154] the recent amendments to the Internal Revenue Code. These are essentially questions which I (and I am certain Mr. Matthew will feel the same way) would hesitate to determine without the advice of experienced tax experts who are in constant touch with the Treasury. I should assume that we would wish to have a number of conferences with the Bureau of Internal Revenue as to many phases of the new act before even reaching a decision upon the very critical question as to whether it should be a consolidated return or whether the trustees should make a separate return on behalf of the Railroad Company. This is but one of the many questions affecting very heavy present and potential tax liabilities to which we should give immediate attention.

"My suggestion is, therefore, that you authorize

me to arrange, if possible, for the services of Messrs. Whitman, Ransom, Coulson & Goetz, who are peculiarly well equipped to give the kind of expert advice that we will require and who are also very familiar with the problems of the Western Pacific Railroad Company. This employment is within the authority granted to the Trustees by the original orders made by Judge St. Sure.

"Very truly yours,

"F. C. NICODEMUS, JR." [155]

Now, 39-C is a letter signed by Mr. Nicodemus on the letterhead of Pierce & Greer, dated March 23, 1943, addressed to Colonel Robert E. Coulson, Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York City:

"Dear Colonel Coulson:

"Enclosed is a copy of a timely letter received this morning from Mr. Schumacher, together with my reply."

This is obviously the two letters I have just read.

"If this arrangement is agreeable to you and your associates would you be willing to start right in without waiting for a confirmation from Mr. Ehrman. The time has been extended to May 15, 1943, but even this extended time is too short for adequate consideration of the questions which are certain to arise in this matter.

"My best regards to you.

"Very truly yours,

"F. C. NICODEMUS, JR."

That is followed by 39-D, a letter from Mr. Schumacher, dated April 7, 1943, addressed to Messrs. Pierce & Greer, 40 Wall Street, New York, New York, attention Mr. F. C. Nicodemus, Jr. It is from T. M. Schumacher and Sidney M. Ehrman, Trustees, with copies to Mr. Sidney M. Ehrman, Mr. Charles Elsey and Mr. Allan P. Matthew:

"Dear Mr. Nicodemus: [156]

"Referring to your letter of March 23, 1943, in regard to our tax matters:

"Since receiving your letter I talked the subject over on the telephone with Mr. Ehrman and wrote him on March 31 (copy to you) and, as you know, while Mr. Matthew was in New York recently I discussed it with him, at which time he stated he fully agreed with your recommendation to employ competent tax counsel for advisory services in connection with the preparation of final Federal tax returns for the calendar year 1942.

"Upon Mr. Matthew's return to San Francisco, he conferred with Mr. Ehrman on the matter and, this morning, I am in receipt of a letter from him, dated April 5, 1943 (copy attached) in which he advises that the firm of Whitman, Ransom, Coulson & Goetz, which you recommended, is acceptable to Mr. Ehrman.

"As it is agreeable to me also, this will authorize you to arrange forthwith for the services of Whitman, Ransom, Coulson & Goetz, since the Federal returns must be filed on or before May 15, 1943.

"Yours very truly,

"T. M. SCHUMACHER."

I am discharged as trustee by the court, and that this letter serve as my application for a pension, account chairman of the executive committee, retired.

"Yours very truly,

"T. M. SCHUMACHER."

The third sheet, 34C, I do not need to read in full. It is a certified copy of a resolution of the Board of Directors of the Western Pacific Railroad Company held on January 26, 1945, granting the pensions as requested.

(Letters referred to above and resolution of Board of Directors were received in evidence and marked Plaintiff's [140] Exhibits 34A, 34B and 34C, respectively.)

Mr. Phleger: I will now offer in evidence defendant's response to plaintiff's request No. 28, which reads (reading):

"H. Brua Campbell——"

whom you will note on Plaintiff's Exhibit 2 is shown as a director of the corporation to for plant 1, plant 45, and also one of the attorneys for the company or trustees——

"——was and is an attorney and associate of Mr. F. C. Nicodemus of the law firm of Pierce & Greer."

The response of the defendant railroad company (reading):

"Admit that H. Brua Campbell was an attorney, but upon the basis of the testimony of Mr. Frank C. Nicodemus, Jr., allege that he was a partner of

Mr. Frank C. Nicodemus, Jr., in the law firm of Pierce & Greer."

The response of Western Realty was substantially the same.

I will now offer in evidence defendant's response to plaintiff's request No. 29 (reading):

"Mr. Nicodemus, Jr., and his firm, Pierce & Greer, were counsel for the company for many years until January 1, 1945, and were New York counsel for Mr. Schumacher in his capacity as one of the reorganization trustees of the company. Pierce and Greer were also general counsel for the corporation."

The response of the defendant railroad company (reading):

"Deny request 29, except that admit that Pierce & Greer [141] were and are general counsel for the plaintiff."

The response of Western Realty is to the same effect.

I will now offer in evidence an admission on page 5 of the defendant's brief (reading):

"The holding corporation's Board of Directors met in New York and the holding corporation and the debtor had the same legal representation in New York."

I will now offer as plaintiff's exhibit 35, a document also identified as interveners' 286. It is a sheet dated May 28, 1945 (reading):

"Pierce & Greer and Frank C. Nicodemus, Jr.
40 Wall Street,
New York 5, New York.

"For allowance by order dated May 21, 1945, of the District Court of the United States, for the Northern District of California, Southern Division, in the matter of the Western Pacific Railroad Company, Debtor, No. 26591-S, as compensation for services rendered and for expenses incurred (including attorneys' fees) in connection with this proceeding, and the plan of reorganization confirmed therein, from November 1, 1939, to date of termination of these proceedings.

"Services, $5,250.00.

"General, $5,250.00.

"Pierce & Greer and Frank C. Nicodemus, Jr., $5,250.00. Five thousand two hundred fifty 00/100."

(Paper referred to above was received in evidence and marked Plaintiff's Exhibit 35.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 36 sheets identified as interveners' exhibits 281, 282, 283, 284, all as one exhibit.

The first sheet consists of a letter signed by Charles Elsey; dated "San Francisco, December 19, 1945." It is addressed to Mr. C. W. Dooling and reads as follows (reading):

"Enclosed is a copy of a letter to me, dated New York, December 17, from Mr. F. C. Nicodemus, Jr., concerning fees to Pierce & Greer for services for our account during the year 1945.

"If this bill is satisfactory, will you please ap-

prove it and pass it to the auditor so that it may be included in December accounts?"

The amount of the last two bills is shown on Plaintiff's Exhibit 2, and included in the red lines running to "trustees" or "company."

The second sheet of the exhibit is a letter on the letterhead of Pierce & Greer, 40 Wall Street, New York 5, signed by F. C. Nicodemus, Jr., and dated December 17, 1945. It is addressed to Mr. Charles Elsey, President, the Western Pacific Railroad Company, 526 Mission Street, San Francisco 5, California (reading):

"Dear Mr. Elsey: [143]

"At the time of the consummation of the reorganization proceedings you asked our firm to continue handling the minor law matters and negotiations growing out of the carrier operations.

"You stated that the compensation would be on a mutually satisfactory, individual fee basis. We have allowed this to run along for approximately a year and I thought it opportune to send in a bill for the current calendar year. We do not think that there will be any further matters of substance to be handled during the remaining two weeks of the year, and I am sending the bill now for attention this year, which may be desirable from both of our standpoints.

"While it is difficult to appraise services of this nature, we are sending a bill in the amount of $2,500 which seems to us reasonable for the services shown in the schedule thereto attached.

You will see from this schedule that Mr. Campbell devoted much time to these various matters.

"With kind personal regards,

"Yours very truly,

"F. C. NICODEMUS, JR."

The third sheet is a bill or invoice dated December 17, 1945, for legal services from 1 January, 1945, to 31 December, 1945, in the amount of $2,500. [144]

Mr. Phleger: The next sheet shows the receipt of payment of that bill.

Mr. Adams: The third sheet, Mr. Phleger, is neither a bill nor invoice but is a voucher for payment.

Mr. Phleger: A voucher for payment?

Mr. Adams: Yes.

Mr. Phleger: Thank you. The next sheet is the actual receipted bill with the O.K. of Mr. Dooling.

I will next offer in evidence the defendants' response to plaintiff's requests 35 and 36.

Request 35:

"Mr. Coulson and his firm were attorneys for James and his holding companies and are attorneys for the James Foundation and Coulson has always been one of its trustees."

That is admitted by the defendants.

Request 36:

"During Mr. James' lifetime he and Coulson's firm on his behalf and after his death and until the decision of the United States Supreme Court on March 15, 1943, affirming the order of the Bankruptcy Court approving the plan, James Estate

and James Foundation and Mr. Coulson's firm on their behalf were active in opposing approval of the plan. The response of the [145] defendant Railroad Company admit Request No. 36 if that request refers to the modified plan of reorganization promulgated by the ICC."

The response of the Western Realty is to the same effect.

I will now offer in evidence as Plaintiff's Exhibit 37 a letter also identified as Defendants' Exhibit 864. This is a letter on the letterhead of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York. The date is February 24, 1943. That date, I will direct the Court's attention to, is a date shortly before the Supreme Court approved the plan. It is signed by Robert E. Coulson, I. C., addressed to Mr. Charles Elsey, President of the Western Pacific Railroad Company, Mills Building, San Francisco.

"Dear Mr. Elsey:

"I am extremely anxious to receive as early as possible a copy of the Federal income tax return for 1942 of the Western Pacific Railroad Company together with sufficient of the working sheets to see how the tax was computed. No doubt I might obtain this in New York as I assume the question of a consolidated return has been considered and adopted or rejected. However, I also want to obtain figures which I have no doubt you have had made up as to what the Federal tax would be if the Commission plan had been in effect in 1942.

These [146] figures I could probably only obtain through your office, and I am therefore writing you directly for them. While the Supreme Court has delayed a long time in considering the questions presented to it, I am inclined to believe that a decision will come down next Monday.

"Sincerely yours,

"ROBERT E. COULSON."

I will direct your attention to the fact that as of the date of this letter there was no official connection between Robert E. Coulson and the Western Pacific Railroad Company.

Mr. Adams: If the Court please, I take exception to that remark. His official position, of course, was one of representation which he had had with the reorganization for many years. Mr. Coulson appeared throughout the proceedings as the attorney for the A. C. James Co. in the reorganization proceeding, and like every other party to the proceedings he was entitled to ask Mr. Elsey, the trustees' agent, for information. That statement is out of order.

Mr. Phleger: I am not questioning his right, perhaps to request the information. I am pointing out a fact, which you cannot deny, that at this date he had no official connection either with the trustees in reorganization or with the Western Pacific Railroad Company.

Mr. Adams: I have stated the fact of record that he had [147] an official representation for a

party to the reorganization, the A. C. James Co., and had such for years. [148]

* * *

Mr. Phleger: I will now offer as Plaintiff's Exhibit 38-A a memorandum identified as Interveners' 51-A. I will offer as Plaintiff's Exhibit 38-B a letter identified as Interveners' 51-B and 51-C.

(The documents referred to were received in evidence and marked respectively Plaintiff's Exhibits 38-A and 38-B.)

Mr. Phleger: 38-A is a memorandum dated March 15, 1943, signed "R. E. C.," meaning Mr. Coulson. It is addressed "Memorandum for Mr. Polk." Mr Polk is a partner in the Ransom firm and handled the tax matters, as will be more fully developed by the evidence. This is the memorandum:

"I wish you would read the attached letter from Charles Elsey. It makes me wonder whether I ought not to insist on reviewing the consolidated tax return. Actually I happen to know that the only person in the corporation office over here in New York who has any knowledge of taxes is a girl who is primarily Schumacher's secretary. They probably have certified public accountants auditing the corporation books who are of some use to her, but I would be a little surprised if the [149] report were intelligently prepared. Either Elsey's letter is evasive or his organization in California

has done very little on the tax returns. Also I find it quite impossible to spell out from his letter what they have really done on depreciation. I would be glad to have your reaction on all this."

It is endorsed at the bottom of the letter in handwriting——

Mr. Adams: Mr. Polk's handwriting?

Mr. Clark: Concededly.

Mr. Phleger: Mr. Polk's handwriting, addressed to Colonel Coulson, is this statement:

"As I understand the procedure in the New York office, only the lady referred to had any part in the preparation of the return. She now has separate company data and will require several weeks to prepare consolidated schedules. She 'confers' with an accounting firm, but Mr. Curry says they are too impoverished to hire accounting help. They paid on March 15 a quarterly payment of $1,000,000. No decision has been reached as to depreciation treatment. I will follow this up if you so direct in about four weeks.

"J. K. P."

Up at the top in pencil is this: "J. K. P.: Better follow up. R. E. C." [150]

Exhibit 38-B, attached to 38-A, is a letter signed by Charles Elsey dated March 9, 1943, on the letterhead of the Western Pacific Railroad Company, San Francisco, California, addressed to Mr. Robert E. Coulson, care of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York:

"Dear Mr. Coulson:

"This refers to your letter of February 24 making inquiry with respect to certain income tax matters. Income tax for the Western Pacific and its subsiduary companies is computed on the basis of a consolidated return by the Western Pacific Railroad Corporation. We do not compute the income taxes of the various companies separately. Under date of March 5, 1943, Mr. D. C. DeGraff, our general auditor, furnished Mr. Curry with all the required income tax data for the following companies: Western Pacific Railroad Company, Sacramento Northern, Tidewater Southern, Deep Creek, the Western Realty Company, Standard Realty and Development Co., the Delta Finance Company, Lfd. Using this data Mr. Curry is in a position to proceed with preparation of the consolidated return and you can obtain full information from him. As to the question of the second paragraph of your letter, I fear it must go unanswered, because no one knows at this time how or on [151] what basis the income tax of the reorganized company will be computed for the years 1939 to date. So far as we are aware, no waiver has been included covering the taxes for the year 1939, in which case the return already made would stand. Certain phases of the tax for 1942 would be dependent upon results of 1940 and 1941, and the whole subject is so full of uncertainties that we have ceased to make any attempt to compute taxes on the reorganized company basis. The forthcoming

decision of the Supreme Court could also change the entire picture."

Mr. Clark: Your Honor, may I ask Mr. Adams if he will concede that the lady referred to in Interveners' 51-A, which is now Plaintiff's Exhibit 38-A, was Miss Valouch?

Mr. Adams: I will agree with that inference, and I take it all counsel are agreed on that.

Mr. Clark: Thank you.

Mr. Phleger: I think it is apparent from the face of the document, particularly as it is in quotes. I will now offer as Plaintiff's Exhibit 39-A, 39-B, 39-C, 39-D, 39-E and 39-F letters identified respectively as Interveners' 6, Interveners' 7, Interveners' 8, Defendants' 20, Defendants' 21 and Defendants' 23 and consisting of the following: These have to do, if your Honor please, with the employment of Mr. Coulson to handle the tax matter.

* * *

Mr. Adams: May I inquire, your Honor, with reference to the remark last made by Mr. Phleger, in which he referred to the engagement of Mr. Coulson as tax counsel, whether he had any purpose in distinguishing Mr. Coulson and his firm?

Mr. Phleger: No, I did not. I simply wanted to direct the attention of the Court to the significance of this exhibit, which shows the employment of Mr. Coulson and his firm as tax counsel.

Mr. Adams: The record will show the employment of the firm. I take it you have nothing in mind by way of distinguishing between Mr. Coulson and his firm?

Mr. Phleger: No, I have not.

I will now direct the Court's attention to Exhibits 39-A to -F, inclusive.

(Letter dated March 23, 1943, signed by T. M. Schumacher; letter dated March 23, 1943, signed by F. C. Nicodemus, Jr.; letter dated March 23, 1943, signed by F. C. Nicodemus, Jr.; letter dated April 7, 1943, signed by T. M. Schumacher; letter dated April 8, 1943, signed by F. C. Nicodemus, Jr., and letter dated April 20, 1943, signed by Robert E. Coulson, were received in evidence and marked Plaintiff's Exhibits 39-A to -F, inclusive.)

Mr. Phleger: 39-A is a letter on the letterhead of the Western Pacific Railroad Company, T. M. Schumacher and Sidney Mr. Ehrman, Trustees, signed by T. M. Schumacher and dated [153] March 23, 1943. I direct the Court's attention to the fact that that was a few days after the decision of the United States Supreme Court. It is addressed to Mr. F. C. Nicodemus, Jr., Pierce & Greer, 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942.

"The return filed is a tentative one, an extension having been granted until May 15, 1943, to file a final return. As one of the Trustees of the Western

and signed by the initials M.C.V., which I take it, counsel, you will stipulate as Miss Valouch?

Mr. Adams: Mary C. Valouch.

Mr. Phleger: "Herewith for your approval are proposed journal entries made up by Mr. Worden of Lybrand, Ross Bros. and Montgomery, who is entering the corporation books as of June 30, 1944.".

In pencil is "M.C.V." At the bottom is the following:

"Returned July 27, with inked corrections, Mr. Polk stating that Mr. Coulson, Mr. Whiteside and he had approved with corrections noted."

I do not think that it is necessary to go through this exhibit except to point out that this exhibit has to do with the book entries on the corporation's books of the stock loss, which was the loss taken advantage of or used in the consolidated returns that produced this tax result.

Mr. Adams: May I object to the characterization again, your Honor? The documents will speak for themselves and are quite elaborate and, to my way of thinking, prove other matters besides the particular purpose which counsel has indicated was his purpose. I do not want to interfere too much with his presentation, but I suggest that when it comes to documents, counsel's characterization of the documents is going to be subject to dispute, and if we can have as little of that as possible, we will have a record with fewer interruptions.

Mr. Phleger: I am trying to save time, if the Court please, and I suggested it to counsel that if

by inadvertence or otherwise I omit something of importance, I wish he would call it to my attention.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 44.)

Mr. Phleger: The attached journal entries show the correction in ink which is mentioned by Miss Yalouch's memorandum as being corrections by Mr. Polk:

"12-31-43, loss as result of reorganization of subsidiary's capital stock the Western Pacific Railroad Company $75,796,400."

Mr. Adams: Are you reading the first page?

Mr. Phleger: Yes, 213B.

I direct your attention also to a written memorandum [182] identified as intervener's 213K on yellow paper, signed M.C.V., dated July 26, addressed to Mr. Worden:

"Our lawyers feel that the tax should reflect the sale of collateral securities when they were sold in 1943, and was corporation property until date of sale. The balance of collateral unsold in 1944 was turned over to the creditors as of the date of the stockholder's meeting April 20, 1944, when the agreement with the three creditors was approved. The stock of the Western Pacific Railroad Company should be written down to $1 as of the date of the Supreme Court decision approving the I.C.C. plan of reorganization."

That is this date (indicating on chart).

The next, 39-E, is a letter from Mr. Nicodemus to Colonel Robert E. Coulson dated April 8, 1943:

"Dear Colonel Coulson:

"Referring to my recommendation to Messrs. Schumacher and Ehrman that your firm be engaged as advisory counsel to aid Mr. Matthew and me in the solution of the serious problems that will arise in connection with the preparation of final Federal tax returns for the calendar year 1942, I am just in receipt of advice from Mr. Schumacher that this recommendation in which Mr. Matthew has concurred is agreeable to the two Trustees and that they desire me to arrange forthwith for your firm's services.

"Since you already have advised me informally of your firm's willingness to undertake this work I write merely to confirm the arrangement and to say that I will hold myself in readiness to confer with your Mr. Polk and to make available to him such data as has been supplied to me and such further data as he may desire.

"The firm of Lybrand, Ross and Montgomery has been employed in connection with certain accounting problems and I understand their services will be available to us to the extent that we deem necessary."

The final letter of the series is 39-F, a letter on the letterhead of Whitman, Ransom, Coulson & Goetz, signed by Robert E. Coulson, dated April 20, 1943, and addressed to F. C. [158] Nicodemus, Jr., Esq., 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"This is a belated acknowledgment of your letter

of April 8, 1943. I had assumed from its text and from the fact that Mr. Polk and you were already at work when I received your letter that you needed no formal acknowledgment. However, it may be better, as a matter of record, that you should have a formal acknowledgment of the fact that we have undertaken the Federal tax work for the Trustees as advisory counsel in conjunction with yourself and Mr. Matthew.

"Sincerely yours,

"ROBERT E. COULSON."

I will now offer in evidence the response of defendants to plaintiff's Request 38-A:

"Robert E. Coulson has been a director of the company ever since December 28, 1944." That was admitted by the railroad company defendant and by the Western Realty.

Mr. Adams: Did that admission characterize the company as the reorganized company?

Mr. Phleger: No, it does not. The response reads——

Mr. Adams: The first one was the defendant, I take it?

Mr. Phleger: The first one reads: "Admit that Robert [159] E. Coulson has been a director of defendant, The Western Pacific Railroad Company, since December 28, 1944."

Mr. MacKinnon: And the Western Realty admits that also, your Honor.

* * *

Mr. Phleger: Fine. I now offer in evidence Plaintiff's Exhibit 40, consisting of two pages, the

first offer identified as intervener's exhibit 332 and the second sheet as intervener's 335. The first sheet is headed "Statement of counsel fees paid to Whitman, Ransom, Coulson and Goetz by the Western Pacific Railroad Company and/or Reorganization Trustees of the Western Pacific Railroad Company during the period 1943-1947. Paid by the Reorganization Trustees of the Western Pacific Railroad Company, 1945, $22,500 for services rendered in connection with federal tax matters for the years 1940-1944." Then under the heading, "The Western Pacific Railroad Company; the year 1945, $85,000 for services rendered to the Reorganization Committee of the Western Pacific Railroad Company. Also for the same year $21,075 for services rendered in connection with federal tax [169] matters for years 1940-1945, 1946, $20,750. For services rendered in connection with federal tax matters for the years 1940-1946, 1947, $20,500 for services rendered in federal tax matters for the years 1940-1947.

"Note: The James Foundation of New York, Inc., has made no payments to Whitman, Ransom, Coulson and Goetz for any services rendered by Whitman, Ransom, Coulson and Goetz to the reorganization trustees, the Western Pacific Railroad Corporation and/or the Western Pacific Railroad Company or any of its subsidiaries."

I might state that the matter which I have just read is the foundation of the showing upon Plaintiff's Exhibit 2 of the total paid Coulson and Goetz, Whitman, Ransom, Coulson and Goetz and James K. Polk of $129,325.

Mr. Adams: If your Honor please, I would just like to note on the record, as I think it is appropriate, that we have objected on the score of immateriality and want of relevance to the offer of evidence as made, and that we may have an exception noted to your Honor's ruling in that regard and also in regard to the production of the documents, so that our position may be protected on the record.

The Court: And with the reservation, I think you should note, of the right to strike it at a later date.

Mr. Adams: Very well, your Honor.

The Court: So you make a note of that now and there may [170] be some other matters of this kind. I gather from what counsel says it is not so much the amount of these fees, it is the circumstance of payment being made here and for what.

Mr. Phleger: Yes. It seems to me it is a very important factor that the entire tax matters——

The Court: No, I am not arguing against your position in the matter. I am merely saying I take it the purpose of the introduction of this is not so much any question as to the amount of the fees but as to the nature of the services for which the fees were charged and the period covered.

Mr. Phleger: Correct.

The Court: I gathered that from what you said.

Mr. Phleger: That is correct.

Mr. MacKinnon: If your Honor please, may the record show a similar objection with respect to the rights of the Western Realty Company?

The Court: All right.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 40.)

The Court: Does that complete the exhibit?

Mr. Phleger: Attached to it is a second sheet, a letter addressed to James K. Polk, c/o Whitman, Ransom, Coulson and Goetz, 40 Wall Street, New York, dated December 19, 1946:

"Dear Mr. Polk:

"Pursuant to my telegram of this date I am inclosing [171] our voucher no 120186 in the grand total of $24,318.93 for the services of yourself and associates in connection with this company's federal tax matters, including miscellaneous expenses incurred by you in the amount of $3,568.93. In accordance with our exchange of telegrams on December 16, the voucher in question is made payable to you."—(that is to Polk) and not to the firm.

"Very truly yours,"

The original is signed Charles Elsey, copy to Mr. C. P. Russell.

Will it be stipulated, Mr. Adams, that the sums paid shown by this memorandum included the sums paid by the Coulson firm to Mr. Curry?

Mr. Adams: No, that is a mistake. You will have the whole record. That would be an incorrect statement.

Mr. Phleger: You do not stipulate?

Mr. Adams: Your statement is incorrect, Mr. Phleger.

Mr. Phleger: I asked you if you would stipulate.

Mr. Adams: We might as well deal with the facts instead of just stipulate about things that are not facts. That is all I have in mind.

* * *

Wednesday, February 2, 1949, 2 P.M.

Mr. Adams: If your Honor please, if I may interrupt Mr. Phleger a moment in his case, I would like to recount compliance with the direction of your Honor for the production of the documents referred to upon the close of the session this morning. Referring to Plaintiff's exhibit No. 40 introduced this morning, there has been handed to opposing counsel the original bills for 1945, the first item, for 1945, the third item, for 1946, and for 1947, and in addition to that, an additional bill that was received by the railroad company subsequent to the date of the exhibit. There has not been handed the opposing counsel a bill in the amount of $85,000 as indicated upon Plaintiff's exhibit No. 40, for the year 1945, for the reason that no such bill was rendered, that payment having been made pursuant to an allowance in the bankruptcy court.

Mr. Phleger: May it please the Court, I would like to add to Plaintiff's Exhibit 40 as a third sheet, a sheet which I neglected to attach when the exhibit was first offered. That sheet is also indentified as intervener's exhibit 336 and is a reply to the letter which is already a part of Exhibit 40. You will remember that that letter was a letter from Mr. Elsey to Mr. Polk transmitting the voucher for $24,000

for services the year 1946, and concludes: "In accordance with our exchange of telegrams of December 16, the voucher in question is made payable to you." [173] That is to Polk.

The document which I now refer to and offer as additional sheet on Plaintiff's Exhibit 40, on the letterhead of Whitman, Ransom, Coulson and Goetz, December 23, 1946, signed by James K. Polk and addressed to Mr. Elsey:

"This acknowledges your letter of December 19, 1946, inclosing a voucher check for the amount of the statement sent you covering the services of myself and my associates in connection with the company's federal tax matters. You may be somewhat puzzled why my suggestion was that this check be drawn to me instead of to the firm. You will remember that my original retainer in the tax matters was by the trustees under Section 77 at a time when Mr. Coulson was one of the Reorganization Committee. The retainer was a retainer personal to me rather than a firm retainer, and in view of the current flood of litigation in behalf of the holding company, it seemed better to continue the professional relationship as originally established.

"With all good wishes of the season, I am

"Sincerely,"

I will now offer as one exhibit, being Plaintiff's Exhibit 41, the bills that have been furnished us by counsel in response to our request and which have just been mentioned by him as follows: The bills are four in number and I will tie them to [174]

Plaintiff's Exhibit 40. The first item, which is reported in the year 1945, $22,500, as being paid by the reorganization trustees, is the first item of the exhibit. It is dated March 31, 1945, and is rendered in the name of James K. Polk, "To James K. Polk, c/o Whitman, Ransom, Coulson and Goetz." That is the first item shown on that exhibit.

The second item, skipping over the $85,000 item just mentioned by counsel, is the bill for the year 1945. That is dated December 20, 1945, and is rendered to the Western Pacific Railroad Company. That is after the company came out of reorganization a year and covers professional services rendered during that calendar year.

Mr. Clark: In what amount, Mr. Phleger, please?

Mr. Phleger: $21,075.

The next item is the bill for 1946, $20,750, which is a bill rendered under date of December 13, 1946, to the Western Pacific Railroad Company by James K. Polk, c/o Whitman, Ransom, Coulson and Goetz.

The last item is that for 1947, of $20,500 covered by a bill dated December 19, 1947, rendered to the Western Pacific Railroad Company, not by Polk, but to Whitman, Ransom, Coulson and Goetz. I ask that these be received and marked Plaintiff's Exhibit 41. I would prefer them as one exhibit.

* * *

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 41.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 42 a further bill which has been produced in response to the plaintiff's demand and which is not covered by Exhibit 40. I will read it. It is dated November 15, 1948. It is rendered to the Western Pacific Railroad Company by Whitman, Ransom, Coulson and Goetz. The statement is: "Final Statement covering professional services in connection with federal tax disputes as to the taxable period from January 1, 1942, through April 30, 1944." That is the period covered by the tax returns which are the subject matter of this litigation, and the amount of the charge is $300,000. In addition to the $300,000 charge for services is this item:

"Retainer payments, July 1, 1945, to December 31, 1948, to M. J. Curry, the President of plaintiff corporation, $10,500, making a total of $310,500."

Mr. Adams: If your Honor please, I would object to so much of counsel's statement with regard to this matter as this bill is not one mentioned in the exhibit which your Honor saw this morning, it being a patent fact that the exhibit was furnished to opposing counsel at a time long prior to the receipt of this bill. This bill has now been furnished to counsel, only recently received by the company, even though not requested [176] within the scope of the morning's request. Counsel has had the full information. I think it is wholly out of keeping for the imputation to be suggested that anything at any time has ever been withheld from opposing counsel with respect to the facts of this case.

Mr. Phleger: There is no suggestion and was none, Mr. Adams, on my part. I think you are taking something for granted that was not at all in my mind.

Mr. Adams: I am glad of that.

Mr. Phleger: It is perfectly obvious it was not included and I did not intend in the slightest way to suggest that it was covered by that statement. But it was covered by our demand.

Mr. Adams: I think that is also correct, and it has been produced.

Mr. Phleger: Correct. I will now offer in evidence the defendant's response to plaintiff's request 41A. Request 41A is:

"The Coulson firm was tax counsel for the corporation with respect to taxes for 1942, 1943, and the first four months of 1944, and served as such until August 1947." The response of the defendant railroad company is:

"Deny, except that they admit that Whitman, Ransom, Coulson and Goetz were employed by the reorganization trustees, namely, Thomas M. Schumacher and Sidney Ehrman, as tax counsel in connection with the federal tax return filed for the affiliated [177] group of corporations of which plaintiff was one for the year 1942-1943 and the first four months of 1944, and that Whitman, Ransom, Coulson and Goetz later employed by defendant, Western Pacific Railroad Company, as tax counsel, and that they continued to act as tax counsel for the affiliated group to and including August, 1947."

The response of the Western Realty Company is in substance the same.

Mr. MacKinnon: I think there is some change.

Mr. Phleger: Would you like me to read it?

Mr. MacKinnon: If you will, please.

Mr. Phleger: The Western Realty response is:

"Admits that Whitman, Ransom, Coulson and Goetz were employed as tax counsel by the reorganization trustees of the debtor in reorganization in connection with the federal tax returns filed for the affiliated group of corporations, of which plaintiff is one, for the years 1942, 1943 and the first four months of 1944, and that Whitman, Ransom, Coulson and Goetz were later employed by defendant as tax counsel when the assets and properties of the reorganization trustees became vested in defendant, and that Whitman, Ransom, Coulson and Goetz continued to act as tax counsel for the affiliated group of corporations in connection with the federal tax returns filed for the years 1942, 1943, and the first four months of 1944 to [178] August of 1947."

(The document previously referred to was received in evidence and marked Plaintiff's Exhibit No. 42.)

Mr. Phleger: Before passing on to the next exhibit I would like to demand of counsel for the defendant the letter, if any, which accompanied the bill which I have just introduced in evidence.

I will next offer in evidence as Plaintiff's exhibit 43 an exhibit consisting of two letters on the same subject, which I will offer as one exhibit. The first

letter is identified as defendant's exhibit 448 and the second as defendant's exhibit 449. The first letter is on the letterhead of the Coulson firm, under date of July 25, 1944, and signed in the firm name and addressed to M. J. Curry, President of the Western Pacific Railroad Corporation, 37 Wall Street.

"Dear Mr. Curry:

"We have given the matter of adoption of declared value on the 1944 capital stock tax return for the Western Pacific Railroad Corporation consideration, after discussing with Miss Valouch and Mr. Reilly the present estimates of declared value excess profits tax net income for the calendar year 1944."

I do not think it is necessary to read the entire letter, but to call the Court's attention to a paragraph which states that the "best judgment of the company officers and employees would seem to be that there will be no declared value excess [179] profits tax net income derived by the corporation in the calendar year 1944. Accordingly it is believed that the capital stock tax return may properly reflect the declared valuation of zero for the Western Pacific Railroad Corporation."

I do not think there is anything else in the letter that is important.

The attached letter is signed by M. J. Curry, dated July 26, 1944, addressed to Mr. D. C. DeGraff, general auditor, the Western Pacific Railroad Company, in San Francisco; copies to Mr. James K. Polk, Mr. Frank C. Nicodemus.

"Dear Mr. DeGraff:

"After receiving copies of the 1944 returns of the capital stock tax which were inclosed with your letter of July 21, they were delivered to our tax counsel, Mr. James K. Polk of Whitman, Ransom, Coulson and Goetz for his review, having previously submitted to him for consideration the question of the capital stock returns. I am in receipt of a reply from his firm, copy of which I am inclosing for your information."

Mr. Adams: There is a further paragraph in that letter.

Mr. Phleger: Do you wish me to read it?

Mr. Adams: If you please.

Mr. Phleger: "I am also inclosing 1944 return of capital stock tax for the Western Pacific Railroad Company and statement of the trustees, both executed by [180] Mr. T. M. Schumacher as trustee. We would appreciate it if you will send us conformed copies of all the returns filed for our records."

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 43.)

Mr. Phleger: I next offer as Plaintiff's Exhibit 44 a sheaf of documents otherwise exhibited as intervener's 213A, 213B and following to and including 213Z and 213AA, all dealing with the same subject. The top sheet of the exhibit is a typewritten memorandum dated July 26, 1944, addressed to Mr. Polk

"Wherein the stock is declared worthless." That date is March 15, 1943.

"A journal entry should be made to reflect that this stock, although worthless, is shown at $1 to indicate that legal title to the stock was still held by the Western Pacific Corportation. Counsel would like to hear what journal entry is before entered in books (over phone) when the transfer was made of this stock to the reorganization committee on May 1, 1944.

"The dollar is written off, the advances to the Western Pacific Railroad Company are to be written off as of the Supreme Court decision on the W.P.R.R. Co. plan of reorganization [183] March 15, 1943, which states that unsecured claims are to be cancelled, Western Realty Stock, of course, to be treated as other collateral property of James Foundation of New York as of stockholders' meeting dated April 30, 1944. The question of turning back the Standard Realty and Sacramento Northern advances (accommodation collateral) is on appeal with the Circuit Court of Appeals and should remain on books until order is issued."

That shows the treatment of the loss. The loss was written off on March 15, 1943, as of the date of the reorganization, but the title to the stock was carried in the parent corporation until April 30 of the following year, during all of which period the technical affiliation continued which permitted, of course, the filing of the consolidated returns for that period. [184]

* * *

I will now offer as Plaintiff's Exhibit No. 45 four sheets otherwise identified as intervener's 226, 225-A, 225B and 225C. The first sheet is a telegram from M. J. Curry to Robert E. Coulson in San Francisco dated March 26, 1945, and reading as follows:

"Delaware Tax Board has granted extension to July 1, for payment delinquent franchise tax. Have up with Mr. Polk question preparation petition for redetermination franchise taxes for 42 and 43, which must be filed by March 29."

Those, if your Honor please, are franchise taxes of the parent corporation, no one else. The subsidiary corporations have no interest in those.

The second sheet consists of a letter on the letterhead of the Coulson firm, signed by J. B. Robinson, who is one of the partners of that firm, as shown by the letterhead, dated March 27, 1945, and addressed to M. J. Curry, Vice President of the Western Pacific Railroad Company, not the corporation, 37 Wall Street:

"Dear Mr. Curry:

"Pursuant to your letter to Mr. Polk of March 23, 1945, I have prepared and enclose herewith a petition for commutation of franchise tax in respect of the Delaware franchise tax of your corporation for the calendar years 1942 and 1943. The annual reports, financial statement and correspondence which Miss Valouch furnished me in this connection are returned herewith."

The last two sheets are copies of the petition for commutation of franchise tax of the State of Dela-

ware, of the [186] Western Pacific Railroad Corporation, referred to in the previous letter. I will read the last two paragraphs of the last page. This is the rider to the petition:

"In support of this appeal, reference is made to petitioner's letter of March 27, 1943, addressed to the State of Delaware, State Tax Department, 843 King Street, Wilmington, Delaware, which contained a detailed statement regarding the bankruptcy of the two railroads, securities of which constituted practically the entire assets of the petitioner.

"On the basis of this letter, the State Tax Board, under date of April 9, 1943, granted the one-half tax rate for the years 1940 and 1941, and reduced statutory interests from 12% to 4% per annum.

"There has been no improvement in the financial condition of the petitioner since the foregoing letter. On the contrary, the reorganization of the Western Pacific Railroad Company, one of the two railroads referred to above, has now been completed. The petitioner now has no securities of any kind in this railroad except a nominal amount of common stock issued in the reorganization, having a value of less than $300.

The petitioner at all times since the bankruptcy of said two railroad companies has been inactive and unable to carry on its normal functions."

That is the language of the petition prepared by the Coulson firm for the plaintiff corporation.

The Court: Now, what do you suppose they meant by that?

Mr. Phleger: They meant that the plaintiff corporation——

The Court: Or is that just an argument that counsel made?

Mr. Phleger: No, I think it was a very fair statement. I think the plaintiff was in a state of corporate coma.

The Court: Well, he said they were unable to act. I don't know what that means.

Mr. Phleger: The last two sentences there make it clear that it is unable to carry on its normal functions.

The Court: Well, I might say that that comes to me like an argument that attorneys make to get the tax changed.

Mr. Phleger: That may be.

(The documents referred to were received in evidence and marked Plaintiff's Exhibit 45.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 46 the minutes of the Western Pacific Railroad Corporation, which are otherwise identified as Interveners' 253.

(The minutes referred to were received in evidence and marked Plaintiff's Exhibit 46.)

Mr. Phleger: I will only read two paragraphs from this, because I don't think that the balance is important.

(Exhibit 46 examined by Mr. Adams.) [188]

Mr. Phleger: The following appears in those minutes, and these are the minutes of the meeting on July 31, 1945, of the corporation:

"The Chairman reported that on advice of Whitman, Ransom, Coulson & Goetz, Tax Counsel, the corporation declared a zero value on its 1945 capital stock tax return for the year ended June 30, 1945, and that he, as President, had executed and filed such return with the Collector of Internal Revenue at Wilmington, Delaware; on motion duly made and seconded, the action of the President in filing the declaration recommended by Tax Counsel be and the same is hereby approved."

Mr. Clark: Mr. Phleger, may we have indicated the persons present at that meeting?

Mr. Phleger: There were present at that meeting the following directors: M. J. Curry, W. W. Hatton, A. Perry Osborn, T. M. Schumacher, M. C. Valouch, John F. Wienken, Willis D. Wood, constituting a quorum. Also present were Mr. F. C. Nicodemus, Jr., of counsel; Miss M. C. Valouch acted as secretary.

Mr. Adams: Occasionally reference is made to "Mr. Nicodemus, Jr." and then occasionally without the "Jr."; but may it appear it is the same gentleman at all times that you have reference to?

Mr. Phleger: Yes. [189].

Mr. Clark: In spite of his various capacities.

Mr. Phleger: It is so stipulated.

May it please the Court, I would now like to offer in evidence Plaintiff's Exhibits 1 and 2, all the

material on them having been shown by other evidence.

The Court: Well, they are only for illustrative purposes?

Mr. Phleger: Correct.

Mr. Adams: In this state of the record, I would have several objections to make to the receipt in evidence of these documents, and I suggest that they may remain until a later date and we can fully develop whatever inaccuracies there may be, as we believe there are. Or perhaps you may be able to establish to his Honor's satisfaction that they are not inaccurate in the respects that we may suggest.

Mr. Phleger: Well, of course, as your Honor pointed out, they are for illustrative purposes only, and for convenience. They are not binding on you as separate evidence. I think it would be a convenience at this time to put them in, because we would like to reproduce them.

Mr. MacKinnon: Well, your Honor, my position is that the documents have not been established, and until they are established, I don't think they are properly received; and I think as the evidence unfolds it will be demonstrated that they are not accurate.

Mr. Clark: Well, your Honor, may they be received simply [190] for the purpose of illustrating the evidence which has thus far been admitted, without any probative effect?

Mr. MacKinnon: I think even then, your Honor, until they are properly qualified as competent and relevant——

Mr. Phleger: Well, let's argue that out now, then, gentlemen.

Mr. Clark: Well, the proposition is, they have been authenticated and qualified.

Mr. Phleger: We have covered every single item on that. He may dispute our evidence, but the fact is that our evidence supports every single item on those charts. They have no probative effect. The evidence itself is the evidence, but we think we are entitled to introduce those two exhibits as illustrative.

The Court: Well, you mean really that they are a summary of what you have brought forth?

Mr. Clark: That's right, without any simple probity to the fact, except the evidence that supports them and is already in—simply as a convenience to the Court and counsel and all parties.

The Court: Well, of course you don't really need them in evidence. They are here, and as you say, it is a summary. If it isn't correct, if it isn't a correct summary, the other side will correct you in it. I don't know that it adds anything particularly to the record to introduce it in evidence. [191] I will consider that counsel wants the Court to look at it as a summary and if they do want me to look at it as a summary, I will do so. If the other side says it isn't correct, they can correct it. I don't know how it adds to the record, in any way. But it is here and the record will show that the Court now has in front of it these charts as a summary of the evidence, the Court has been looking at it, my atten-

tion has been called to it by counsel, and I will continue to look at it; and counsel on the other side can point out any respect in which it is inaccurate.

Doesn't that take care of it?

Mr. Phleger: I take it also that having been identified, that this would go along with the record in this case for the purposes which your Honor has just stated?

The Court: Yes, it would be a part of the record. I guess that might be said to be correct.

Mr. Clark: Well, that was my only point of suggesting that, your Honor.

The Court: It would be not necessarily as proof of any fact therein stated.

Mr. Phleger: That's right.

Mr. Adams: This is marked for identification, so it may well be considered that they have been marked for identification as the documents to which plaintiff's counsel have from time to time addressed themselves. [192]

The Court: Well, do you think that there is some inaccuracy there?

Mr. Adams: Oh, yes, your Honor. I expect, when we get our time to talk, that we will be wanting to point out things that are inaccurate in that presentation.

The Court: I suspect what you mean is that they are inaccurate because they draw conclusions you do not from the evidence?

Mr. Adams: And I think what our purpose will be, will be to indicate that there are material re-

spects in which those documents are missing something that should be there in order for a fair statement to be in the record.

The Court: You mean certain people there were not occupying positions at the times stated?

Mr. Clark: I don't think Mr. Adams could make any contention such as that, your Honor; I think it has something to do with the railroad defendants' interpretation of these very positions. I think factually there is no doubt but what these charts are accurate. I don't think that will be disputed.

Mr. Adams: I don't want to take up the Court's time at this time, beyond suggesting that I do think I am going to find fault with those presentations.

The Court: I will reserve ruling on admitting this in evidence, and you can fight it out later on.

Mr. Phleger: I will now offer in evidence as Plaintiff's [193] Exhibit 47 minutes of the board of directors, of the corporation itself, meeting on Tuesday, March 23, 1943. That meeting, as you will note by reference to our chart, was shortly after the decision of the United States Supreme Court upholding the reorganization as proposed by the ICC.

(Minutes dated March 23, 1943, referred to were received in evidence and marked Plaintiff's Exhibit 47.)

M. Phleger: I will only read the portions that appear to me to be pertinent.

Mr. MacKinnon: Will you describe the date of the minutes?

Mr. Phleger: Yes. March 23, 1943, and the document is otherwise identified as Interveners' 194.

Mr. Clark: The other markings are from the New York litigation, I think—the plaintiff's.

Mr. Phleger: I read from the fourth page:

"Counsel for the Corporation was requested by the Chairman to report upon the decision of the United States Supreme Court handed down on March 15, 1943, in the Western Pacific Railroad Company reorganization proceedings, reversing the judgment of the Circuit Court of Appeals and affirming the order of the District Court which had approved the plan of reorganization certified to it by the Interstate Commerce Commission. In [194] outlining the scope of the decision, counsel pointed out that the Supreme Court had approved the finding of the Commission that unsecured indebtedness, as well as the capital stock of the railroad company, was without value, and expressed the belief that a motion for reargument would be fruitless, inasmuch as the Court had not overlooked any substantial question involved in the case, but had passed upon all such questions. The effect of this decision upon the corporation's future was considered by the Board, and counsel submitted a draft of the proposed communication to the corporation's three principal creditors, advising them of said decision of the Supreme Court and inquiring whether it was their desire that the corporate status of the corporation should be preserved, or that the corporation be liquidated immediately and without judicial proceedings, and whether they are pre-

pared to advance the funds necessary to preserve the corporate status or liquidate the corporation.

"Whereupon, after full discussion, the President was directed to forward to said three principal creditors a communication in substantially the form submitted to the meeting, and a copy of said communication was ordered to be annexed to and made a [195] part of the minutes of this meeting."

The attached copy of the letter is on the letterhead of the Western Pacific Railroad Corporation, dated March 23, 1943, and signed by M. J. Curry. It is addressed to Mr. William W. Carman, and the United States Trust Company, Executors of the Estate of Arthur Curtis James; the Chase National Bank; Central Hanover Bank and Trust Company:

"Dear Sirs:

"Each of you is a creditor of this corporation as of January 1, 1943, in the amounts shown in the schedule set out below, except as your claim may have been reduced by application of the proceeds of sale of certain of the collateral."

And then there is the schedule of the indebtedness.

"On March 15, 1943, the United States Supreme Court released the opinion in the proceedings for the reorganization of the Western Pacific Railroad Company and the companion proceeding for the reorganization of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in which it held that the capital stock of each of these two com-

panies had properly been declared to be worthless by the Interstate Commerce Commission, and that the action in each case of the District Court in affirming the finding so made by the Interstate Commerce [196] Commission was correct.

"At the expiration of 25 days from the date of the decision, a mandate will issue to the District Court directing it to take further proceedings consistent with the decision of the United States Supreme Court.

"The only asset of this corporation which could be utilized to further collateralize your loans is 283,000 shares of preferred stock and 475,000 shares of common stock of the Western Pacific Railroad Company, held unpledged in the treasury of the corporation. The common stock has been delisted by the New York Stock Exchange, but trading continues on the exchange in the preferred stock, and from day to day certificates in substantial amounts are presented for transfer into the names of purchasers.

"The corporation is without funds to continue its corporate existence, and the Board of Directors has directed the undersigned to communicate with you with a view of obtaining the following information: 1. Do you desire the corporate status of the corporation to be preserved, or do you desire to have the corporation liquidated immediately and without judical proceeding? 2. Are you prepared to advance the funds necessary to preserve the corporate status or liquidate the corporation?

"Your prompt advice in the premises will be greatly appreciated.

"Very truly yours,

"M. J. CURRY."

Mr. Adams: I suggest it be stated, and I think all counsel would agree, that in the paragraph which refers to the only asset of the corporation as certain shares of preferred stock and certain shares of common stock of the Western Pacific Railroad Company, that that reference is as stated to the railroad company's stock. The next paragraph, which refers to the statement, "the common stock has been delisted, but trading continues on the exchange in the preferred stock," I understand to refer to the common stock and the preferred stock of the holding company.

Mr. Clark: That is correct.

Mr. Phleger: It will be so stipulated.

Mr. Adams: Counsel, do you desire to read the last few lines? I interrupted you. The last few lines in the minutes, which follow after the letter which you had just read into the record.

Mr. Phleger: Well, I don't think they are of any importance, but I will be glad to do so if you wish.

Mr. Adams: They are relevant to your presentation.

Mr. Phleger: Well, they are part of the sentence: "Upon [198] motion duly made, seconded and carried, the meeting was adjourned, to be re-

convened upon receipt of reply from said creditors to the aforementioned communication."

And then it is signed by John F. Wienken, Secretary, and approved by M. J. Curry, Chairman.

Mr. Adams: Would you read into the record, please, the names of the persons present at that meeting of the board of directors of the parent company?

Mr. Phleger: Those present were directors Campbell, Curry, Hatton, Osborn, Schumacher, Wienken, Wood,—by the way, their names are shown on Plaintiff's Exhibit 2—constituting a quorum. Mr. Nicodemus, Jr. of counsel was also present.

I will now read an admission from defendants' brief, page 4:

"Its"—meaning the corporation's—"only other substantial asset was a one-half interest in the stock of the Denver Rio Grande and Western Railroad. The holding company's only remaining substantial asset, its stock interest in the Denver Rio Grande and Western Railroad, was also subsequently determined to be without value in reorganization before the ICC."

That last was from pages 8 and 9 of the brief.

I now offer as Plaintiff's Exhibit 49, otherwise identified [199] as Interveners' Exhibit 10, a letter on the letterhead of the Coluson firm, signed by Robert E. Coulson, dated April 12, 1943, addressed to M. J. Curry, President, the Western Pacific Railroad Corporation; in reply to the form of letter which I have just read:

"Dear Sir:

"On behalf of the executors of the estate of the late Arthur Curtiss James, we are instructed to advise you in reply to your letter of March 23, 1943, that the claim of the Curtiss Southerwestern Company against your corporation, which was one of the assets held by the executors, has been transferred to the James Foundation of New York, Incorporated, as residuary legatee under the will of Arthur Curtiss James. We are further instructed to advise you on behalf of the James Foundation of New York, Inc., that the trustees of the Foundation do not feel justified in authorizing any advance from the Foundation to your corporation for the preservation of the corporate existence of your corporation.

"The trustees of the Foundation would, however, be prepared to consider any specific proposal that was made on behalf of your corporation to facilitate its prompt liquidation by the release [200] of any deficiency claim against your corporation, in consideration of the surrender by your corporation of any rights which it might have in the collateral held by the Foundation.

"If there were included in any such proposal a participation by the Foundation in the payment of any necessary State tax charges involved in the dissolution of your corporation, this element would be considered by the trustees of the Foundation as a part of the general proposal. Any such proposal, however, would need to state specifically and accu-

rately the amount of payment by the Foundation which was contemplated."

Mr. Clark: That is Plaintiff's 48, Mr. Phleger.

The Clerk: You stated it was 49.

Mr. Phleger: 48 was correct. I am sorry.

(The letter dated April 12, 1943, referred to above, was received in evidence and marked Plaintiff's Exhibit 48.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 49 a letter otherwise identified as Defendants' No. 67, on the letterhead of the Coulson firm, signed by Robert E. Coulson, dated May 1, 1943; subject: Western Pacific. It is addressed to F. C. Nicodemus, Jr., Pierce & Greer, New York:

"Dear Mr. Nicodemus:

"This morning I received your letter under date of April 30, enclosing a copy of a proposed petition, which I understand you are filing Monday with the District Court in San Francisco.

"It does not seem to me that your petition will serve any useful purpose, and I assume that you are filing it under what you deem to be, as set out in your petition, your statutory duty of representing all interested parties throughout the proceeding.

"Your petition presents an interesting divergence in your prayers for relief, in that in behalf of the equity you are asking for a reopening of the proceeding, and in behalf of certain bondholders not previously represented, you are asking an immediate confirmation of the Commission plan.

"At a meeting last Thursday of the insurance group with the three junior creditor groups, it was definitely decided to abandon any effort to modify the Commission plan and to work wholeheartedly for a prompt consummation of the plan. This necessarily involved a withdrawal of the petition previously filed by those parties with the District Court asking deferment of certification.

"It is my impression that Judge St. Sure is likely to deny your petition promptly."

The date of that letter is May 1, 1943, which is a month [202] and a half after the Supreme Court decision.

(The letter of May 1, 1943, referred to above, was received in evidence and marked Plaintiff's Exhibit 49.)

The Court: What was the petition?

Mr. Phleger: That was a petition for rehearing.

The Court: I mean, on the general ground that some equity should still be allowed the plaintiff?

Mr. Adams: No, your Honor. We might as well get the record straight about this. There was no such petition ever filed. That is one thing that is apparent from the record. Another thing is that there was a petition filed by the senior creditor group, to which reference is made in the letter just read. I think if documents of this sort are going to be produced, it would be well to have them tied into the part of the record to which they refer and have clarity when it comes to statements which are not a part of the record.

Mr. Phleger: Well, now, just a moment. The reference in this letter is to a petition by Mr. Nicodemus, and the fact is that Mr. Nicodemus' petition to the District Court was for the purpose of inducing the Court to give some recognition to the equity.

Mr. Adams: The petition was never filed.

Mr. Clark: It was never filed.

Mr. Phleger: I know, but that was the purpose, even though the petition was not filed. [203]

Mr. Adams: Well, let's have the record clear that that petition was a draft petition which was never filed.

Mr. Phleger: That's right, but it was for that purpose, was it not?

Mr. Adams: Let's have the petition speak for itself.

Mr. Phleger: Can't you stipulate that that is what it was?

Mr. Adams: I am very much more interested in having the true facts before your Honor. If there is going to be a discussion about this matter, it can be shortened a great deal if the thing itself is proven.

The Court: Well, all I want to find out is what the petition was. It was a proposed petition which was not filed, in which some relief was being asked?

Mr. Clark: Correct. It was a proposed petition which was sent out here for filing, but on further consideration was not filed, seeking to defer certification, or in other words, reopen the proceeding

for the purpose of getting a higher valuation on the properties than the ICC had placed on them in 1939. In general, your Honor, it was a petition seeking relief for the holding corporation from the standpoint of possibly getting it some equity in the debt.

Mr. Adams: Granting to all counsel, as I do, of course, complete candor,—and the purpose I have is to be completely candid in regard to this—we are going to have trouble, [204] regardless of our own statement, for matters that are readily open to proof by precise documents. Now, in this case, it may be that it will be unnecessary to discuss this petition further. But if it should be necessary, if other counsel then do not bring the facts to your Honor, we will do so.

The Court: Of what importance is this, anyhow?

Mr. Adams: That I don't understand myself, but counsel brought it in.

The Court: Just what has this got to do with the case?

Mr. Phleger: You mean the contents?

The Court: Well, the letter, the petition; the Coulson firm writes a letter to Nicodemus. What do I care about that in deciding whether or not the holding company has got some rights?

Mr. Phleger: It is submitted as proof, your Honor, of the thing that I think is very important, and that is that shortly after the Supreme Court decision, the parent corporation was without funds and was in a state of corporate coma, and that Mr.

Coulson, who represented the largest creditor or one of the largest creditors, who had previously been active in supporting a claim for an equity for the parent corporation, advised Mr. Nicodemus that he would make no further effort, but would use his efforts for the prompt consummation of the plan of reorganization. And the probative effect of it is that it became hopeless at that moment for the parent [205] company to attempt to further claim an equity, because the principal creditors who had previously backed its claims, and the largest single stockholder, advised the corporation that thereafter it would use its efforts to carry out the plan which denied the parent company any equity. It seems to me it is very important as proving the fact that this corporation from this date on was in a state of corporate coma. It had no assets, it had no hope of preserving its equity, and the reason it didn't is that the principal parties who previously had furthered its claims for equity now gave word or said word that they no longer would attempt to preserve an equity but would work for the carrying out of the plan.

The Court: Well, the Supreme Court already said the stock was worthless.

Mr. Phleger: Yes.

The Court: What could they do about it? What difference did it make what those attorneys said between on and the other? As a matter of fact, as I understand the presentation so far, there is no question about the fact the holding company didn't have any more assets and it was wiped out—that is,

wiped out effectively, practically, even though the District Court didn't confirm the plan until a later date. It was effectively wiped out, practically wiped out, by the Supreme Court's approval of the plan.

Mr. Phleger: That is exactly—— [206]

The Court: So what is the materiality of this?

Mr. Phleger: That is exactly what we are proving. But, your Honor, there is a further point, and perhaps in an excess of caution we are not covering this. That is that it was necessary after this, and after the District Court approved the plan, confirmed the plan, that it be voted on by the creditors. And these people were large creditors of the subsidiary company, and by not voting for the plan they could still have upset the plan, because while the plan was confirmed by the Court, it required the approval of the creditors, and I intend to offer now the formal resolutions by these creditors, who, had they chosen to do it, could have stopped the reorganization at least temporarily by not voting for it. They could have forced the consideration of a further plan. But they now gave definite indication that they were through and would work actively for the consummation of the plan.

The Court: Well, you mean *the the* holding company could, by virtue of its position as a creditor, by voting against it, stop it?

Mr. Phleger: No, not the holding company, but these creditors to whom the James interset, for instance, that was a large creditor of the railroad company,——

The Court: Well, the only effect of that would have been that there would have been an adjudication in bankruptcy.

Mr. Phleger: No, it would probably have resulted—— [207]

The Court: I don't think that the creditors, or any person, be it creditor or otherwise, by refusing to vote for a plan that had been confirmed could do anything else except bring about the plaintiff's——

Mr. Phleger: Well, the confirmation, I think, came after the voting on the plan. The confirmation by the Court came after the voting by the creditors.

Mr. Adams: It is the law, however, your Honor, that if the Court had desired, it could confirm the plan over the adverse vote of the security holders, had the vote been adverse.

Mr. Clark: Well, may it please your Honor, so far as the interveners are concerned,——

The Court: Well, perhaps we are spending too much time on discussion in this matter now. It just occurred to me to wonder as to the materiality of these letters between attorneys. Mr. Phleger has explained it in a way, that it was in connection with whether or not they were going to take any further steps with respect to changing their vote as to participating in the plan. But it may be a factor in the chronology. I don't know whether it is of any importance or not.

Mr. Clark: No. The only relevancy is, your

Honor,—although we don't think it is the strongest evidence on the point—is that it shows that the James interests, likewise represented by Mr. Coulson, committed themselves to the railroad company as against the holding company. And from that [208] time on this whole pattern advantages the railroad company to the disadvantage of the plaintiff corporation. That is the point.

Mr. Adams: Your Honor,——

The Court: Well, the District Court hadn't confirmed the plan yet.

Mr. Clark: I know, may it please your Honor, but the plan and this failure to file a petition——

The Court: Well, when you are talking about the railroad company, who are you talking about at this time?

Mr. Clark: The railroad company is the defendant in this case, your Honor.

The Court: Yes, but the railroad company that is defendant in this case is the railroad company that came into being, as I take it, after the end of December of 1944.

Mr. Clark: No, your Honor, it is the same railroad company and has been since 1917. It is the same corporation.

The Court: Well, you mean not the same corporate form, or, rather, you mean the same corporate form but it is not the same railroad company so far as who owns the railroad company goes, is it?

Mr. Clark: It is the same railroad company so

far as its corporate structure, so far as its assets. It is now in the hands of the creditors.

The Court: That is just a formality. It is not the same [209] people owning the railroad who owned it before.

Mr. Clark: Well, this holding company did not own it at that time, that is quite correct.

The Court: Someone else came into the ownership of the railroad company.

Mr. Phleger: Well, someone who had been a creditor theretofore.

The Court: Well, it is a different owner, so it is a different company. I don't care whether it is the same name or not, it is a different company. Smith doesn't own it any more; Jones owns it.

Mr. Clark: That is quite correct, as soon as the reorganization was completed, your Honor. But as of this time, the time that the evidence pertains to,——

The Court: Well, then, it is not the same railroad company, in fact, or the same owners of the railroad company, in fact, that you are talking about in the period of 1943, the period before the Court in this case, is it?

Mr. Clark: That is correct, your Honor.

Mr. Phleger: Well, if your Honor please, after all, every act of the reorganization trustees and every act of the reorganization committee was for the benefit of this present defendant. It is possessed of its assets, it assumed the liability, including counsel fees, for the handling of this tax mat-

ter; and whether or not you say it is the same corporate entity or [210] not, it is in fact the same corporate entity, but it is the successor to the liabilities and the assets and so forth that were for a time in reorganization. And they are the beneficiaries of all of the acts that we are talking about, those that took place in reorganization as well as those that took place thereafter.

The Court: Well, we are getting now into a discussion of the merits of the case, and I didn't intend that. It was merely in connection with the statement that Mr. Clark made as to the relevancy of these communications between the attorneys in May 1943; and Mr. Clark had made the statement that that was on behalf of the defendant. Well, as a matter of fact, it wasn't the defendant that is before the Court now, at that time.

Mr. Phleger: Oh, yes, your Honor.

Mr. Clark: Let me make a statement.

Mr. Phleger: May I interrupt for just a moment?

Mr. Clark: Yes, surely.

Mr. Phleger: The purpose for which we are introducing them is to show that as of that date, which is early in 1943, that the declaration of the only people who could further and make effective efforts to stop the consummation of the plan, that they had decided and so communicated to the corporation, that they would make no further such efforts, but that they thereafter would use their best efforts to carry out the [211] plan which wiped out

the equity. And that has, I think, a very effective bearing upon the condition of the plaintiff corporation and the time of its loss and its mental attitude and its ability to look after itself. That is the purpose for which we are putting it in.

The Court: Well, I don't attach too much to that. There is so much more that you have in the case that is so very much more important, that I don't see much point to some of this matter that you are now putting in.

Mr. Phleger: Well, if your Honor thinks that we have proven it sufficiently, we will not labor the point.

The Court: Well, don't take that attitude. I haven't studied these exhibits like you have.

Mr. Phleger: Well, I perhaps have cumulated some of the evidence here, but that is our point, that from here on there was no hope of the preservation of the equity, because the interests represented by Mr. Coulson had determined that thereafter they would work for the consummation of the plan, and so advised the corporation.

The Court: So far as I can see, up to this point, in the introduction of these various exhibits, irrespective of what interpretation either side may put on them, there doesn't seem to me to be much of a factual question here or that there is going to be presented in this case much of a factual question. It looks like it is pretty much a question of law, from the very beginning.

Mr. Phleger: Well, I think so too. I agree with

you. And that is why we are putting this in the form of documentary evidence.

The Court: Well, I am not intending that that statement necessarliy is in favor of your side of the case, Mr. Phleger, but it just looks to me as if the whole chronology so far in this thing is not going to be dependent upon whether I have to accept anybody's statement as against anybody else's statement as to what happened in this matter.

Mr. Phleger: That is why we put it in in the form of documentary evidence. We think that that is the way to go at it.

Mr. MacKinnon: Well, your Honor, I think that that is true as far as the bare essential facts are concerned. I haven't any doubt that it can be stipulated on our part. But of course, as the record is being made, it will have to be amplified, because this is only a selection of documents, and a very limited selection.

Mr. Phleger: I think we will find that they are a very fair selection. They purport to be, or are intended to be,——

The Court: Maybe this is a good time to take a little recess.

(Recess.) [213]

Mr. Phleger: I will next offer in evidence as Plaintiff's Exhibit 50 a letter otherwise identified as intervener's 185. This is a letter on the letterhead of the Coulson firm signed by James K. Polk dated May 20, 1943, addressed to M. J. Curry, Vice

President of the Western Pacific Railroad Company, 37 Wall Street. This letter has become known as the paradoxical letter, and so far as any written communication, that is, letter is concerned, seems to be the first time in which the use of the stock loss of the parent for reducing taxes was suggested. The date is May 20, 1943, which was two months after the Supreme Court affirmed the plan. I will not read the entire letter because I think most of the contents are not particularly illuminating. It is addressed to Mr. Carry, and then on the bottom of page 2 is this paragraph:

"It may also be noted that it is clearly demonstrable that the consolidated return basis of reporting for the year 1942 as contrasted with a separate basis of reporting, was advantageous to the group. Since consolidated returns were filed for 1940 and 1941, any unused excess profits credit inhered in the common parent corporation, had separate returns been field for 1942. A preliminary survey of the smaller affiliates indicates that they would have incurred no excess profits tax liability. The operating company, however, if placed on a separate basis without the benefit of the credit carry-overs, [214] would have been liable for a net excess profits tax liability of $3,650,000 even if all other figures as shown in the return were left unchanged. This amount is offset by several factors. In the first place, on an individual basis, the operating companies' interest on expense deductions would have increased $705,000. It would have lost,

however, its allocable share of the net operating loss reduction of approximately $438,000. Further, a portion of its earnings subject to excess profits tax rates would have been eliminated from normal tax rates. There would have been, in addition a reduction in the surtax rate on a separate basis of the 2% penalty for filing a consolidated return, which would have amounted to approximately $200,000 in tax. All of these factors combine to establish a net tax advantage of in excess of $1,550,000 in the adoption of the consolidated return under the separate return."

I think he meant over the separate return. That, as your Honor will note, does not discuss the use of the 1942 return, which was to be filed a little bit later.

Mr. Clark: The use of this loss. This is the provision, however, which does discuss that.

Mr. Adams: The 1942 return had been filed at the time this letter was written. [215]

Mr. Clark: Yes, five days before.

The Court: It was a consolidated return.

Mr. Phleger: A consolidated return.

The Court: But it had not made the claim for the loss.

Mr. Phleger: That is right.

"There is a further possibility of adjustment under the internal revenue code provisions contained in Sections 23(g)(4) and (k)(5) by which the worthlessness of the operating company's stock may produce a net loss for the year 1943 with pos-

sible carry-back applications. This is commented upon rather than suggested as of certain value, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless. This matter will receive more careful consideration when the completion of the reorganization makes possible the assertion of the claim for worthlessness of the operating company's stock."

There are some pencil notes on this one:

"Mr. Schumacher, to note, M.J.C.," that is Mr. Curry. And then addressed to "M.J.C.: interesting letter. T.M.S."

Mr. Levy: Very interesting.

Mr. Phleger: No, there isn't any "very" on it, just "interesting." [216]

Mr. Adams: "T.M.S." being Mr. Schumacher's initials and his endorsement.

Mr. Phleger: Correct.

(The letter referred to above was thereupon received in evidence and marked Plaintiff's Exhibit 50.)

Mr. Adams: I think since the document itself is the original paper and the Court may wish to examine it, and because this is a document of interest to all counsel in this lawsuit, I believe it would be proper to observe at this point that Mr. Schumacher had the custom of endorsing his comments

in a blue crayon pencil while Mr. Curry had the custom of marking his notations in a green crayon pencil, and this document is one of several which has those characteristics, and the Court, when seeing the markings, will understand whose markings they are and how they came to be there. [217]

* * *

Mr. Phleger: The next document which I shall offer as Plaintiff's Exhibit No. 51, otherwise identified as intervener's 60, is a typewritten memorandum from R. R. Coulson—that is Mr. Coulson—to J. K. Polk—that is Mr. Polk—denoted "urgent, June 26, 1943," reading as follows:

"Will it embarrass in the Western Pacific situation if the corporate charter of the Western Pacific Corporation is cancelled by the State of Delaware by failure to pay its 1940 Delaware franchise tax prior to July 1, 1943?"

That is the parent corporation. On the bottom in ink, in the handwriting of Mr. Polk, signed with his initials, is the following, addressed back to Coulson:

"Until the revised provisions we are urging for incorporation into the internal revenue code are adopted, it is essential to protect the possible use of the net loss carry-back that the holding company continue until the consummation of the reorganization. It would require more study of the consolidated return regulations before all the advantages of continuation of a charter beyond June 30 can be noted."

Mr. Adams: Counsel, the document just offered carries with it also a further notation to which I direct your attention.

Counsel refers to what is evidently a longhand endorsement [218] on the last exhibit reading "see letter May 26, 1943 from F. C. Nicodemus, Jr., which is intervener's exhibit 31A, and I desire to inquire whether counsel desires, in order that this record may be complete, that intervener's exhibits 31A and B shall be produced at this time, being part of this same record?

Mr. Phleger: We do not propose to introduce them but if you would like them, we would be glad to put them in.

Mr. Adams: That is satisfactory to us, your Honor.

Mr. Phleger: I rejected them, because what I was trying to prove here was the interest of the tax attorneys in the preservation of the corporate charter of the parent corporation in connection with the tax matters. Now, if your would like the others then, if you will let me have them, I will put them in right now.

Mr. Adams: I take it Mr. Dickerson is in possession of the documents.

Mr. Phleger: Yes.

The Court: Suppose, Mr. Phleger, that the attorneys and tax attorneys for the company in reorganization for the trustees were total strangers to everyone concerned: wouldn't it be proper, and within the orbit of their activities, in aid of the estate, to accomplish a saving for the estate?

Mr. Phleger: Yes, but we have proved already and we will prove further they were at the same time acting as counsel for the parent corporation.

The Court: What is the significance of that?

Mr. Phleger: The significance of that is if there arose any duty by the parent corporation to have taken any action at that time, why then, the fact that it was represented by a common counsel that was giving legal advice in the tax matter, it would mean it could not be expected to take such action except with the advice of such counsel. In other words, the duality of legal representation of the two parties is shown by the fact that common counsel, common tax counsel for both was advising the parent corporation with respect to matters involving the continuance of its corporate charter.

The Court: Does it make any difference that the parent company had other assets than the ownership of the Western Pacific Railroad Company?

Mr. Phleger: Only it is evidence, and we think it is of some importance, with respect to charges of its inaction, and so forth, that it was without assets. It was struggling even to maintain its existence.

The Court: What bearing would that have in the matter? Suppose it was an individual who owned all of the stock of the Western Pacific Railroad?

Mr. Phleger: It has this very important bearing in the light of very obvious defenses which counsel for the defendant is constantly raising, that there

was some duty or obligation on the part of the parent corporation to step forward and do [220] something. Now, our position in that there was no such obligation or duty, of course, on its part. If it had a right it would not lose it because it did not act. But the defendant seems to think otherwise. He seems to think that the plaintiff was under some active duty to step forward and assert his rights, demanding this, that and all the rest, and we are showing it was in a state of corporate coma and it was represented at that time and taking tax advice from counsel who were employed and paid then at that time by the reorganization trustees and later by the reorganized company, and we think that is a very significant factor in judging whether any of the rights of the plaintiff arising out of the situation could have been lost to it by its inaction.

Mr. MacKinnon: Your Honor, I do not think that states the position of counsel for the defendant. It is our position they did not have any claim under any such a state of facts; that if they had a claim, that that claim was known to them at the time of reorganization and they should have come forward and asserted it at that time.

Mr. Phleger: That is just what I am saying.

The Court: Of course, we are in equity here and we should not pay too much attention to the form. In other words, I think offhand this case is going to center down, not so much to the manner in which things were done, but as to whether there is in fact

and in truth and in good conscience and in equity a valid [221] claim or not. That, I think, is the toughest hurdle the plaintiff has to get over.

Mr. Phleger: You will notice, your Honor, in the statement of counsel just now of the position of the defendant, his second point was it was the duty of the plaintiff to have come forward in the reorganization proceedings and assert his claim. Now, all of this line of evidence is just going into the point that it was not in a position to do that. It was in a state of corporate coma. It was dazed by the loss of its entire investment, and it was being represented and advised by counsel who were handling the tax matter, who were employed by the reorganization trustees, and who were later paid for their services, in part by the company, and for whose ultimate benefits the matter was handled. That is our point.

The Court: Of course, we are not dealing with the technical tax question. If we strip aside the corporate fiction, the plaintiff was the Western Pacific Railroad Company.

Mr. Phleger: That is right.

The Court: They owned all the stock, so it was the company. That comes down to the question, doesn't it, in the last analysis, of whether or not the owner in reorganization can get some, let us say, after-discovered right or asset out of the reorganization?

Mr. Phleger: No.——

The Court: If we are dealing in equity. [222]

Mr. Phleger: I think we have not perhaps made our position exactly clear. Our claim is not that we are entitled to share in any assets that were in the hands of the reorganization trustees or in the company as their successors, because we were the stockholder, and arising out of that stock.

The Court: You mean because of the creditors' claim?

Mr. Phleger: No, it is because the defendant, either through its trustees in bankruptcy or itself later took and employed for its own use in connection with these tax returns the tax loss, that is, the loss of the $75,000,000 investment in its stock, and it took—like any other property of the plaintiff, and with that it discharged its tax liability of $20,000,000. It is just as if it took a promissory note or something else and used it to discharge its tax liability, and thereby it obtained a benefit or advantage from the use of the plaintiff's property, which in good conscience it should account for. We are not tracing this through the continued ownership of the shares of stock or as attributable to the shares of stock. We are attributing it to the fact that in the tax returns, that were filed the loss of the parent corporation was utilized to offset the subsidiary's income, with the result that the subsidiary did not have to pay a tax which it would have had to pay had it not utilized the parent's stock loss.

Now, that hasn't anything to do with the fact that there was a technical affiliation which did con-

tinue after the loss. [223] It is property. Our point is that property, namely the tax loss belonging to the plaintiff corporation, was taken and utilized by the subsidiary corporation to satisfy its tax liability.

The Court: Why could not that question, Mr. Phleger, which I have suspected all along, and I think I said so already, is the question I have to determine—why can't that question be determined without all this business of my hearing what one lawyer said to another about it?

Mr. Phleger: Because there are all sorts of defenses, including the defense which has just been asserted here, namely, that granted, for the sake of argument, that we do have that claim, it was lost because this moribund plaintiff, or rather this shocked plaintiff, did not appear in the reorganization court and asserted, and we are merely pointing out——

The Court: You are anticipating a defense?

Mr. Phleger: Well, and I think it is a point of the equities also, if your Honor please. I think one of the equities of this case is the fact that counsel employed, paid for by the trustees and later by the company, took over and handled this tax matter. I think that is an affirmative equity. But if you will read my opening statement of yesterday, I stated a propostion of law, which is the basic proposition of law, and we have just been talking about it, that is the basic proposition; but I do think, and it is perfectly obvious, that the

defendant is going to come forward and say, "Why didn't these people appear? [224] Why didn't they come in and tell Judge St. Sure of this? Why didn't they demand a contract? Why didn't they do all of these things?" As counsel said, they were an object of charity and time. As Coulsen said here in his memorandum, they haven't got enough money to prepare their tax returns.

The Court: Well, do you think it is necessary to put in all these matters in the affirmative case?

Mr. Phleger: I think it is a very definite equity here bearing upon the inequity of retaining the benefits that the defendant corporation, through its attorneys and its agents, took over and handled this tax matter and utilized for their benefit, for the benefit of the people who employed them and paid them, this tax loss.

The Court: You, of course, have studied this matter and I have not. I suppose I am responsible for starting this discussion, only with the thought in mind that some of what appeared to me to be unnecessary matter, making a very large record here, might be curtailed; but if you consider it is a part of the equitable showing which you wish to make, of course, you go ahead and present whatever you consider is proper on that.

Mr. Phleger: It will show, for instance, that all of these discussions about the tax loss, that is the main discussions were held in San Francisco with the counsel for the reorganization trustees and with the officers of the company here. It will

show that all of the negotiations for the settlement of [225] the case were conducted by these counsel employed by the trustees in the company without the knowledge of the plaintiff corporation. I think that creates equities.

Now, if counsel wants to withdraw its position that because we did not do something we lost a right which we otherwise would have, I would be very glad not to put in so many of those exhibits, but I will say, your Honor, I have called down over 2000 exhibits to about 80, and the original offers that were made here, both by defendant and intervener, added up to some 1200 exhibits and I thought as a result of a lot of hard work I really had got it down to something pretty small.

The Court: Well, go ahead with the exhibits.

(Memorandum dated June 26, 1943 was thereupon received in evidence and marked Plaintiff's Exhibit 51.) [226]

* * *

Mr. Phleger: 52, yes, consisting of two sheets, as I say, identified as intervener's 31A and 31B.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 52.)

Mr. Phleger: The first sheet is a letter on the letterhead of Pierce and Greer dated May 26, 1943, signed by F. C. Nicodemus, addressed to Mr. Polk:

"Attached is form of communication to security holders which the Western Pacific Railroad Corpo-

ration would like to hand out to persons applying at its office for information as to the status of the corporation.

"Is there any reason in your mind, in connection with [227] your letter to the railroad corporation of May 20, 1943, why the corporation should not do this?"

"Yours very truly,

F. C. Nicodemus."

At the bottom in longhand——

Mr. Adams: In Mr. Polk's handwriting.

Mr. Phleger: In Mr. Polk's handwriting, which I have difficulty reading, and you might help me——

Mr. Adams: It is dated May 26.

Mr. Phleger: 5/26.

* * * *

Mr. Adams: (reading)

"Mr. Nicodemus phoned me before a reply could be prepared and I told him I had no objection save that the actual dissolution should be deferred until the plan consummation in any event—perhaps longer, as tax aspects warranted. J.K.P." [228]

* * *

Mr. Phleger: No, I have already offered it.

I will offer as Plaintiff's Exhibit 53 a memorandum also identified as intervener's 116 dated January 8, 1944, signed by the initials J.K.P., Mr. Polk. It is, your Honor, I think, an important memorandum. It deals with the tax matters.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 53.)

"Memorandum

"In Re: Western Pacific
"Reorganization Trustees
1943 Federal Income Tax Return

"Conferences were held today with Mr. Elsey, Mr. Englebright, Mr. DeGraff, and Mr. Gloster at the Company offices, and with Mr. Elsey and Mr. Matthew at luncheon in connection with the deduction to be claimed by the parent company on loss on the operating company's stock, their affect thereof upon the tax liability of the subsidiary operating company.

"It was explained that under Internal Revenue Code provisions losses on the stocks of operating subsidiary [229] companies were specifically removed from the capital gains and loss classification and accordingly allowed as operating losses and, on consolidated return treatment the parent company loss could offset subsidiary company incomes.

"The Western Pacific Railroad Corporation's investment in the (operating) Western Pacific Railroad Company's stock has been shown at $75,000,000. The basis is under any calculation well in excess of the operating income of the operating company for 1943.

"There has been accrued on the operating com-

pany's books through November a reserve for Federal tax liability of approximately $7,500,000. Since there will be no tax liability if this operating loss deduction on the consolidated return basis is allowed the suggestion was made that the books of account be adjusted so as to reflect at December 31 no accrual for Federal tax liability on the part of the operating company for 1943.

"After considerable discussion it was decided tentatively to set up a "Reserve for Road Improvement" in an amount approximating the $7,500,000 figure. This action is to be taken upon order of the court after appropriate application for same. As a preliminary step the precedure is to be further studied and submitted to the Reorganization Committee for their approval, which if [230] obtained is to be then submitted to the trustees for their approval. In support of the dollar reserve, accrual engineering studies are to be compiled showing cost of change of existing rails from 80 to 112 pounds, installation of continuous block system, substitution of concrete for timber tunnel linings, and possibly extension of centralized traffic control. Studies are also to be included of cost of acquiring modernized passenger and freight equipment. Further conferences are to be held Monday on these matters."

I think the rest of the letter is not important.

Mr. Clark: Isn't that the memorandum that requests an opinion, Mr. Phleger?

Mr. Phleger: No.

Mr. Adams: Yes, it is.

Mr. Clark: The last sentence.

Mr. Adams: There is a short balance. You might read that into the record.

Mr. Phleger:

"Mr. Gloster furnished the undersigned with a preliminary draft of engineering studies on machinery and equipment investments for consideration in connection with the Bureau requirements for submission of data under Treasury Mimeograph 58.

"Discussions were also had with Mr. Matthew and Mr. [231] Elsey concerning the program for corporate readjustments and substitute lease arrangements with the Salt Lake City Union Depot and Railroad Company. Mr. Matthew has completed a draft of lease and a copy is to be furnished me for review. In the draft Mr. Matthew has made provision for limited preferred stock dividend requirements, but in the light of the discussion of Mr. McAllister's suggestions has noted that these provisions are subject to revision to accord with the proposals prepared by Mr. Hart and the undersigned. Mr. Matthew is to join in the conference to be held Monday in regard to both the tax return and the Salt Lake Depot matters. A request was made that opinion letter of counsel be drafted covering the tax return deduction item and this will be done after review of the applicable statutory provisions Monday.

J.K.P." [232]

* * *

The Court: Is this what you referred to in your chronology as the accrual reversal, in January of 1944?

Mr. Phleger: That is the first mention of it, yes. That is the conference at which the reversal of the accruals and the setting up of a reserve was discussed.

Mr. Adams: This is Mr. Polk's memorandum.

Mr. Phleger: Correct.

Mr. Clark: This is the period of time——

The Court: This is the subject matter that you are referring to, January of 1944, is that right?

Mr. Phleger: That's right. We are coming now to the Coulson opinion letter.

I will now offer in evidence as Plaintiff's Exhibit 54 a letter known as his "opinion letter," and it is evidently the letter which is mentioned in the memorandum just placed in evidence.

Mr. Adams: Your chronology order is in reverse. The memorandum speaks of an opinion to be rendered, and you are now speaking of the opinion subsequently rendered.

Mr. Phleger: That's right.

(Letter dated January 11, 1944, from Whitman, Ransom, Coulson & Goetz referred to was received in evidence and marked Plaintiff's Exhibit 54.)

Mr. Phleger: Exhibit 54 is a letter on the Coulson letterhead, signed by "Whitman, Ransom, Coulson & Goetz." You will [233] stipulate that that

was in effect signed by Mr. Coulson in behalf of the firm?

* * *

Mr. Adams: The signature of the firm, the firm name, "Whitman, Ransom, Coulson & Goetz," is Mr. Coulson's handwriting.

Mr. Phleger: This letter, your Honor, is an important letter and is the legal opinion upon which these tax actions were taken, including the reversal of the accruals for 1943 and the setting up of the reserve just mentioned. It is addressed to Mr. Charles Elsey, President, Western Pacific Railroad Company, 526 Mission Street, San Francisco, California:

"Dear Sir:

A preliminary review has been had of the statements of income and expense of the Western Pacific Railroad Corporation, the Western Pacific Railroad Company and the several subsidiaries of the latter company. This review was made with particular regard to a consideration of the applicability of [234] Internal Revenue Code provisions to the transactions of the several system companies in order that there might be made at this time as definite as possible an estimate of Federal income and excess profits tax liability for the year 1943.

In view of the elections heretofore made and of the continuation during 1943 of the stock ownership of the subsidiaries by the Western Pacific Railroad Company and the stock of that company

by the Western Pacific Railroad Corporation the tax liability is to be determined on the basis of consolidated returns. In the determination of taxable net income on a consolidated return basis the losses of affiliated companies are offset against the gains of other affiliated companies and resulting net income of the group alone is subjected to tax.

Under the Interstate Commerce Commission plan of reorganization the capital stock of the Western Pacific Railroad Company was deemed worthless and the holder of that stock excluded from participation in the securities provided under the plan for issuance by the reorganized company. The Commission plan was from the time of its inception vigorously contested by the holder of capital stock of the railroad company and others. The plan was first [235] sustained by the United States District Court, but prior to January 1, 1943, the action of the United States District Court had been reversed by the United States Circuit Court of Appeals, so that there was sound reason for expectation that the holder of capital stock of the Western Pacific Railroad Company would participate in the securities in the reorganization. The capital stock was definitely not worthless at the beginning of the year 1943.

During 1943 the Supreme Court of the United States reversed the United States Circuit Court of Appeals and there was thus reinstated the Interstate Commerce Commission reorganization plan.

Later during the year the United States District Court, after completion of all legal requirements, entered its order of confirmation of the plan. During 1943 therefore the stock of the Western Pacific Railroad Company owned by the Western Pacific Railroad Corporation became worthless.

The stock of the railroad company was originally issued to the railroad corporation upon the transfer of the operating properties to the railroad company at the time of its organization. Both the railroad company and the railroad corporation have [236] at all times reported to the Federal Government the value of this stock of at least the par amount of $75,000,000. A review of the company records of dealings with the Bureau of Internal Revenue does not indicate that its value has been disturbed. For the purpose of preparation of the 1943 Federal income and excess profits tax returns this valuation and basis of $75,000,000 for the stock of the Western Pacific Railroad Company in the hands of the Western Pacific Railroad Corporation appears proper and should, except as noted below, be adopted without change.

It is apparent from the foregoing that the stock of the Western Pacific Railroad Company having a basis to the Western Pacific Railroad Corporation of $75,000,000 became worthless during 1943. Under Sections 23(f) and (g) of the Internal Revenue Code provision is made in the determination of taxable net income for deduction of losses sustained by corporations.

It is of particular importance to note that under certain circumstances in the classification of losses there are excluded as capital losses those sustained upon the stock of affiliated corporations becoming worthless. The Western Pacific Railroad [237] Company meets the statutory requirements so that the worthlessness of its stock during 1943 does not become a capital loss to the railroad corporation but falls into the general loss deduction provisions of Section 23(f). There are attached copies of the Code provisions above referred to and of Section 29.23(g)-2 of Regulations 11 which contains the interpretation of the Commissioner of Internal Revenue of these loss provisions.

It will be noted that while the stock of the Western Pacific Railroad Company became worthless sometime during the year 1943 the affiliation status continued throughout 1943. The inclusion of the Western Pacific Railroad Company in a consolidated return for the entire year 1943 with the Western Pacific Railroad Corporation is therefore proper.

Under Internal Revenue Code provisions a loss equal to the adjusted basis of the stock is recognized. The "adjusted basis" in the Western Pacific case is the cost (which is claimed to be $75,000,000) less any distributions of the operating company out of capital, less losses availed of by the parent company in prior year consolidated returns, etc., all of which appear from preliminary review [238] to be negligible in amount. Accord-

ingly, there will be allowed in the consolidated return a loss to the parent company of approximately the cost of the railroad company stock. This loss however computed would appear to far exceed the incomes of the other members of the affiliated group. Accordingly, for the year 1943 on a consolidated return basis there would appear to be no excess profits tax or income tax liability.

At our request there are being prepared analyses of taxable incomes and losses by each of the affiliated companies over the entire period 1917 to 1943 during which consolidated returns were filed. Similarly, information is in process of assembly from which it can be determined if any distributions by the railroad company were out of capital, etc. From these studies it will be possible to reflect in the computations of loss on the worthlessness of the subsidiary company's stock the proper adjustments for operating losses of the subsidiary availed of to offset parent or system companies' incomes in prior consolidated return periods, returns of capital, etc. Our preliminary review however indicates that any such adjustment of the [illegible] and consequent diminuation of the loss deduction in 1943 will be relatively minor and that the remaining loss will be far greater than the operating incomes of the other affiliated companies for 1943, so that the final computations will reflect net losses on the consolidated income and excess profits tax returns with the resultant showing of no tax liability for any of the system companies for 1943." Attached is a

copy of certain sections of regulations 111, and of chapter I of the Internal Revenue Code.

I will now offer as Plaintiff's Exhibit 55 a letter otherwise identified as Defendants' Exhibit 844, dated January 18, 1944, from Robert E. Coulson to Mr. Frederick H. Ecker, Chairman of the Board, Metropolitan Life Insurance Company, 1 Madison Avenue, New York, New York. Mr. Ecker was one of the reorganization committee, with Mr. Coulson.

Mr. Adams: He was chairman of the committee.

Mr. Phleger: Unless counsel wishes otherwise, I will read only one paragraph, the whole not being germane:

"Looking at The Western Pacific Railroad Company as a separate corporation, it would show an aggregate liability for Federal taxes, income and excess profits for the year 1943, of upwards of $7,000,000. The company has, however, been joining in a consolidated return with The Western Pacific Railroad Corporation, the holding company, in [240] prior years and will necessarily so report as to 1943. Under the Internal Revenue Code, the holding company is entitled to a substantial deduction in 1943 because of the judicial declaration that the stock of the operating company, which it owned, is without value. The resulting 1943 loss will apparently exceed the operating profits of the railroad for 1943. We have advised the Bankruptcy Trustees that the tax report of the consolidated group for 1943 should take that position.

While the position so taken is technically sound, it will no doubt be questioned on Treasury Department audit. The amount of tax which the operating company would pay in reporting as a separate entity should, of course, be set aside, quite separate from the general funds of the enterprise. The management in San Francisco wish to set aside the sum and invest it in Federal bonds so that it will be available for such tax payment in the event the position taken on the consolidated return should not be successfully maintained. This seems to us a quite proper and necessary course. If you see any reason why such a funded reserve should not be set up, please let me have your comments, if possible on or before next Saturady, January 22. [241]

Sincerely yours,

ROBERT E. COULSON."

There are several similar letters which I will not offer because I think they are merely cumulative.

(Letter dated January 18, 1944, from Robert E. Coulson to Mr. Frederick H. Ecker, was received in evidence and marked Plaintiff's Exhibit 55.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 56 what is otherwise identified as Interveners' 69-A, 69-B and 69-C, two letters of Charles Elsey. The first is dated January 24, 1944, signed by Mr. Elsey, copies to Mr. T. M. Schumacher, Mr.

A. P. Matthew, Mr. Robert E. Coulson, for Reorganization Committee.

(Letters dated January 24, 1944, signed by Charles Elsey, were received in evidence and marked Plaintiff's Exhibit 56.)

Mr. Adams: If I may interrupt, this document that counsel is about to read from—there is no question about its authenticity, but it is a copy, and there is also in the record the original of the letter. I suggest that the original be used in the course of the presentation.

Mr. Phleger: Well, we will see if we can find it. May I proceed to read, and then we will substitute the original if we can find it.

Mr. Adams: That is quite all right. Go right ahead.

Mr. Phleger (Reading): [242]

"Mr. Sidney M. Ehrman:

In order to bring Mr. Schumacher up to date on the Federal tax situation, following Mr. Polk's visit and my conversation with you, the attached letter has been written.

Please note the question asked in the last paragraph of that letter and advise me whether you wish to extend approval for the creation of a contingency fund and its investment as a protection against a possible adverse outcome of discussions with the Treasury Department concerning 1943 Federal taxes."

The attached letter, signed by Mr. Elsey, dated

January 24, 1944, and addressed to Mr. T. M. Schumacher, copies to Mr. Ehrman, Matthew and Coulson for Reorganization Committee, reads as follows:

"Mr. T. M. Schumacher:

Mr. James K. Polk of Mr. Coulson's firm was recently in San Francisco and explained to us the reasons why Western Pacific should not make any accrual for consolidated Federal income and excess profits taxes for 1943. We have received a letter from Mr. Coulson, dated January 11, copy of which is enclosed, which sets forth the reasons for such a conclusion in considerable detail.

Through November, 1943, we had accrued for Western Pacific, the amount of $6,750,000 in anticipation of such taxes and the Western Pacific total for 1943 would have been approximately $7,069,000. Because we now assert that there will be no Federal income tax liability on a consolidated return for 1943, it will be obvious that it would be unwise to let such an accrual stand on Western Pacific income accounts. Our books close about the 18th and after discussion with Mr. Matthew and Mr. Ehrman, arrangements were made for appropriate entries in the December accounts which entirely eliminated all Federal income and excess profits tax accruals from the income accounts of Western Pacific and other subsidiaries of the Western Pacific Railroad Corporation.

There is a possibility that our position in this matter may eventually be successfully overruled

by the Treasury Department. This raises the question of contingent liability for such taxes in that event. Consequently, we will show such a contingent liability on a supplementary statement accompanying railroad company balance sheets, as directed by Special Instruction #4 of the ICC accounting classification for balance sheet accounts, pending final settlement of the issue. [244]

In the case of Western Pacific, major contributor to any taxes paid by the corporation, the sum which would have to be paid in the event of an adverse outcome is so substantial that we believe it should be set aside in an earmarked fund—preferably in Government bonds—pending final determination of the issue. Such a fund for the Western Pacific would be approximately $7,100,000. The amounts involved for the other subsidiaries are nominal and need not be set aside.

Please let me have your instructions with respect to the proposal to create a contingency fund and its investment in Government securities. If you approve the proposal, I will arrange with Mr. Matthew for necessary application to the Court for formal authority to carry the matter to a conclusion.

In a separate letter, copy of which is attached, I am presenting the proposal to Mr. Ehrman for his view."

(Whereupon a conversation among counsel occurred out of the hearing of the reporter.)

Mr. Phleger: While they are looking for the

original, I will now offer in evidence the admission by defendants of certain requests, Request 12:

"The company, through the reorganization trustees, set aside in a reserve fund $7,100,000 for the contingent tax liabilities pursuant to an order of the bankruptcy court made that day, and with the funds purchased $7,100,000 of United States Treasury Savings Notes, Series C, which are still in the possession of the company."

Railroad's response:

"Admit, except that the resrve fund was set aside by the reorganization trustees and not be the defendant, the Western Pacific Railroad Company."

The Western Realty response admits that $7,100,000 was set aside for a reserve against contingent liability by the reorganization trustees, and refers to the order for a true and correct statement of its provisions.

The request 13 has to do with the $3,000,000 fund:

"On March 26, 1945, the company set aside as a reserve against contingent federal tax liabilities for the first four months of 1944, the further sum of $3,000,000, and purchased therewith United States Treasury Savings notes Series 3, which are still in the possession of the company."

Railroad's response:

"Admit, except that the reserve set aside as a reserve against contingent federal tax liability was set aside [246] by the defendant, the Western Pa-

cific Railroad Company, and not by the debtor in reorganization."

In other words, it was set aside by the defendant, and still in its possession.

The Western Realty response admits that $3,000,000 was set aside as a reserve against contingent federal tax liability by the defendant.

I will call your attention to the fact that both admissions are that funds are now in the possession of the defendant, the first fund of $7,000,000 having been set aside by the trustees in reorganization and the second fund of $3,000,000 having been set aside by the defendant company; both admitting that the funds are now in the hands of the defendant.

Mr. Adams: Yesterday counsel read into the record the statements of Western Pacific Railroad Company in respect of these funds, pointing out that in the annual reports for later years, the description of the fund has been changed from its original import, which was to serve as a reserve fund for contingent tax liability, so that it now stands as a reserve fund in respect of contingent litigation liability. The tax questions having been closed and settled. I think that that statement is a fair statement. It seems to me an attempt to recall at this moment something that counsel read into the record yesterday.

Mr. Phleger: Yes. Well, that is quite true. The chief object of our request for the admission was to show that those [247] funds are presently

in the hands, in that form, of the defendant company. [248]

* * *

I will first offer as Plaintiff's Exhibit 57 two sheets otherwise identified as Interveners' Exhibit 293, 352 and 353.

(The sheets referred to were received in evidence and marked Plaintiff's Exhibit 57.)

Mr. Phleger: It consists of certified copies of resolutions of the A. C. James Company, the board of directors of the A. C. James Company, April 28, 1943, resolving "That it is in the interest of the company that the reorganization of the Western Pacific Railroad Company be effectuated at as early a date as possible on the basis of the Commission plan."

Mr. Adams: Will you read the balance, Mr. Phleger. It is only four lines.

Mr. Phleger: "——and that counsel for the Company be instructed to so advise other interested parties and to take any further steps in his discretion to carry out the indicated objective."

The second resolution is that of the James Foundation of New Lork, Incorporated, meeting of the board of directors April 28, 1943, the substance of which is the same as the resolution just mentioned.

I will now offer as Plaintiff's Exhibit 58 the petition of the trustees in bankruptcy for authority to establish a reserve fund for contingent tax liabilities, that being the $7,100,000 reserve that has

been frequently mentioned. I only desire to direct the Court's attention to one statement in it, and that is that the estate of the debtor contains sufficient cash derived from the earnings of the railroad, of the debtor, during the year 1943 to establish a reserve fund in the amount of $7,100,000 without using funds required for other purposes. [250]

(The document referred to was received in evidence and marked Plaintiff's Exhibit 58.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 59 three sheets otherwise identified as Interveners' Exhibits 412-B, 443 and 442. These are reports filed with the Interstate Commerce Commission reporting the contingent assets and liabilities of the railroad company.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 59.)

Mr. Phleger: I will direct attention to the fact that in the report for the year ended December 31, 1943, of the ICC, the reserve just mentioned is reported in the following terms:

"Contingent Liabilities: The Western Pacific Railroad Company has been reporting for Federal tax purposes on consolidated return with various affiliated companies. Certain companies had substantial deficits and credit carryovers affecting the year 1943. Tax counsel has advised that on the basis of a consolidated return no Federal income or excess profits tax will be properly payable for

the year 1943. In view of the present uncertainties of the consideration of new Federal tax laws, it has been deemed advisable as a precautionary measure to set aside a funded reserve in the amount of $7,100,000 which will be invested [251] in Government securities as an estimate of at least the amount of Federal income and excess profits tax that the Western Pacific Railroad Company would have to pay if it were reporting on an individual basis rather than as a part of a consolidated group of corporations."

Mr. Adams: The figure, Mr. Phleger?

Mr. Phleger: The figure is $7,069,052. This is from page 228-B of the annual report form of the Interstate Commerce Commission for the year ended December 31, 1943.

Mr. Adams: I think it is page 228.

Mr. Phleger: The second sheet is the similar report for the year ended December 31, 1944, and shows a reserve on contingent liabilities for the same amount. The third sheet is a similar report for the year ended December 31, 1945, showing the item for contingent liabilities in the same amount, but with the additional statement of contingent assets:

"The Western Pacific Railroad Company paid an amount of $4,144,828.87 as its proportion of the Federal income tax for the year 1942 on the basis of the consolidated return of the various other affiliated companies. Claim for refund of the entire amount paid under consolidated return amount,

$4,201,821.54, was filed by the Western Pacific Railroad Corporation on March 9, 1945." [252]

The figure opposite that being $4,144,829.

I will next offer as Plaintiff's Exhibit 60, otherwise identified as Interveners' Exhibit 454, a letter on the letterhead of the Coulson firm under date of March 5, 1944, signed by Robert E. Coulson, addressed to Mr. Charles Elsey, President, The Western Pacific Railroad Company.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 60.)

Mr. Phleger: I will direct the Court's attention to the last paragraph. This has to do with the advisability of certain amendments to the California State Corporation Law so as to permit the continued use of the corporate charter of the debtor in bankruptcy.

"Needless to say, I hope you will be able to give the matter attention promptly, as it will be a great safeguard to have the statute on the books in California in the event we are not able to secure a contractual transfer to the reorganization committee of the stock of the operating company. The advantage of using the old operating company corporate shell for the purposes of reorganization are so substantial that I would be entirely willing to see the reorganization delayed, if necessary, for as much as three months rather than to be forced to effectuate the reorganization through [253] the organization of a new company."

I will now offer in evidence as Plaintiff's Exhibit 61, also identified as Interveners' 202, a letter on the letterhead of the Coulson firm under date of October 16, 1944, signed by Robert E. Coulson, addressed to Mr. Elsey.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 61.)

Mr. Phleger: This also deals with certain matters arising out of the use of the charter of the defendant, the debtor in reorganization, and having to do with certain tax incidents and the setting up of its books. This is the last two paragraphs on page 2.

Mr. Adams: On what page? There are several pages in this letter.

Mr. Phleger: Page 2.

"You no doubt have clearly in mind one basic factor involved in this entire problem. Section 77 in the melding of related reorganizations under the Bankruptcy Act, technically gives legal title to the property of the debtor to the bankruptcy trustees. The Treasury Department might have used this technical aspect to justify them in taking the position that the bankruptcy trustees were a new taxable entity, which ought to report earnings of the properties and make no deductions for interest paid or accrued on the outstanding obligations of the debtor, but only on obligations actually incurred by the trustees (trustees' certificates) or on obligations definitely assumed by the bankruptcy

trustees. The Treasury Department, after a good deal of internal discussion in general counsel's office has reaffirmed a policy which regards the debtor as a continuing entity. This has permitted the debtor to deduct accrued interest on the old obligations which were outstanding up to the date of consummation. I need not tell you that this is enormously important from a dollars and cents point of view during the recent excess profits tax years."

I will now offer as Plaintiff's Exhibit 62 a telegram otherwise identified as Defendants' Exhibit 933. It is a telegram dated December 20, 1944, signed Robert E. Coulson, addressed to Charles Elsey, President, The Western Pacific Railroad Company, San Francisco.

(The telegram referred to was received in evidence and marked Plaintiff's Exhibit 62.)

Mr. Phleger (reading):

"Mr. Polk and I have been discussing treatment of Federal tax matters for the calendar year 1944. It seems clear that the only course open is to proceed as indicated in conversations with you, including report on a consolidated basis up to May 1, with a later determination as to consolidated or separate basis for the balance of the year during which holding company no longer held operating company's stock. Mr. Polk has arranged to defer any readjustments on books of account as suggested by Interstate Commerce Commission Bureau of Accounts until after a conference with

Bureau of Accounts on January 17 and has so advised Mr. DeGraff." [256]

* * *

I will now offer as Plaintiff's Exhibit 63 a document otherwise identified as Interveners' 223-C, consisting of a memorandum dated January 23, 1945, signed by J. K. Polk, that being Mr. Polk, addressed "Memorandum for Colonel Coulson." The journal entries refer to completion of reorganization.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 63.)

* * *

Mr. Phleger: The paragraph I would like to direct the Court's attention to is as follows:

"It was clearly understood and agreed that under no circumstances"——

Mr. Adams: What page, please?

Mr. Phleger: This is page 1, last paragraph.

(Continuing reading): "——would the corporation jeopardize its primary tax advantage deliberately secured through the maintenance of the continuity of the 1916 corporation by voluntarily filing any proposed journal entries of the type suggested in the letter of December 6, 1944. Subject to such amendments, additions and corrections of dollar figures as will develop from the use of the December 31, 1944, closing figures, it is the position of counsel and of Colonel Coulson as a member of the Board, that the entries reflected in principle in the memorandum of January 17th conference

should form the basis of the proposed journal entries to be prepared and submitted for Interstate Commerce Commission consideration.

"There is attached a photostatic copy of a work sheet reflecting the type of balance sheet before and after journal entries of the kind indicated in [258] the January 17th memorandum. It was noted, of course, that the position estimated as of December 31 will probably vary materially in the cash and current asset qualifications from the actual figures which will form the starting point for the proposed journal entries and schedules to be submitted to the Interstate Commerce Commission. It will also be noted that the resulting balance sheet will reflect an unearned surplus of approximately $83,000,000 and that of this sum only the amount of $75,800,000 is to be classified as 'paid in surplus' for Federal income tax purposes, the balance constituting 'accumulated earnings and profits' in any invested capital or source of dividend distribution computation."

Mr. Adams: The document consisting of five pages and being a memorandum of Mr. Polk.

Mr. Phleger: I will now offer as Plaintiff's Exhibit——

Mr. Adams: May I ask, if I may interrupt? You read a portion which contained a reference to work sheets. You have offered, however, simply the document of five pages, I take it?

Mr. Phleger: That is correct.

I will now offer as Plaintiff's Exhibit 64 a let-

ter otherwise identified as Interveners' No. 68, which has been referred [259] to variously as the "first Krigbaum letter." It is a letter——

Mr. Adams: Now, just one minute. I don't understand that reference, and it is the first time I have heard it.

Mr. Phleger: Well, I am going to call it that. It is the first letter written in connection with the tax matters by the Coulson firm to C. R. Krigbaum, Internal Revenue agent in charge, 225 Broadway, New York. There was a later letter written to Mr. Krigbaum, which I will later refer to as the "second Krigbaum letter." This letter is dated May 31, 1946, is signed by "Whitman, Ransom, Coulson & Goetz," addressed to Mr. C. R. Krigbaum, Internal Revenue Agent in Charge, 225 Broadway, New York.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 64.)

* * *

Mr. Phleger: The next document I offer in evidence as [265] Plaintiff's Exhibit 65, otherwise identified as Interveners' 103. It is a power of attorney from the Western Pacific Railroad Corporation, under date of June 26, 1946.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 65.)

Mr. Phleger: This is after the Krigbaum letter.

The Court: The next month?

Mr. Clark: About a month later. [266]

* * *

Mr. Phleger: My statement was not intended as evidence.

I will now offer as Plaintiff's Exhibit 66 a document otherwise identified as Interveners' No. 205.

* * *

Mr. Phleger: I use the universal "we." The supplemental complaint was filed, your Honor, on December 17, 1947, long after all of these events that we are talking about now. And the subject matter of it in part were the events, as is appropriate with the supplemental complaint, that took place after the filing of the original complaint. So with respect to the manner and method of settlement, what was done, how it was handled, in what manner, those are all germane and are matters of evidence in this suit, because they all took place before the filing of the supplemental complaint which set them forth as the basis of the supplemental complaint.

The original complaint, may it please your Honor, was before the final decision that the defendant would actually receive any benefit as a result of the tax returns. As the evidence will show, it was not deemed that the benefit or advantage had actually been received by the defendant until the tax settlement was made, which was in August of 1947. And so it seems to me that there should be no question——

The Court: Yes, but Mr. Phleger, you are not complaining about the tax settlement.

Mr. Clark: No, no, indeed.

Mr. Phleger: No, no.

The Court: Therefore any statement that you would want to put in as to what an attorney said with respect to that matter might be no more than what attorneys say or do in the course of litigation.

Mr. Clark: That is not the point.

Mr. Phleger: That is not the point, your Honor, but what the attorney here characterizes the president of the corporation as, and his duality, and so forth, I take it is evidence, whether it happened before or after the filing of this suit. Now, this telegram is introduced——

The Court: Well, what does the telegram say, and maybe I can rule upon it? [274]

* * *

Mr. Phleger: This is a wire from Mr. Coulson to Mr. Matthew, dated December 7, 1946:

"We have an embarrassing situation in connection with examinations before trial in pending stockholders' suits because of various capacities in which Curry has acted. He is president of the holding company. As such he holds certain files and papers of the holding company. We have pointed out necessity of distinction between these files and files of correspondence written or received by [275] him or Schumacher as former officers of the operating company. These files belong to operating company and should be technically in our custody as tax counsel insofar as they involve the tax matters. Curry raises question under your letter May 8, 1945, to bankruptcy trustees. Schu-

macher asked Curry to act as his representative in retaining custody of trustees' books and records. This has been construed to include all correspondence with officers of operating company during reorganization period. In our judgment records directly affecting operating company must necessarily be turned over to operating company by bankruptcy trustees even though they remain available to bankruptcy trustees. Can you clear this situation by wire to us or directly to Mr. Curry?

COULSON."

Now, we are offering that as being a declaration or statement by Goulson as to the duality in capacity being occupied by Mr. Curry and what resulted from them, in this particular respect.

Mr. MacKinnon: How is that binding, your Honor, on the defendant?

The Court: It doesn't make any difference, Mr. Phleger, about what Mr. Coulson says about it, does it? [276]

Mr. Phleger: Except that Mr. Coulson was the attorney for the defendant corporation in these matters.

The Court: Well, whether he says the man is acting in a dual capacity or not isn't of any importance. The facts will show that.

Mr. Phleger: May I suggest to your Honor that the state of Mr. Coulson's mind as to his knowledge as to whether or not this man, who was the president of the holding corporation and also the vice president and other officers of the operating

company, was in a dual capacity—the state of Mr. Coulson's mind is a fact which we are entitled to prove.

Mr. Clark: Plus the fact that Mr. Coulson is now a director of this defendant.

Mr. Phleger: What Mr. Coulson thought Mr. Curry's capacities were—he was acting for him, he had the power of attorney of the corporation, signed by Mr. Curry. I think his state of mind, his knowledge of the fact that Mr. Curry was on two sides, is important.

The Court: Well, you have already established, according to the record, the various capacities of Mr. Curry, haven't you?

Mr. Phleger: I have tried to establish that Mr. Coulson knew it.

Mr. Clark: This establishes the consciousness, your Honor. [277]

Mr. Phleger: And that Mr. Matthew was informed of Mr. Coulson's knowledge.

The Court: Well, how could he help knowing it?

Mr. Phleger: I don't know how he could help knowing it, but——

The Court: I don't see any particular importance to this telegram. I also don't see any harm in having it in evidence. But if Mr. Curry, as the record shows, was occupying these various positions, well, the fact that Mr. Coulson says he was, if in fact he was, doesn't add anything to it. You say it is important that this knowledge be shown. But does it need that telegram to show that?

Mr. Phleger: I think it is one way of showing it. He was dealing with this man, and I thought it important to show that he knew in his own mind that he was acting in a dual capacity.

Mr. Levy: Your Honor, with Mr. Clark's permission—he has permitted me to say a few words—I think the relevancy of this exhibit has been talked around, but not talked at, and I think that it has one very strong basis for admission. If your Honor is mindful of one of the theories that we have presented in this case and that we still present in this case; namely this, that apart from the theory of duality and apart from the theory of unjust enrichment, we believe and we believe the evidence justifies our presentation of this theory, and in fact requires it, that there was a conscious use of this corporation for the benefit of the railroad company, and that that letter led to a legal theory other and apart from any that we have discussed, and that it will perhaps lead to a different result as to the quantum of recovery.

Now, in an effort to prove a conscious use of another corporation, you have to prove acts. You want to prove motive, and you want to prove position. And I don't think that in order to prove any of those things during a particular period you are restricted to the event of that period, to the extent that anything may occur later that has a reflection backwards. It is just pertinent and just as proper as evidence of what was the then con-

duct during the period with which we are concerned. Now, let's document that for a moment.

During the period of the tax transaction, that is, the signing of the 1943 return, the filing of the refund claim for 1942, the signing of the 1944 return—and that brings us on this chart to June 15, 1945—during that period, we say, Mr. Coulson's firm had, and Mr. Coulson personally had, this conscious purpose which he exerted and effectuated through the use of some of the corporation's own officers. Now, this exhibit brings us to December, 1946, admittedly one year and a half later.

Now, let us see what has occurred between June 15, 1945, and December, 1946. Where is Mr. Curry, the president of this corporation? He is in Mr. Coulson's office. That is where he is employed. And what is his employment? Not as an attorney of Mr. Coulson's office; Mr. Curry is not an attorney. His employment in Mr. Coulson's office, as the document read to you specifically stated, was as the president of this corporation to do things for the defendant railroad company in connection with the effectuation of these very savings which we are now litigating the right of either of these parties to.

The Court: I do not think you need to labor that point. I have not heard in anything the other side has said any statement that denies the effect of this arrangement was to benefit the defendant corporation. The question in this case is: Was there a right to do it?

Mr. MacKinnon: That is the question. You are precisely [280] correct.

The Court: What difference does it make whether this attorney sent the letter? Of course, he knew that these steps were being taken to file these returns for the benefit of the railroad company. The only question is: Was there a right to do it?

Mr. MacKinnon: That is the question. Your Honor hits the nail right on the head. That is the only question in the case.

Mr. Levy: If I may disagree with you, I do not think your Honor hits the only question in the case. I think your Honor hits one of the questions in this case.

The Court: I think perhaps we are spending unnecessary time. I do not think this telegram is harmful in any way. It is merely a telegram by an attorney with respect to facts of which there is already some evidence.

Mr. Levy: It is not the statement of an attorney; it is a statement of Mr. Coulson, director of this railroad company.

The Court: You do not have to prove the kind of intent here that you have to prove in a criminal case. You do not have to show the facts that are already demonstrated, with which this man was dealing, and then in addition show that there was some conscious mental activity on his part evidenced by something that he said or did by which he recognized that that was the fact. The facts themselves demonstrate that. I do not think [281] it is of any importance. I think we are spending too much time about it.

Mr. MacKinnon: I do not think it is important except it is a clear demonstration of how far afield we are getting from the issue in the case, as, of course, as I said at the outset, they make the issues and we will have to meet them.

Mr. Adams: May I say one word, because I started this discussion. I only arose with the thought in mind that perhaps you could get some limit as to the things we will have to explore, because they are thrown forward by our adversaries, and it occurred to me perhaps a sensible limit would be to say that once this plaintiff corporation, through interveners and through its own counsel, voiced this claim and had its lawsuit and were actively looking after it, that that might be a time when we should stop the examination into what was done. Up to that time these gentlemen, I understand, had the contention here that something was taken from the corporation without its knowledge, while, as Mr. Phleger says, it was in a coma. Certainly at the time they filed the lawsuit and made the claim the knowledge was there and the coma was ended and it occurred to me that perhaps that might be a reasonable way of putting some limit on what should be brought before your Honor. But it is only a suggestion I arose to make in that connection.

Mr. Phleger: Perhaps I should correct counsel's characterization of plaintiff's case. We take the position, your Honor, [282] not only that there arose a right in us when our property was taken and the

handling of the income tax matter was taken over by the defendant corportion, but we say that when all of those acts took place the plaintiff corporation, by virtue of the fact that all its active officers were acting in dual capacities should not be charged for lack of action, with making of gifts, or any of these other matters which defendants are raising as defenses, and they bear also directly upon the equities. We want to prove, beyond peradventure, that this defendant took over and handled these tax matters and dealt with plaintiff's property, as a result of which it was unjustly enriched, and the fact that the active officers and the people who were purporting to represent the plaintiff corporation were at this time in the employ and in the pay of the defendant corporation is a very important part of this case, and this wire shows that the chief actor on the part of the defendant knew that fact.

The Court: I think the evidence otherwise may show that.

Mr. Phleger: I agree this is accumulative.

The Court: I do not think that this is too important, this document. I will allow it to be admitted in evidence subject to a motion to strike if at some future time in the case the importance of it may assume greater proportions.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 66.) [283]

Mr. MacKinnon: I do not think, your Honor, it will ever assume importance. The only point I want

to emphasize is that they are embarking on an unlimited field and we will have to meet it. That is all. We will have to put in the full facts. They say they are dealing in equities. They have selected documents and we will have to meet them. We have no alternative.

The Court: We can't help that. I think perhaps we will take a brief recess at this time.

(Recess.)

Mr. Phleger: Mr. Curry, will you take the stand, please?

MICHAEL J. CURRY

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court?

A. Michael J. Curry, 10 Perth Ave., New Rochelle, New York.

Direct Examination

By Mr. Phleger:

Q. Mr. Curry, what is your occupation?

A. I am a retired railroad official.

Q. Did you know Mr. Schumacher in his lifetime?

A. During his lifetime, yes. I have known him since 1914.

Q. Will you very briefly state to the Court how you met him? And generally your relations with him during his lifetime?

A. I met him in 1914. At that time I was with

(Testimony of Michael J. Curry.)

the Chicago, Rock Island and Pacific Railway, in Chicago, Illinois, and Mr. J. E. Gorman, was president of the Rock Island at that time. [284] He was the brother-in-law of Mr. Schumacher. He had stated to Mr. Gorman that he was looking for a secretary to come to New York, and Mr. Gorman suggested that I might be willing to come with him. So he conferred with me, and I agreed to come as Mr. Schumacher's secretary.

At that time he, Mr. Schumacher, was Chairman of the Board of the Rock Island and Vice President of the El Paso and Southwestern Railroads. I remained with Mr. Schumacher from that time up to his death in February, 1948, in various capacities as secretary and assistant to the president of the El Paso and Southwestern, and as his chief clerk when he became executive vice-president of the Southern Pacific, at the time of the sale of the El Paso and Southwestern to the Southern Pacific. At that time Mr. Schumacher and I went over to the Southern Pacific.

After about four or five months Mr. Schumacher was directed to go to Chicago and organize a traffic agency, a so-called off-line traffic agency. That was an agency in charge of all the traffic soliciting agencies that were not located on the line of the Southern Pacific.

I stayed with Mr. Schumacher in Chicago while he left Chicago in July, 1926, and I remained in Chicago as office manager of the traffic agency.

(Testimony of Michael J. Curry.)

About a year later he contacted me again and asked me if I would care to come back to New York as officer of the railroad company and corporation.

Q. That is the Western Pacific Railroad?

A. The Western Pacific Railroad Company and Western Pacific Railroad Corporation, which I agreed to do, and I came to New York and took those positions on April 1, 1927.

Q. From that date forward up until the last year or so you have been continuously connected with those companies? A. Yes, I have been.

Q. And connected with Mr. Schumacher until his death? A. Yes, sir.

Q. When did Mr. Schumacher die?

A. He died February 26, 1948.

Q. Can you state generally what the nature of your services were while you were serving with Mr. Schumacher?

Mr. MacKinnon: That, your Honor, I object to on the ground the by-laws of the corporation are the best evidence of the duties of the officers.

The Court: I think he wants to know what offices he held.

Mr. MacKinnon: That is all in evidence here. It is prepared in the schedule.

Mr. Phleger: Your Honor, I want to establish the general nature of the functions of this witness in order that your Honor may have some general idea of his capacity and of the manner in which he conducted the various positions which he held.

(Testimony of Michael J. Curry.)

Mr. MacKinon: My response is to that, your Honor, the by-laws provide what the duties of the officers are. [286]

Mr. Phleger: Do they provide what the duties are of a stenographer to Mr. Schumacher?

Mr. MacKinnon: They provide what the duties are, your Honor, when he came back to the company-corporation.

The Court: I will overrule the objection, unless this is something lately.

Mr. Phleger: No, this is preliminary.

The Witness: The question, please?

The Court: What was the general nature of your work with Mr. Schumacher with both companies?

A. Generally my duties were those of a chief clerk or an office manager. Mr. Schumacher gave me to understand on many occasions that he was the boss of that office, both the company and the corporation.

Mr. MacKinnon: That, I submit, your Honor, is not responsive. I move to strike it out.

The Court: Yes, what Mr. Schumacher gave him to understand may go out.

The Witness: Well, as to the duties, they were generally those of a chief clerk or an office manager. I had a number of titles but no authority.

Mr. MacKinnon: That, your Honor, I object to on the ground that the by-laws of the corporation specify the authority. No matter what anybody

(Testimony of Michael J. Curry.)

said to him, the by-laws provide what the duties of the officers are. [287]

The Court: Yes, but the witness can testify to what he did.

Mr. McKinnon: Yes, but the protestations of the witness——

The Court: Yes, his statement that he had no authority may go out.

The Witness: May I say here——

The Court: Wait just a minute, Mr. Curry. What is it that you want to bring out? The actual functions performed by the witness.

Mr. Phleger: Yes, and I will proceed to do that, your Honor.

The Court: I think you had better ask the question.

Q. (By Mr. Phleger): When did you first become an officer of the Western Pacific Railroad Company? A. In April, 1927.

Q. And what position did you assume at that time?

A. I was appointed vice-president, assistant secretary and assistant treasurer.

Q. And at whose suggestion?

A. At Mr. Schumacher's suggestion.

Q. When did you first become an officer of the Western Pacific Railroad Corporation?

A. On or about that time I was appointed secretary and treasurer of the corporation.

Q. At whose instance?

(Testimony of Michael J. Curry.)

A. At Mr. Schumacher's recommendation. [288]

Q. Will you describe generally what you did as an officer of the Western Pacific Railroad Company?

A. Well, I performed the duties of secretary and treasurer as prescribed under the by-laws.

Q. My question is, of the Western Pacific Railroad Company?

A. Oh, the company. Vice-president, assistant secretary and assistant treasurer. I was merely a signing officer with that title. I had no authority. The by-laws of the railroad company provided that one or more vice-presidents could be appointed or elected and their duties delegated from time to time and authorized at various times to execute papers and documents of various kinds.

Q. Did you execute papers in behalf of defendant company? A. I did.

Q. Many papers? A. I would say yes.

Q. What was the general course of procedure in connection with your execution of papers for the defendant company?

Mr. Adams: Objection, your Honor, on the score of characterization. So that it may be clear, and I won't make the objection again, are these questions addressed to the time that Mr. Phleger refers to as the time when the defendant was the debtor in reorganization or prior to that time?

Mr. Phleger: It covers the entire period during which he held those titles with the company. [289]

Mr. Clark: Commencing in 1927.

(Testimony of Michael J. Curry.)

Mr. Adams: As long as we are clear about the fact that is being addressed to the witness and you are not making any particular reference as to the first four months of the year 1945. Is that clear? You are asking the witness generally over the whole period?

Mr. Phleger: That is correct.

Mr. Adams: Very well.

The Witness: The question?

(Question read by the reporter.)

A. I was instructed by either Mr. Elsey, the president, or Mr. Schumacher, the chairman, to execute such documents under the authority of the Board of Directors and under their direction.

The Court: What you mean is you signed whatever documents they told you to sign?

A. Yes, sir. Yes, your Honor.

Q. (By Mr. Phleger): Did you prepare the documents you signed?

A. I did not. I do not think that I would have ever been allowed to sign any documents that I prepared.

Mr. MacKinnon: I move to strike out everything after "I did not".

The Court: Yes. [290]

* * *

Q. (By Mr. Phleger): This question will be of particular interest to counsel. When did you become an officer of the Western Realty Company?

(Testimony of Michael J. Curry.)

A. I think some time in 1927 or 1928.

Q. What position did you hold?

A. Assistant Treasurer.

Q. At whose instance were you appointed to that position? A. Mr. Schumacher's.

Mr. Clark: Mr. Phleger, may I suggest that you put in the schedule which was identified on the deposition of the Western Realty officers and their tenures?

Mr. Phleger: I have no objection.

Mr. Clark: It is agreed to and it establishes the length of time Mr. Curry was an officer.

Mr. Phleger: That is intervener's exhibit 200 and would be plaintiff's exhibit 67. It is a schedule of the officers of the Western Realty Company.

(Schedule of officers of Western Realty Company was thereupon received in evidence and marked Plaintiff's Exhibit 67.)

Q. (By Mr. Phleger): Where were the officers of the Western Pacific Railroad Corporation and Company in New York?

A. They were at 37 Wall Street.

Q. Were the same offices occupied by both companies? [291] A. Yes, sir.

Q. Were there employees in those offices of both companies? A. Yes, sir.

Q. Were the people who worked in those offices employees of both companies?

A. They were.

Q. How were the expenses of that office paid?

(Testimony of Michael J. Curry.)

Mr. Adams: At what period of time, Mr. Phleger?

Mr. Phleger: During the entire period.

The Witness: For some time after I came there they were divided fifty-fifty between the two companies and later on, the percentages varied.

Q. Can you fix the date up to which they were paid one-half by each?

A. I think it was up to the year 1934.

Q. And thereafter and up to June 1, 1943, how were the expenses divided? [292]

* * *

A. As I stated, the percentages after 1934 varied. They were 75 and 25 and 66 and ⅔ and 33 and ⅓ until June 1, 1943, when the railroad company took over the entire expense of the New York office.

Q. (By Mr. Phleger): How long was the entire, or for what period was the entire expense of the New York office borne by the railroad company?

A. From June 1, 1943, to May 1, 1945.

Q. And what happened then?

A. The office was closed.

Q. When did you become president of the Western Pacific Railroad Corporation?

A. On February 1, 1942.

Q. At whose instance?

A. Mr. Schumacher's.

Q. Was anything said to you at that time as to the reason for Mr. Schumacher's retirement and your election? [293]

(Testimony of Michael J. Curry.)

A. Yes, Mr. Schumacher was impaired somewhat physically and besides we wanted to reduce the expenses of the corporation.

Mr. MacKinnon: If your Honor please, I submit he should respond and say what was said and who said it, and not enter into a dissertation each time he is asked a question.

The Witness: Well, Mr. Schumacher said to me at this time that he would resign and he felt that I should take over the presidency and see the corporation through its liquidation and dissolution. That is what he told me at the time.

Q. (By Mr. Phleger): Did he say anything about expense?

A. Yes. His resignation—his salary went with it. He gave up his salary of $15,000 a year.

Q. And what did they do with your salary?

A. Well, as I recall it, I was getting $4,500 a year as secretary and treasurer, and I think for a short time after that I got $1,000 additional, I believe it was, to act as president and treasurer.

Q. How long did your salary as the chief executive of the corporation continue?

A. I received no compensation from the corporation since June 1, 1943.

Q. That is the date on which you say all of the office expenses of the New York office were taken over by the defendant company?

A. Correct.

Q. Your salary stopped then from the corpora-

(Testimony of Michael J. Curry.)

tion, and have you [294] received any compensation from it since? A. I have not.

Q. As to your duties as president of the corporation, who prepared the minutes of the corporate meetings after you became president?

A. Well, I prepared the agenda and the minutes.

Mr. MacKinnon: That I object to because——

The Witness: I did.

Q. (By Mr. Phleger): You attended the directors' meetings, did you? A. I did.

Q. Did you engage in any discussions of policy matters personally in the directors' meetings?

A. I did not.

Mr. MacKinnon: I object to that as calling for a conclusion. The form of the question is completely bad: Did he engage in policy discussions?

Mr. Phleger: I do not see that that is objectionable, your Honor. It does not call for any conclusions.

The Court: What is bothering you about that? What "policy" means?

Mr. MacKinnon: That is right.

Mr. Phleger: It will take a lot longer to ask the questions.

The Court: What are you trying to show, that the president was just a presiding officer and a sort of figurehead? [295]

Mr. Phleger: That is correct.

The Court: Do you admit that that is so?

(Testimony of Michael J. Curry.)

A. I admit that that is so.

The Court: Ask him another question.

Q. (By Mr. Phleger): Who were the joint employees at the New York office during the period of 1943 through the date when it closed? Was Mr. Schumacher there?

A. Mr. Schumacher was there, but he was a trustee and paid, I believe, by the trustee.

Q. There was yourself—— A. Myself.

Q. Miss Valouch—who is she?

A. Miss Valouch was Mr. Schumacher's secretary, personal secretary, and in addition handled our tax matters for us and did some of my secretarial work.

Q. Who is Sheehan?

A. Mrs. Sheehan was the telephone operator, receptionist, and of the files, and assisted the other clerks generally in their work; also helping out in the transfer work that Mr. Wienken was handling.

Q. The chart shows that she was a director of the corporation. Do you know at whose instance she became a director?

A. At Mr. Schumacher's recommendation.

Q. And there was also that Miss Valouch became a director of the corporation. Do you know at whose instance she became a director?

A. At Mr. Schumacher's instance. [296]

Q. Mr. Wienken—who is he?

A. Mr. Wienken for a time was my secretary and later became secretary of the corporation and con-

(Testimony of Michael J. Curry.)

tinued to handle my secretarial work, such as typing letters and telegrams and memoranda, and took over the transfer work from the Chase National Bank, who was the transfer agent for the stock of the corporation.

Q. I notice that he became secretary and director of the corporation, secretary in 1945 and director in 1946; do you know at whose instance?

A. Mr. Schumacher's.

Q. This chart described Mr. Weinken as a stenographer. There was some question as to that designation. Was he a stenographer?

A. He was a stenographer.

Q. Pierce and Greer were the attorneys, were they, in New York for the company and for the corporation? A. They were.

Q. Mr. Osborn—he was a director of the corporation, was he? A. Yes, sir.

Q. And also of the company? A. Yes, sir.

Q. Who was Mr. Hatton?

A. Mr. Hatton was assistant secretary and assistant treasurer of the Denver & Rio Grande Western Railroad. We gave him office space in our suite at 37 Wall Street, desk room only. He was the transfer agent for the preferred stock of the Denver & Rio [297] Grande. He was not connected at all with the railroad—the Western Pacific Railroad Company or the Western Pacific Corporation.

Q. I notice that he became a director or was a director of plaintiff corporation. Do you know at whose instance he became a director?

(Testimony of Michael J. Curry.)

A. Mr. Schumacher's. [297-A]

* * *

Mr. Adams: Your Honor, at this time I desire to report with reference to the request made yesterday by counsel for the production of any letter accompanying Plaintiff's Exhibit No. 42, the latest of the lawyers' bills. That request was made to me during the session yesterday. In compliance with that request I have produced and have exhibited to counsel and will hand to him a letter from Mr. Polk to Mr. Elsey, of November 15, 1948. And since the letter last mentioned refers to the letter of December 19, 1947, I have also exhibited to counsel and am now handing to counsel the letter of December 19, 1947. And at this time, your Honor, I take it that the objections stated yesterday with reference to the bills may be deemed to apply to the production of the papers just mentioned.

The Court: Very well.

Mr. MacKinnon: May the record also contain a notation to the same effect on the behalf of defendant Western Realty Company?

The Court: Very well. [298]

* * *

Mr. Phleger: I think, may it please the Court, that it would be desirable to attach these two letters to Plaintiff's Exhibit No. 42 now in evidence, and because of the importance of the letters, I will im-

(Testimony of Michael J. Curry.)

pose upon your time sufficient to read all or portions of them. The first——

Mr. Adams: It may be understood, your Honor, that an objection has been registered on our part to the offer of these documents, as not relevant or material to any issue in the case.

The Court: Very well. [301]

* * *

(Letter of December 19, 1947, Polk to Elsey, and letter of November 15, 1948, Polk to Elsey, were incorporated in Plaintiff's Exhibit 42.)

MICHAEL J. CURRY

resumed.

Direct Examination

(Continued)

By Mr. Phleger:

Q. As to the employees in the office at 37 Wall Street, who instructed them as to their duties?

A. I did.

Q. I think you have testified as to who did that. Now, after the Western Pacific Railroad Company took over the entire payroll, was there any physical change in the manner of conducting the office?

Mr. MacKinnon: I object to the form of the question on the ground that it mischaracterizes the

(Testimony of Michael J. Curry.)

evidence. There is no [306] evidence that the Western Pacific Railroad took over the entire office. It was the trustees. There is no foundation for the question. The reorganization trustees were operating the property at June, 1943, when the office was taken over. It was their function and their function alone, and there are exhibits which demonstrate that fact.

The Court: I think the Court can take note of that. I do not think the question is worded with the idea of proving that fact, but merely for the purpose of making a differentiation between two organizations.

* * *

Q. (By Mr. Phleger): Will you answer the question? A. There was no change.

Q. No physical change? Was there any change in duties that were performed by the persons who worked there? A. None whatever.

Q. It went on just as before?

A. Just as before, yes, sir.

Q. When was the office at 37 Wall Street closed?

A. April 30, 1945.

Q. Who directed the closing?

A. The president of the railroad company, Mr. Elsey.

(Testimony of Michael J. Curry.)

Q. Where did you go after the office was closed?

A. Well, I remained at 37 Wall Street to clean up some various [307] matters, and on June 1 I went over to the suite of Whitman, Ransom, Coulson & Goetz at 40 Wall Street.

Q. That was across the street?

A. Across the street, yes, sir.

Q. Who gave you the instructions to go to the Coulson office?

A. Mr. Coulson talked with me and said that I was to come over there June 1 or as soon as convenient, and that he would provide a room for me.

Q. Do you remember receiving a letter from Mr. Coulson stating that you would be retained as an independent contractor? A. I do.

Q. I show you Plaintiff's Exhibit 33, a letter from Robert E. Coulson to yourself, June 6, 1945. That letter was received by you, was it?

A. Yes, sir.

Q. Was that the first indication you had of the amount of the retainer that was to be paid to you?

Mr. MacKinnon: Just a minute, your Honor. I object to the form of the question. I think the question is clearly bad.

The Court: I will overrule the objection.

A. Yes, the first information I had definitely of the amount.

Q. (By Mr. Phleger): Had you had any previous discussion about going over to the Coulson office?

A. It is my recollection that Colonel Coulson

(Testimony of Michael J. Curry:)

asked me to come over to his office a few days prior to the writing of that letter, [308] and he informed me of this arrangement. But at that time I do not recall that he stated any figure.

Q. Now, after the office closed what became of the other employees? Let me first mention Miss Valouch. What happened to her?

A. Miss Valouch went over to the firm of Whitman, Ransom, Coulson & Goetz on May 1, 1945.

Q. Is she still there?

A. She is still there, to the best of my knowledge.

Q. How about Mrs. Sheehan?

A. Mrs. Catherine Sheehan, yes. She elected to take her severance pay and seek a job somewhere else.

Mr. Clark: May we have a stipulation on the amount of the severance pay at this time, your Honor?

The Court: Is it important?

Mr. Adams: The fact is of record now.

Mr. Clark: I do not think it is.

Mr. Adams: You asked us for the amount and we gave it to you.

Mr. Clark: It has not been put in.

Mr. Adams: I think it has.

Mr. Clark: Will you concede that those employees who did not continue with the company, or in Mr. Curry's case, who did not get a pension from the company, received six months' severance pay from the railroad company? [309]

(Testimony of Michael J. Curry.)

Mr. Adams: Mr. Clark, whatever the fact is. I think you are right. I am a little uncertain about the precision of your statement. I am sure, however, that we furnished you all that information. You have it readily at hand and we have no objection to it being put in evidence.

Q. (By Mr. Phleger): What happened to Mr. Wienken?

A. Mr. Wienken stayed with me until I moved over to the Whitman firm, and then he left the employment of the companies, and I believe moved to Texas or someplace.

Q. And how about Mr. Hatton?

A. Mr. Hatton retired as vice president—assistant secretary and assistant treasurer of the Denver, and was unemployed thereafter.

Q. Did your company salary stop when the office closed? A. It did. [310]

Q. Since that time have you been receiving a pension from the company?

A. I have, since May 1, 1945.

Q. In what amount?

A. At first it was $89.45, but at the present time it is $65.54 a month.

Q. What was the occasion for the reduction?

A. Well, the Railroad Retirement Board increased the maximum benefits under the Retirement Act 20%, and that would have brought my retirement pay up to $140, and under the provisional retirement plan of the Western Pacific Rail-

(Testimony of Michael J. Curry.)

road Company, that was deducted, the amount of the increase, from what I was receiving from the company, and I now get $65.54 a month.

Q. Is that a voluntary retirement plan?

A. It is a provisional retirement plan.

Q. It may be terminated?

A. It may be terminated at the will of the company or the board.

Q. Now when the office was closed at 37 Wall Street and you moved over to 40 Wall Street, where in 40 Wall Street, physically, was your office?

A. I was on the 52nd floor. The firm of Whitman, Ransom, Coulson and Goetz occupied the 51st and 52nd. I was on the 52nd floor in close proximity to Mr. Jomes K. Polk's office, of tax counsel. [311]

Q. Well, how far was Mr. Polk's office from your office?

A. Oh, I would say it's 30 or 40 feet.

Q. Now did Miss Valouch have an office in the Coulson office at the same time?

A. Yes, she had an office adjoining that of Mr. Polk's.

Q. And adjoining yours?

A. No, it was across the hall.

Q. Across the hall. What became of the files and records that had been at 37 Wall Street when the office was closed?

A. Well, Mr. Elsey sent Mr. Droit, the secre-

(Testimony of Michael J. Curry.)

tary of the railroad corporation, to confer with me as to the disposition of the files, and he designated certain files that should be sent to the headquarters in San Francisco, others to be turned over to the Whitman, Ransom, Coulson and Goetz firm as perhaps being useful in connection with tax matters. In addition, I had the corporation files, which were separate and distinct from these other files, and as well, the so-called trustees' files, the reorganization files. Those, of course, I understood, were in the custody of Mr. Schumacher, but he didn't want them to be taken to his house or anything to be done with them. He said, "Do with them as you please." And so the only thing I could do was to take them over there with me to the room that I had at 40 Wall Street. They remained there with me until some time later in 1946 or 7. I am not sure which.

Q. Now the tax files, the income tax files—where did they go? [312]

A. The tax files, which were also separated from our other files, were transferred to the office of Whitman, Ransom, Coulson and Goetz.

Q. And where were they kept?

A. They were kept on the 52nd floor, on which I was, and in which Mr. Polk and Miss Valouch also occupied.

Q. And in whose room?

A. They were in Miss Valouch's room.

Q. Where are those files now?

(Testimony of Michael J. Curry.)

A. They are at the present time in the custody of Mr. James K. Polk.

Q. You haven't those files?

A. I have nothing in my possession having to do with tax files.

Q. You went over to Mr. Coulson's office about May 1, 1945. How long did you remain in those offices?

A. As I stated a while ago, I went over there June 1, 1945, and remained there until September 10, 1948.

Q. How did you happen to leave?

A. Well, I was directed by Mr. Coulson who came to my office, to vacate the room as they wished to use it, to have one of their employees or partners use that room. That was on September 10, which was a Friday. I immediately arranged to transfer my belongings down to our counsel's office at 44 Wall Street, and they remained there until I was able to locate [313] space at the old address, 37 Wall Street.

Q. Did Mr. Coulson, when he came into your office on Friday, tell you when he wanted the room?

A. He did. He said he wanted it the following Monday.

Q. And you got out by Monday?

A. I was out before Friday, the close of business Friday.

Q. Did he give any reason for telling you to get out other than——

(Testimony of Michael J. Curry.)

A. Other than they wanted the space. Pardon me, he came to my office about noontime, around twelve o'clock and told me this, and then I came back to the office and hustled about and got the files over to Mr. Nicodemus' office that afternoon.

Q. How long did you continue to receive the payments from the Coulson firm?

A. Until December 31, 1948.

Q. Nothing has been paid by the Coulson firm to you since that date, is that correct?

A. That's correct.

Q. During the two and a half years that you were in Mr. Coulson's office, what duties, if any, did you perform for the Coulson firm?

A. Well, so far as duties under the retainer are concerned, the only services that I performed so far as I can remember was the signing of income tax returns and the power of attorney. [314]

Mr. MacKinnon: I move to strike out the answer, your Honor, because he couldn't do that on the basis of the retainer. He did it as president of the holding corporation. His testimony is completely inconsistent, legally, with the facts.

The Court: Well, is that a legal matter?

Mr. MacKinnon: That is a legal matter, but I want to point these things out, because your Honor will note that the witness is very zealous in making his answers.

The Court: Well, this is the retainer that there

(Testimony of Michael J. Curry.)

is evidence of in the form of document, isn't that right?

Mr. Clark: That's right.

Mr. Phleger: Correct. It seems to me it is entirely appropriate to ask him what he did in return for the payment of that retainer.

Q. (By Mr. Phleger): Did you perform any other services for Mr. Coulson?

A. Not for Mr. Coulson, no.

Q. For anyone else?

The Court: You mean you sat there for a couple of years or so and signed your name a few times?

A. That is about all, sir, except that I did carry on whatever necessary thing had to be done for the corporation, such as answering letters of stockholders, inquiries and other incidental things that didn't occupy much of my time, because the [315] corporation was a dying concern, I thought.

Q. (By Mr. Phleger): Where was the corporation's principal office following the closing of the office at 37 Wall Street?

A. The principal office was moved to 100 West 10th Street, Wilmington, Delaware.

Q. And what was that?

A. The corporation trust company.

Q. That was your official headquarters?

A. And they were also named the transfer agents for the stocks of the corporation.

Q. I think you have already testified, have you

(Testimony of Michael J. Curry.)

not, that during this period you had received no compensation from the corporation, that is, since June 1, 1943? A. Correct.

Q. About how many stockholders has the Western Pacific Railroad Corporation?

A. I would say approximately 4700.

Q. Do any of them live in the west?

A. Yes.

Q. How many?

A. Well, in California we have over a thousand stockholders, but the stock of the corporation is distributed among the 48 states of the Union.

Q. Now, Mr. Curry, did you ever prepare a tax return? A. No, sir. [316]

Q. For either the corporation or the company?

A. No, sir.

Q. Tax returns, however, were prepared in the office at 37 Wall Street, were they not?

A. They were.

Q. Who in that office worked on tax returns?

A. Miss Valouch.

Q. Did she have any assistance?

A. Yes, yes, whenever it *came to* file our return, she brought in the firm of Lybrand, Ross Bros. & Montgomery, consulted them, and between them they prepared the returns and placed them before me for signature.

Mr. Clark: This testimony is directed to what time, counsel?

Mr. Phleger: Just a moment, I will do that.

(Testimony of Michael J. Curry.)

Q. What period of time are you referring to in the testimony you have just given?

A. Up to the year 1942, as I recall.

Q. What, if anything, did Mr. Schumacher have to do with income tax returns? A. Nothing.

Q. What happened with respect to the preparation of the 1942 tax return, as distinguished from the tax returns for prior years?

A. Well, early in 1943, the firm of Whitman, Ransom, Coulson and Goetz were designated as the tax counsel of the corporation, [317] and the '42 returns were prepared by that firm or a member of that firm.

Q. Who told you that the Coulson firm was to advise with respect to and prepare the tax return?

A. Mr. Schumacher gave me that information, and I believe Mr. Nicodemus.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 50 which is a letter dated May 20, 1943, signed by James K. Polk and addressed to you as vice president of the Western Pacific Railroad Company. (Handing to witness.) Do you recall receiving that letter? That is the so-called "paradox" letter. A. Yes, I do.

Q. Can you state what happened with the letter when you received it?

A. I read it, didn't thoroughly understand it—

Mr. MacKinnon: I move to strike that out, your Honor, on the ground it is not responsive. He was asked what he did with it.

(Testimony of Michael J. Curry.)

The Court: All right, that may go out. You read it and then what happened?

A. (Continuing): After reading it, I marked it over to Mr. Schumacher to note, which he did, and he marked thereon in his blue pencil, "An interesting letter." He handed it to me and suggested I should give a copy to Mr. Nicodemus, our counsel, which I did. [318]

Q. (By Mr. Phleger): Who was Frank L. Reilly.

A. I know nothing about him, except that he was engaged by the Whitman, Ransom, Coulson and Goetz firm to help out in tax matters, federal tax matters.

Q. Well, when did you first meet him?

A. Well, he came to the office at 37 Wall Street, I think, early in 1943, and Miss Valouch introduced me to him and said that he was to work on the income tax returns, and we provided space for him in the board room, and he was there off and on for some time. He and Miss Valouch prepared the tax returns.

Q. Who was James K. Polk?

A. Mr. James K. Polk was a patrner in the firm of Whitman, Ransom, Coulson and Goetz.

Q. Did you see him from time to time in connection with tax matters?

A. I saw him from time to time, yes, but it was only casually. I didn't consult him on tax matters.

Q. Did you have extensive conversations with him? A. No, I did not.

(Testimony of Michael J. Curry.)

Q. Who was Robert E. Coulson?

A. Mr. Robert E. Coulson is also a member of the firm of Whitman, Ransom, Coulson and Goetz.

Q. Did he come to 37 Wall Street at all in connection with these tax returns? [319]

A. Not to my knowledge.

Q. Did you ever discuss the matter of these tax returns with him? A. I did not.

Q. I will now direct your attention to the signing and filing of the 1942 tax returns. Who prepared those returns?

A. Those returns were prepared, I understand, under the supervision of Mr. James K. Polk by Miss Valouch.

Mr. MacKinnon: Your Honor, I object to the witness' testimony, if he says he understood. If he doesn't know, he can't make a responsive answer.

The Witness: I will change the answer to "under the supervision of Mr. Polk."

Q. (By Mr. Phleger): Did you have anything to do with their preparation?

A. Nothing whatever.

Q. When did you first see them?

A. I saw them when they were placed before me, I think it was in May, 1943. They were placed before me for signature in behalf of the corporation.

Q. Who presented them to you?

A. Miss Valouch.

(Testimony of Michael J. Curry.)

Q. What did she say, if anything?

A. I asked her if they were O.K. or all right and had Mr. Polk's approval, and she said, "Yes." I then signed them. [320]

Q. Did you consult the Board of Directors or any officers of the railroad corporation prior to signing the '42 returns as to whether or not you should sign them? A. No, I did not.

Q. Did Mr. Reilly, Mr. Polk, or anyone else advise you prior to signing the 1942 returns that the railroad corporation didn't have to sign them unless it wanted to? A. No, sir.

Q. Do you remember the circumstances surrounding the signing of the 1943 returns?

A. Yes.

Q. Do you know who prepared them?

A. They were prepared in the office of Mr. Polk, the tax counsel, and the figures, schedules, were assembled by Miss Valouch.

Q. Did you assist in their preparation?

A. I did not.

Q. By the way, Mr. Curry, did you keep the books or have anything to do with the books in 37 Wall Street?

Mr. MacKinnon: May I inquire as to the time, your Honor?

Q. (By Mr. Phleger): At any time.

A. I had nothing whatever to do with the bookkeeping.

Q. Are you a bookkeeper?

(Testimony of Michael J. Curry.)

A. I am not.

Q. Did you ever make any entries upon books?

A. I never put pen or pencil to any book of the corporation. I depended entirely on the employee who was delegated that work.

Q. What are the circumstances surrounding your signing of the 1943 return?

A. The circumstances were similar to the previous years. The returns were placed to me in complete form by Miss Valouch. I asked her the same questions, if Mr. Polk approved them. She said, "Yes" and I signed them.

Q. Did you examine the schedules attached to the 1943 returns?

A. I did not. I merely looked over the copy—the original—the first sheet where the computations were down to the net or the taxable figure, and that was as far as I went.

Q. That is the sheet upon which you affixed your signature, is it not? A. Correct.

Q. Did you consult the directors of the corporation or any of its officers as to whether or not you should sign that 1943 return before you signed it?

A. I did not.

Q. Were you advised prior to signing that return that the corporation need not file a consolidated return if it did not wish to?

A. I was not so advised.

Q. Were you given any advice in connection with the filing of that return by Mr. Coulson, Mr.

(Testimony of Michael J. Curry.)

Reilly, or any member of Mr. [322] Coulson's firm? A. I was not.

Mr. Adams: Just a moment. What kind of advice do you refer to? Written or oral?

Mr. Phleger: Any kind.

Mr. Adams: Do you exclude from your question the document you just exhibited to the witness?

Mr. Phleger: I do not consider that a letter of advice. If you do, we will have the answer amended.

Mr. Adams: Let us have the answer amended, because it shows on its face it is a full letter of advice and is addressed to Mr. Curry.

Mr. Clark: For a different year.

Mr. Adams: I thought the answer was general.

Mr. Phleger: It is.

The Court: You can take the witness on cross-examination.

Q. (By Mr. Phleger): I show you, Mr. Curry, Plaintiff's Exhibit No. 54, which is a letter on the Coulson letterhead dated January 11, 1944, addressed to Mr. Elsey advising with respect to the 1943 tax accruals, their reversal, and other matters. That is the so-called "opinion" letter. Did you receive a copy of that letter?

A. I did not.

Q. Did you ever see a copy of that letter?

A. I never did. [323]

Mr. Clark: Mr. Phleger, is that the January 11 opinion?

(Testimony of Michael J. Curry.)

Mr. Phleger: Yes.

Q. I direct your attention now to the signing and filing of the 1944 returns. Who prepared those returns?

A. Those were prepared in the office of Mr. Polk.

Q. Did you have anything to do with their preparation? A. I did not.

Q. What took place when you signed the returns?

A. It was placed before me by Miss Valouch and I inquired if it had Mr. Polk's approval, and she said it had, and it was all right to sign, and so I signed it.

Q. Did you examine the schedules attached to the return? A. No, I did not.

Q. Did you consult the directors or officers of the corporation prior to signing that return as to whether or not you should sign it?

A. I did not.

Q. Were you advised prior to the time that you signed it that the corporation need not file consolidated return if it did not choose to do so?

A. I was not so advised.

Q. Where were you when you signed the 1944 return?

A. I was at 40 Wall Street in the office of Whitman, Ransom, Coulson and Goetz.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 6, which is a [333] claim for refund of taxes for

(Testimony of Michael J. Curry.)

the year 1942, signed by the Western Pacific Railroad Corporation, by yourself as president. You signed the original of that, did you not?

A. I did.

Q. What were the circumstances under which you signed it?

A. I was at 37 Wall Street at the time, and Miss Valouch placed it on my desk with the statement that it had Mr. Polk's approval and it was all right to sign, so I signed it.

Q. Did you have anything to do with its preparation? A. I did not.

Q. Did you consult any of the corporation's directors or officers prior to signing it as to whether you should sign it? A. I did not.

Q. Did you have anything to do with its preparation? A. I did not.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 64, a letter dated May 31, 1946, on the letterhead of the Coulson firm, addressed to Mr. C. R. Krigbaum, internal revenue agent in charge, signed by Whitman, Ransom, Coulson and Goetz; that has been termed the first Krigbaum letter, your Honor. Did you ever see the original or a copy of that letter? A. No, sir.

Q. Were you ever advised that it had been sent?

A. No, sir.

Q. I now show you, Mr. Curry, Plaintiff's Exhibit 65, a power [325] of attorney of the Western Pacific Railroad Corporation dated June 26, 1946,

(Testimony of Michael J. Curry.)

running to James K. Polk and others. Do you recall having executed the original of that power of attorney? A. I do.

Q. At whose instance did you sign it?

A. At 40 Wall Street in the suite of Whitman, Ransom, Coulson and Goetz.

Q. Did you consult any of the directors or any officer of the corporation before you executed that power of attorney as to whether or not you should sign it?

A. I did not, as I depended entirely on our tax counsel for putting those things before us.

Mr. MacKinnon: I move to strike out everything after "I did not" as not responsive.

Mr. Phleger: It may go out as far as I am concerned.

The Court: It may go out.

Q. (By Mr. Phleger): Did you consult with anyone prior to signing that power of attorney?

A. Not to my knowledge.

Q. I now show you attachment to Plaintiff's Exhibit 7, a letter dated [326] February 11, 1947, addressed to the Hon. Joseph D. Nunan, Jr., Commissioner of Internal Revenue, Washington, D. C., signed by the Western Pacific Railroad Corporation, James K. Polk, Attorney in Fact. Was that letter ever shown to you previous to its being sent?

A. No, sir.

Q. Did you ever see a copy of it?

A. Some months later I did.

(Testimony of Michael J. Curry.)

Q. Can you recall the approximate date when you first saw a copy of that letter?

A. Well, it is my thought it was somewhere around April, some time in April.

Q. That is April of 1947? A. Yes, sir.

The Court: I am confused there. Exhibit 7——

Mr. Phleger: That is attached to the stipulation, your Honor.

The Court: Oh, I see. There was the stipulation that was entered into in September, 1947.

Mr. Phleger: Yes.

Q. I show you now letter purporting to be signed by you dated April 4, 1947, addressed to Pierce & Greer. Do you remember sending that letter? A. Yes, sir.

Mr. Phleger: Your Honor, I offer in evidence as Plaintiff's [327] Exhibit 68 documents which have been identified as intervener's 41A, 41B, C, D, E, and F.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 68.)

Mr. Phleger: The first sheet is the letter I have just referred to. It is addressed to Mr. Nicodemus by Mr. Curry and states:

"Herewith copy of letter dated April 2, 1947, and enclosure from Mr. James K. Polk in regard to the corporation's federal income taxes for the years 1942, 1943, and the period January 1 to April

(Testimony of Michael J. Curry.)

30, 1944. A copy is also being sent to Mr. A. Perry Osborn. This will be presented to the board at a meeting called for next Tuesday, the 8th, for consideration and such action as the board may direct.

"Enclosure copy to Mr. A. Perry Osborn."

The enclosed letter, the next sheet, is on the letterhead of the Coulson firm, signed by James K. Polk, dated April 2, 1947, and addressed to Mr. Michael J. Curry, President, the Western Pacific Railroad Corporation, Room 5205 Wall Street, New York, New York.

Q. That was the number of the room occupied by you, was it not?

A. 5205 at that time, yes, at 40 Wall Street.

Q. And that was a couple of doors away from Mr. Polk's office, [328] who signed it?

A. Yes, sir.

Mr. Phleger: It says:

"Dear Mr. Curry:

"As you doubtless know, Internal Revenue Agent Thomas Leahy has been conducting an examination of the operations of the Western Pacific Railroad Corporatoin and its affiliated companies for the calendar years 1942 and 1943 and the period from January 1 to April 30, 1944. His activities in this connection seem to be approaching completion. I have thoroughly covered with him all phases of the matter and this report is being made to you so that you may be advised of its current status.

(Testimony of Michael J. Curry.)

"In the course of his examination, Revenue Agent Leahy originally determined on a tentative basis that the worthlessness of the stock of the Western Pacific Railroad Company occurred in the year 1940. Although in view of the intermediate status of the matter no formal advice or notice of a proposed deficiency had been or could then be received, our tentative computations indicated that the deficiencies that would be asserted on the basis of any such determination as to the year of loss, would be considerably in excess of any reserve provision heretofore made against such tax [329] liability. We immediately took the matter up with the local office of the internal revenue agent in charge, and various conferences were held at which were presented the taxpayer's views that this loss occurred in the year 1943.

"The matter was submitted by the internal revenue agent in charge to the Office of the Commissioner of Internal Revenue in Washington, D. C., for advice. Conferences were held with bureau officials in Washington in connection therewith. It was first proposed by the bureau officials at Washington to support the tentative determination of the field examiner that the stock became worthless in 1940. In further conferences in Washington it was suggested that the matter was one appropriate for disposition by settlement or agreement between the parties. At the request of the Commissioner's Office, a written proposal as a basis

(Testimony of Michael J. Curry.)

for settlement was made by me as attorney in fact under date of February 11, 1947, copy of which I am enclosing."

Q. That was the Nunan letter I have justs hown you, was it not? A. It was.

Q. And this is the first notice that you had that it had been sent, February? A. That is right.

Q. This letter being April? [330]

A. Yes.

Mr. Phleger:

"After consideration by the bureau officials, the case was recently returned by them to the local office of the internal revenue agent in charge. Revenue Agent Leahy, whose investigation was to a large extent suspended during the pendency of the matter in Washington, has now resumed his activities and is, we believe, now in the process of completing the draft of his report. His conclusions, we are hopeful, are now in accord with a proposal submitted to the Washington officials.

"The proposal as to a possible basis for settlement is presently pending in the local office of the Internal revenue agent in charge and will continue in that status until final action thereon can be taken by the appropriate bureau officials. Under the bureau practice and the necessities of this particularly difficult case, there will probably be an interval of at least two months before an agreement can be reached with those who must approve it, if it is accepted. It can be revoked at any time prior to such

(Testimony of Michael J. Curry.)

acceptance and there will be ample time for consideration by you and your associates before definitive action is taken.

"If the government approves the proposed basis for settlement, it will be an unsually advantageous disposition [331] of the matter. The doubts as to the construction of the applicable Internal Revenue Code provisions are so real and the factual background so involved, that the government would certainly be fully justified in resisting our claim in its entirety, if complete recovery were to be sought for 1942 as well as avoidance of all liability for 1943 and the period ended April 30, 1944. We would then be compelled to pursue our rights even to the Supreme Court of the United States. In any such extended litigation, we would necessarily incur all of the risks usually attendant upon any litigation plus the inevitable bringing to bear on the problem, in behalf of the government, of a succession of fresh and ingenious minds, eager to establish full tax liability in a case involving such large sums. The determination of the year of worthlessness in a factual matter involving a risk of loss which in itself, in my carefully considered opinion, fully justifies the proposed basis of settlement. This is entirely apart from other serious defenses which would most certainly be asserted by the government, if it were to contest our position in the case.

"It is, therefore, my definite recommendation that in the event the government advises us of its

(Testimony of Michael J. Curry.)

willingness to close the matter on the basis suggested in the [332] attached proposal, that the matter be so disposed of as promptly as possible. You will, of course, be advised promptly of any definitive corporate action required from your corporation to that end. I cannot impress upon you too much the depth of my conviction as to the importance of moving promptly when and if opportunity arises to close this matter on the basis proposed. I am fortified in this by the years of my experience in the Bureau of Internal Revenue and my knowledge of the extreme sensitivity which attends the situation in the Bureau in any case of this magnitude.

"I will be glad to discuss this matter with you and your associates at any convenient time."

Attached to it is the Nunan letter of February 11, 1947, already in evidence, which suggests as a basis of settlement waiver of the claim for refund for the year 1942 and closing of the 1943-1944 cases upon the basis of no tax to be paid.

The Court: How do you suppose they ever got the government to agree to this matter?

Mr. Phleger: I assume——

The Court: Do you think the young men were not so alert at this time?

Mr. Phleger: I assume it is because it is within the provisions of law and the regulations which entitled——

The Court: I am just wondering—it is not per-

(Testimony of Michael J. Curry.)

tinent to this [333] case—what was the reason why there was an abandonment of the claim for refund of the amount that was paid in 1942? I suppose that is a complicated matter.

Mr. Adams: Mr. Polk will be a witness. He handled the transaction, and I am sure he would be the man best qualified to tell your Honor the answer to all of these questions. But it is the fact, as I stated to your Honor, that something like a year and a half ago this matter came before the Bureau in the regular way, and the Bureau are the watchdogs of the treasury——

The Court: I am not complaining about it; I am just wondering how they were so successful.

Mr. Adams: I think we shall satisfy your Honor before this case is over that the Bureau did wisely and that all the suggestions held forward here in a general fashion of some enormous windfall are nothing but pure imagination.

The Court: I am not so sure about that.

Mr. Clark: I think probably the form of the settlement was a practical solution, your Honor, when we regard the distinction between 1942 and 1943-1944.

The Court: Maybe.

Q. (By Mr. Phleger): Mr. Curry, I show you now a letter purporting to be signed by you, addressed to Mr. James K. Polk, dated May 5, 1947. Is that your signature? A. Yes, it is.

Mr. Phleger: I offer as Plaintiff's exhibit No.

(Testimony of Michael J. Curry.)

69, otherwise [334] identified as intervener's exhibit 172, a letter from Mr. Curry to Mr. Polk, dated New York, May 5, 1947.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 69.)

Mr. Phleger:

"After the conference between the board committee dealing with corporation tax matters, and yourself, held in your office on April 15, we have further considered the questions involved and the points raised at the conference.

"We are prepared to recommend to the board the sending to you of a letter of general approval of the proposed tax settlement outlined in your letter to the corporation under date of April 2, signed by myself as president, with a copy of an authorizing resolution of the board.

"We will expect to be informed as to the progress of the negotiations and if there are any changes in the proposed settlement the corporation must be entirely free to reconsider its approval. [335]

"Although we wish to be entirely cooperative in this matter, the corporation finds itself embarrassed by the action of The Western Pacific Railroad Company in opposing judicial settlement of the allocations of tax benefits, if any, derived from the application of the capital losses of the corporation for the benefit of the group." and so on, "—about the litigation."

(Testimony of Michael J. Curry.)

I want particularly to call your attention to the fact that in this letter to Mr. Polk, Mr. Curry characterizes Mr. Polk as counsel for both the railroad company and the railroad corporation. I will offer that as Plaintiff's Exhibit 69.

Mr. Adams: May it be stipulated that copies of this letter went to Mr. Nicodemus, Mr. Osborn and Mr. Wood?

Q. (By Mr. Phleger): Did they?

Mr. Adams: Yes, it is so stated on the letter.

Mr. Phleger: I will now offer as Plaintiff's Exhibit 70 a letter otherwise identified as Interveners' 173, a letter from James K. Polk, on the letterhead of the Coulson firm, dated May 6, 1947, addressed to Mr. M. J. Curry, 40 Wall Street, Room 5205.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 70.)

"Dear Mr. Curry:

"This acknowledges your letter of May 5, as to the pending tax matters for the years 1942, 1943 and 1944, the Western Pacific group in which I act as tax counsel.

"Obviously, as your letter suggests, the only thing that I could do in connection with the possible stipulation between the various interested companies in connection with pending litigation between them as to allocation would be to 'use my good offices.' The use of my good offices would necessarily be limited to calling to the attention of the other members of the group the fact that I have impressed upon your

(Testimony of Michael J. Curry.)

group, namely, that there is a common interest in concluding promptly the proposed settlement which I have been negotiating with the Treasury Department. It would, in my judgment, be disastrous if controversy between members of the group which could properly await subsequent disposition should make impossible a settlement along the lines heretofore outlined to your group."

I take it that refers to his previous letter, in which he outlines just what settlement is proposed, and I think the balance of the letter is not important. The last paragraph reads:

"Naturally, I am at the disposition of you and your associates and of any other member of the corporate group as to the method of computing the settlement or any other information which will be helpful in ironing out such differences as may exist between members of the corporate group.

"In closing, however, let me emphasize again the vital element that this controversy as between the members of the corporate group shall not be allowed to interfere with an advantageous settlement with the Treasury Department, as to which there is clearly no conflict in interest."

Copies were sent to Mr. Nicodemus, Mr. A. P. Osborn, Mr. Willis D. Wood.

I will now offer as Plaintiff's Exhibit 71 a letter otherwise identified as Interveners' Exhibit 175. It is a letter on the letterhead of the Coulson firm, dated May 19, 1947, addressed to Mr. C. R. Krig-

(Testimony of Michael J. Curry.)

baum, Internal Revenue Agent in Charge, 225 Broadway, New York, New York.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 71.)

Mr. Phleger: To identify it from the earlier Krigbaum letter, I have referred to it as the "second Krigbaum letter." It is signed, "The Western Pacific Railroad Corporation, James K. Polk, Attorney in Fact," and contains in substance the same material that is contained in the Nunan letter of February.

Q. (By Mr. Phleger): I show you this document, Mr. Curry, and ask you if you ever saw it before it was written and dispatched (handing to witness.)

Mr. Adams: We would object to counsel's characterization, which we believe to be inadvertently erroneous, in so far as it is a statement that is substantially identical with the Nunan letter, but the documents will speak for themselves.

Mr. Phleger: Well, that is an inadvertence, if that isn't the fact. Let me look at it. This says:

"Reference is made to the conference held in your office May 6, with regard to the tax liabilities of The Western Pacific Railroad Corporation, and its affiliated companies, for the taxable years 1942, 1943, 1944.

"At this conference an agreed basis of settlement of the tax liabilities involved was reached and this letter contains the written undertaking of the taxpayers effectuating the settlement."

(Testimony of Michael J. Curry.)

Mr. Adams: You have now read enough to establish my point.

Mr. Phleger: I would like to read the rest of it.

"The taxpayer"——

and the taxpayer, as signed, is "The Western Pacific Railroad [339] Corporation"

"——on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liability of said corporation for the taxable years '42, '43, and '44 in the amount shown on the returns as filed. This proposal of settlement accordingly relates to the consolidated returns filed for the calendar years 1942, 1943 and 1944, in which said return for 1944 The Western Pacific Railroad Corporation included then its subsidiaries for the period January 1, 1944 to April 30, 1944, during which period affiliation existed.

"This settlement does not relate to or affect the tax liability of the subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated.

"As part of the settlement, The Western Pacific Railroad Corporation, on behalf of itself and its affiliated subsidiaries, will, if this settlement is accepted, execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement. The settlement reached with your office is agreed to without prejudice, however, to the rights or claims of the

(Testimony of Michael J. Curry.)

parties in the event the settlement is not accepted by the Commissioner of Internal Revenue.

"Authority for settlement of the tax liabilities of the above-named taxpayers by the undersigning company is contained in power of attorney heretofore filed with your office."

Q. (By Mr. Phleger): I think I asked you whether you had seen that letter before it was sent.

A. The Krigbaum letter?

Q. Yes. A. I did not.

Q. When did you first hear that it had been sent?

A. I neved heard that it had been sent. This is the first time that I knew of it.

Q. Now, when did you hear that the offer contained in that letter had been accepted? [341]

A. I believe it was sometime in August, 1947.

Mr. Phleger: I have the Nunan letter here now, and I really don't see the difference between it and the second Krigbaum letter, but I suppose there is.

Q. (By Mr. Phleger): I show you an attachment to Plaintiff's Exhibit 7, which is the stipulation that was heretofore filed regarding the 1942 refund. There are two letters attached to it, both signed by E. I. McLarney, Deputy Commissioner. Do you recall when you saw those two letters (indicating to witness)?

A. Yes; it was sometime in August 1947.

The Court: Well, we will take the afternoon recess at this time.

(Recess.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Phleger): Mr. Curry, when did you first hear that the loss of the value of the corporation stock was being used in connection with income tax?

Mr. MacKinnon: Oh, that question, your Honor, is a question of "hear of it" when he saw it as well as hearing of it? You mean whether somebody told him? I am just asking for an explanation of the question.

Mr. Phleger: Well, either one or both, if you want.

Mr. Clark: Became aware.

A. I first learned of the actual writing off of the loss of the stock holdings of the corporation at the time that the 1943 return was placed before me and Miss Valouch stated that [342] the stock loss had been written off on that return.

Q. And you noticed, did you, on the first sheet of the return as to what the tax was?

A. I did.

Q. And what did that show?

A. Well, it showed, as I recall, approximately $75,000,000.

Q. No, I mean as to the tax.

A. Oh, as to the tax. No tax to be paid.

Q. Yes.

Mr. Phleger: And I will offer as Plaintiff's Exhibit 72 a document otherwise identified as Interveners' Exhibits 167, 168 and 169. Now, the top sheet is a letter from Mr. Elsey on the letterhead of

(Testimony of Michael J. Curry.)

Western Pacific Railroad Company, under date of February 11, 1947, by air mail, addressed to James K. Polk, Esq., care of Carlton Hotel, Washington, D. C.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 72.)

Mr. Phleger: It reads as follows:

"Dear Mr. Polk:

"In order that you may have definite authorization from this company to proceed in connection with the pending controversy as to Federal income taxes for the years 1942, 1943 and 1944, as to which you hold power of attorney, I have today conferred with all available directors. All of [343] the directors I have been able to reach, constituting a majority of the directors, have concurred in the proposal that you submit in writing to the Commissioner of Internal Revenue a definite proposal that the three years, 1942, 1943 and 1944, be settled on the basis of no refund and no additional tax.

"We understand that the year 1944 is involved in this controversy so far as this company is concerned, only during the period of affiliation. That is, through April 30, 1944, and that for the balance of the year 1944, the taxes of this company will be determined on the basis of its separate return for that period, outside the affiliation."

Attached to it is a resolution of the board of directors of the defendant company authorizing the

(Testimony of Michael J. Curry.)

submission of the offer of settlement, which is contained in the Nunan letter.

Mr. Adams: The resolution was at a subsequent date, Mr. Phleger.

Mr. Phleger: Yes, the resolution was adopted at a meeting on the 4th day of March 1947. The Nunan letter, as I recall it, was written on February 12.

Mr. Adams: The 11th. [344]

* * *

Direct Examination For Interveners

By Mr. Clark:

Q. Now, Mr. Curry, you are still the president of the plaintiff corporation, are you not?

A. I am.

Q. And are you receiving any compensation from it at the present time? A. No, sir.

Q. Am I correct in stating that you have received no [345] compensation from the plaintiff since on or about June 1, 1943?

A. That is correct.

Q. You are, however, receiving a pension from the defendant railroad company? A. I am.

Q. And in addition to that, do you receive a pension under the Railroad Retirement Act?

A. I do.

Q. And up to the last of the year 1948 did you receive the payments called for by the so-called retainer letter from Mr. Coulson's firm, which is in evidence in this case? A. I did.

Q. Now, let me direct your attention to the period commencing March 15, 1943, to April 30, 1945.

(Testimony of Michael J. Curry.)

Do you have that period in mind? A. I have.

Q. On or about March 15, 1943, did you become aware of a decision by the Supreme Court of the United States in the Western Pacific reorganization? A. I did.

Q. And was that shortly after March 15 of 1943? A. Yes, sir.

* * *

Q. (By Mr. Clark): At that time did you arrive at the understanding that that decision had any effect upon the stock in the railroad company owned by the plaintiff corporation? A. Yes.

Q. And what was that, please?

A. Well, it meant that the stockholdings of the corporation and the unsecured indebtedness were wiped out.

Q. And was that your understanding shortly after March 15, 1943? A. It was.

Q. Now, let me direct your attention to the situation in the so-called New York office—you testified to in your examination in chief by Mr. Phleger, during the period commencing—withdraw that.

During the period I just called your attention to—— A. Yes.

Q. You have testified that you gave instructions to the rest of the employees, is that right?

A. Yes, I instructed them.

Q. All right. Did anyone give instructions to you? A. Yes.

Q. And who was that, please? [347]

(Testimony of Michael J. Curry.)

A. Mr. Schumacher.

Q. Now, am I correct in stating that the New York office during that period of time was also the office of Mr. Schumacher, as one of the reorganization trustees in the reorganization of the Western Pacific Railroad Company? A. It was.

Q. And during that period of time were you employed in any capacity by the reorganization trustees?

A. Well, it is rather difficult for me to say. I continued in my employment as previously. We all went along just the same, but whether I was employed by the agent for the trustees or the trustees, it is a legal question, and I don't know that I can answer it.

Q. All right. Do you remember the occasion of the company going into bankruptcy back in August of 1935? A. I do.

Q. And do I understand that from that time on you continued to perform the same functions in the office at 37 Wall Street that you had performed previous to the date of the bankruptcy?

A. That is correct.

Q. I see.

* * *

Mr. MacKinnon: The questions are all leading, your Honor.

Q. (By Mr. Clark): Will you please state, Mr. Curry, whether [348] there was any difference in the functions performed by you personally in the

(Testimony of Michael J. Curry.)

37 Wall Street office prior to the reorganization proceedings instituted in August of '35 and thereafter? A. There was no change.

Q. All right. Now, coming back again to the period commencing March 15, 1943, will you please tell us very briefly what functions you did perform in the office?

A. Well, as I have testified, I always considered myself as a chief clerk or office manager.

Mr. MacKinnon: Your Honor, I move to strike that out.

Mr. Clark: It may go out, your Honor.

The Court: If he has already testified to it, what is the good of going over it again?

Mr. Clark: I don't think he has specifically. It is one question I wanted answered, to make sure the record is complete on it.

The Court: All right.

Mr. Clark: I will do my best not to duplicate anything that Mr. Phleger has gone into.

Q. Just tell us briefly what you did in the office.

A. Well, I supervised the employees and I was careful to watch things, the matters that were handed by Mr. Schumacher. He was not very alert in later years, and he——

Mr. MacKinnon: Now, your Honor, I move to strike that, [349] all these gratuitous remarks of the witness. He can respond to the questions.

Mr. Clark: It may go out.

A. And he depended upon me to see that papers

(Testimony of Michael J. Curry.)

that were going in and out of the office were brought to the attention of everybody that might be interested in them and that was one of my functions.

Q. Were you also the office manager?

A. Yes.

Q. And who was head of the office?

A. Mr. Schumacher.

Q. Now, let me direct your attention to Mr. W. W. Hatton, who I think you have told us was an official of the Denver and Rio Grande?

A. Yes.

Q. During this period of time. Would you state whether or not Mr. Schumacher, during that period of time, held any office with the Denver and Rio Grande?

Mr. MacKinnon: I submit, your Honor, it is not the best evidence.

Mr. Clark: If he knows.

A. That is between the period March 15, 1943——

Q. Up to the time the office closed on April 30, 1945.

A. He resigned from the Denver and Rio Grande Western, but I do not remember just when. I don't think he was an officer of the Denver during that period. [350]

Q. I say, had he been an officer of the Denver and Rio Grande? A. Yes.

Q. What position had he held?

(Testimony of Michael J. Curry.)

A. He held the position of Chairman of the Board or Chairman of the Executive Committee of the Denver and Rio Grande Western, and those positions were alternated between the two owners, the Western Pacific Railroad Corporation and the Missouri Pacific Railroad Company.

Q. And Mr. Schumacher held that position while Mr. Hatton held his position as Assistant Secretary? A. Yes.

Q. During this period, Mr. Curry, commencing March 15, 1943, and on up to the time the New York office closed on April 30, 1945, was there any segregation as between employees who performed services for the holding corporation and those who performed services for the railroad company?

A. There was no segregation.

Q. Was there any segregation of duties performed by any employees between those two companies? A. No.

Mr. Clark: May it please your Honor, we will offer in evidence as Interveners' Exhibit 3 a memorandum which on the deposition was marked Railroad Company Defendant's Exhibit 106-A, to which is attached a slip addressed to Mr. Polk by M. J. Curry dated March 16, 1943, marked on the deposition as Railroad Company's Defendant's 106-B, and we will offer them as one exhibit, Interveners' 3.

(Memorandum, Curry to Polk, March 16, 1943, was received in evidence and marked Interveners' Exhibit 3.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Clark:) Now, Mr. Curry, I show you the documents which have just been received in evidence, and you will note that the slip reads, "Mr. Polk, herewith extract from AAR weekly information letter as per phone conversation of date. M. J. Curry, 3/16/43." I will ask you whether you sent the document to which that slip was attached to Mr. Polk on March 16, 1943. You will note the memorandum to which that slip is attached is a release by the American Association of Railroads concerning a tax department ruling.

A. Yes, I have a recollection that I sent it over to Mr. Polk.

Q. In what capacity were you sending material of this sort to Mr. Polk on March 16, 1943?

A. Anything and everything that had to do with tax matters I handled that way. I referred them to either Miss Valouch or Mr. Polk.

Q. At that time, namely, March 16, 1943, did you regard Mr. Polk as tax counsel for the corporation?

A. At that time—it was early in 1943 that I believe they were appointed tax counsel.

Q. I am asking you why you sent this tax ruling to him. I [352] will withdraw that question.

At the time you sent the tax ruling, which is part of Interveners' Exhibit 3, to Mr. Polk did you regard him as tax counsel for the holding corporation?

A. I do not recall.

(Testimony of Michael J. Curry.)

Q. Did you regard him at that time as tax counsel for the company? A. Yes.

Q. Now, you testified in response to questions put to you by Mr. Phleger that sometime early in 1943 Mr. Schumacher had advised you that Mr. Polk was taking over the tax representation of the corporation? A. That is correct.

Q. Do you remember that testimony?

A. I do.

Q. Did Mr. Schumacher so advise you before or after the date of the slip attached to Interveners' Exhibit No. 3, namely, March 16, 1943?

A. I do not recall.

Mr. Clark: May I have Mr. Curry's deposition opened?

Q. Mr. Curry, you remember your deposition being taken in this case in New York in the spring of last year? A. I do.

Q. Namely, about March 23, 1948?

A. Yes, sir. [353]

Q. That is, it was on that day, part of it?

A. Yes.

Mr. Clark: Your Honor, I shall refer to page 2819 of Mr. Curry's deposition in this case, and just follow me, if you will, Mr. Curry:

"Q. Let me direct your attention, Mr. Curry, to Railroad Company Defendant's Exhibit 106-A and -B, which is a copy of an Internal Revenue ruling concerning depreciation accounting, upon which appears the note apparently addressed by you to Mr.

(Testimony of Michael J. Curry.)

Polk on March 16, 1943, and I will ask you to examine that document (handing it to the witness).

A. Yes.

Q. Do you remember having sent the original of Railroad Company Defendant's Exhibit 106-B over to Mr. Polk on or about March 16, 1943?

A. Yes.

Q. Do you remember why you sent it to him?

A. Yes.

Q. Why?

A. I read carefully these weekly letters from the Association of American Railroads and they covered various subjects of interest to railroad executives, and so forth. Anything I saw in there that had to do with tax matters, whether I understood them or not, I sent over to Mr. Polk as tax [354] counsel.

Q. Mr. Curry, at that time, namely, on March 16, 1943, was it your understanding that the firm of Whitman, Ransom, Coulson & Goetz and Mr. Polk as a partner of that firm had been retained as tax counsel for the Western Pacific Railroad Corporation? A. It is my recollection they had.

Q. When was it, do you remember—withdrawn. Did you have any part in the retainer of Messrs. Whitman, Ransom, Coulson & Goetz and Mr. Polk as a member of that firm as tax counsel?

A. I did not.

Q. For either the corporation or the company?

A. Correct.

Q. Did you have anything whatsoever to do with it? A. Nothing whatsoever.

(Testimony of Michael J. Curry.)

Q. At some time were you advised that Whitman, Ransom, Coulson & Goetz had been retained as tax counsel for either the corporation or the company?

A. It is my recollection that Mr. Schumacher advised me they had been.

Q. Do you remember about when that was with reference to March 16, 1943?

A. It must have been early in 1943. I cannot remember.

Mr. Adams: I move to strike out that portion of the [355] statement 'it must have been.' I ask the witness to state his best recollection if he has any.

Q. (By Mr. Clark): What is your best recollection?

A. My best recollection is early in 1943.

Q. In view of the note from you to Polk, which appears on Railroad Company Defendant's Exhibit 106-A, and to which I just directed your attention, Mr. Curry, is your recollection refreshed with respect to the approximate time that you were advised that Whitman, Ransom, Coulson & Goetz had been retained as tax counsel? A. Yes

Q. Is it your recollection that you were so advised before or after March 16, 1943?

A. It is my recollection that it was before that date.

Q. Do you refer in that connection to your conversation with Mr. Schumacher to which you have just testified? A. Yes.

(Testimony of Michael J. Curry.)

Q. Were you ever consulted with respect to the retainer of Whitman, Ransom, Coulson & Goetz as tax counsel? A. No."

Q. Do you remember, Mr. Curry, that I asked you those questions on deposition and you gave the answers I just read to you? A. I do.

Q. And are they correct? [356]

A. To my present knowledge they are.

Mr. Clark: May it please your Honor, we will offer in evidence as Interveners' Exhibit 4 a letter dated March 17, 1943, that is, it is a copy of a letter addressed to Mr. Robert E. Coulson, Whitman, Ranson, Coulson & Goetz, 40 Wall Street, New York, and bearing a stamp "Original signed Charles Elsey" and an endorsement that a copy went to Mr. T. M. Schumacher, which was marked on the depositions as Railroad Company Exhibit 306. And also we offer the notations in green pencil—in fact, all the handwritten notations on this document being in blue pencil, "M. J. C." and signed—I can't make it out—and then in green, "Discussed March 23, 1943, M.C.V. to attach to tax papers, M.J.C."

Is that a sign of any kind?

Mr. Adams: That is a check mark in green pencil drawn through the blue pencil lines.

Mr. Clark: That is all. I will accept that.

(The letter referred to was received in evidence and marked Interveners' Exhibit 4.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Clark): Mr. Curry, I show you the letter which has just been received in evidence as Interveners' Exhibit No. 4, and I want to direct your attnetion to the first paragraph and the sentence reading: "Dear Mr. Coulson"—this being from Mr. Elsey—"This will reply to your letter of March 1 relating to depreciation on way and structures and its [357] relation to income tax," and then to the markings in green pencil which appear on the heading "Discussed March 23, 1943, M.C.V. to attach to tax papers, M.J.C.," which is already conceded to be your signature. A. Yes.

Q. Those green markings were placed upon the document by you on March 23, 1943, were they not?

A. That is right.

Q. What does the word "Discussed" mean?

Mr. MacKinnon: I object to that, your Honor.

Mr. Clark: Withdraw that.

Q. Does the word "discussed" on that exhibit evidence the fact that you discussed that letter with someone?

Mr. MacKinnon: I object to the form of the question. It is clearly leading.

Mr. Clark: Submitted. Withdrawn.

Q. What was the occasion for your putting the word "Discussed" on the exhibit?

A. This is a copy of the said letter——

Mr. MacKinnon: Your Honor, I move to strike out the witness' response.

A. (Continuing): ——which Mr. Schumacher received.

(Testimony of Michael J. Curry.)

Mr. MacKinnon: He can make direct responses.

Mr. Clark: We do not care about that, your Honor. All I care about is an answer to my question. [358]

The Witness: Mr. Schumacher got this copy, marked it out to me, and questioned it, and it was my custom to take it in and talk these things over with him.

Q. (By Mr. Clark): That is not my question. Did you discuss it with anyone on March 23, 1943?

A. Well, my statement——

Mr. MacKinnon: I move to strike out the answer and get a responsive answer.

The Court: He wants to know after you got the letter, did you take it in and talk it over with Mr. Schumacher?

The Witness: That is all I can state. Mr. Schumacher got the copy, marked it out to me, I went in and we talked about it, and that is all there was to it. So I just marked it "Discussed," put the date on, and marked it over to Miss Valouch to put in the tax papers.

Q. (By Mr. Clark): Do you remember what the discussion was?

A. I do not. I do not recall it at all.

Q. Was Mr. Nicodemus present for the discussion?

A. There is nothing on here to indicate that he was, and I do not recall that he was.

Q. Will you please hold that exhibit for a moment?

(Testimony of Michael J. Curry.)

Mr. Elkington, may I have Plaintiff's Exhibit 39-A?

Q. I want also to show you, Mr. Curry, a letter addressed to Mr. F. C. Nicodemus, Jr., Pierce & Greer, 40 Wall Street, New York, likewise dated March 23, 1943, and signed by Mr. [359] Schumacher.

Mr. Adams: Will you identify the exhibit?

Mr. Clark: I think I did identify it as Plaintiff's 39-A and on deposition Interveners' 6, in which appears this statement:

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942. The return filed is a tentative one, an extension having been granted until 15, 1943, to file a final return. As one of the trustees of the Western Pacific Railroad Company, I am looking to you to cooperate with Mr. Matthew, general counsel for the trustees, in protecting the trust estate in the preparation of the final return."

Q. Does the reference in there to the conversation refresh your recollection as to whether or not you discussed Interveners' Exhibit 4 on any occasion with Mr. Nicodemus present? A. No.

Q. About this date, March 23, 1943, had you had any discussion with Mr. Nicodemus concerning tax matters affecting the corporation?

A. Yes, I have a recollection that I talked with

(Testimony of Michael J. Curry.)

Mr. Nicodemus about the possibility of filing these consolidated returns, [360] and it was about that time that the firm of Whitman, Ransom, were named as tax counsel.

Q. Was it at this time, on March 23, 1943, or was it sometime prior to March 16, 1943?

A. I do not recall at the moment.

Q. Will you still please hold that letter, Mr. Curry. Can you tell us who prepared, that is, who dictated or drafted the letter signed by Mr. Schumacher which has been received in this case as Plaintiff's Exhibit 39-A addressed to Mr. Nicodemus? A. Can I tell you who dictated it?

Q. Yes, sir.

A. No, I can't definitely. I have an idea.

Q. Let us have your idea.

Mr. MacKinnon: I object to his ideas, your Honor.

Q. (By Mr. Clark): Let me ask this question: Didn't Mr. Nicodemus himself prepare that letter addressed to himself for Mr. Schumacher's signature?

Mr. Adams: That is leading. Your Honor, I take it the interveners are leading their own witness in the examination.

Mr. Clark: He is not our witness, your Honor. We represent stockholders, and as I told your Honor in the opening statement, the chips are going to fall where they may in this case.

The Court: What is the importance of this?

(Testimony of Michael J. Curry.)

Mr. Clark: I simply want to develop the fact, your Honor, because I think the evidence indicates that Mr. Coulson, on the basis of the memorandum already in the record on March 15, when he makes inquiry about the situation in the office at 37 Wall Street, simply took over the tax situation, and that he took it over with the consent and through arrangement with Mr. Nicodemus, and that this letter, which was written for the record, purportedly coming from Mr. Schumacher to Mr. Nicodemus, was written by Mr. Nicodemus himself, and the answer prepared on the same day by Mr. Nicodemus and Mr. Coulson went to work on the tax returns without bothering to get the consent of one trustee, Sidney Ehrman, who was not even consulted until a later date.

The Court: What difference does it make whether it was prepared by Mr. Nicodemus?

Mr. Clark: It shows, if it please your Honor, who was in control of these corporations so far as the tax matters were concerned.

The Court: Nicodemus was the attorney for the company.

Mr. Clark: And also the attorney for the railroad company, also the attorney for the debtor.

The Court: He was the attorney for the company. Now, what difference does it make whether the attorney for the company or the president of the company wrote the letter?

Mr. Clark: Because Mr. Nicodemus was not only

(Testimony of Michael J. Curry.)

the attorney [362] for this corporation but the attorney for the railroad company.

The Court: I know that, but so was Mr. Schumacher in both companies at the time. I do not see any difference in whether the attorney wrote the letter or the officer wrote the letter.

Mr. Clark: Very well, we won't pursue that.

The Court: I mean, it does not seem to have any importance. Lots of times attorneys write these letters.

Mr. Clark: To themselves?

The Court: What difference does it make? That is what lawyers are for. They write the letter and the principal signs it, if they want to get it in the right legal form. I see no particular significance to that.

Mr. Clark: Very well, your Honor. May I have the question answered?

Q. Did Mr. Nicodemus dictate that or prepare it?

A. I do not know. The only thing I know is——

Mr. MacKinnon: Just a minute. Just a minute. I object to these gratuitous remarks by the witness.

The Court: Everything after "I do not know" may go out.

Mr. Clark: We will consent that it go out.

Mr. MacKinnon: I submit, your Honor, you should instruct the witness to answer the questions because there has been a great deal of volunteering on his part. [363]

(Testimony of Michael J. Curry.)

The Court: I will rule on it when it comes up.

Q. (By Mr. Clark): Let me direct your attention, Mr. Curry, to the time when you signed the consolidated tax return in the name of plaintiff corporation for the year 1943, which the record in this case shows was on July 15, 1944. Have you that incident in mind? A. Yes.

Q. Where were you when you signed those returns?

The Court: He has already testified to that.

Mr. Clark: Not with respect to 1943, your Honor. He has testified with respect to 1942, with respect to 1944 and with respect to——

The Court: I thought Mr. Phleger took each one of the returns and the refund.

Mr. MacKinnon: That is my recollection of the record. It accords with yours.

Mr. Clark: I do not think he took 1943.

The Court: I think he stated, if my recollection is correct, in answer to Mr. Phleger's question that it was signed under the same conditions, circumstances. I may be wrong about that.

Mr. Clark: I think that is 1944.

The Court: He took up three instances, two tax returns and a refund, if I remember correctly.

Mr. Clark: That is all I want to establish, your Honor. [364] At the cost of one question may I have an answer?

The Court: You signed the returns and the refund claim all under the same circumstances, did you, Mr. Curry? Is that a fair statement?

(Testimony of Michael J. Curry.)

The Witness: Yes, your Honor.

Mr. MacKinnon: Your Honor, I do not think that is true at all because the witness' prior testimony is that he signed the 1942 and 1943 returns at 37 Wall Street.

Mr. Clark: That is right; they are in different places.

The Court: All right.

Mr. Phleger: I take it he meant by circumstances the same general conditions, not the locus. However, I think I asked him and he answered every one of those questions.

Mr. Clark: I will withdraw the question, then.

Q. At the time you signed the 1943 returns, Mr. Curry, did you have any conversation with Miss Valouch? A. The 1943 returns?

Q. Yes. The evidence shows they were signed—

A. Yes, I testified she informed me that the stock loss was being written off, and that was practically the only conversation we had. The return was in front of me. I looked at the first sheet all the way down the column, and I asked her if Mr. Polk approved this return as prepared. She said Yes, and so I signed it.

Q. Prior to your signing of the return had you received any [365] advice from Mr. Polk or anyone in the Coulson firm concerning any possible liability on the holding corporation in signing such consolidated return? A. No, I did not.

Q. At that time you knew, did you not, that it

(Testimony of Michael J. Curry.)

was proposed to use the stock loss to effect a tax saving for the railroad company? A. Yes.

Q. And for how long had you known that?

A. I do not recall. It was the talk off and on for some time.

Q. You knew at that time that a reserve had been set up in early 1944 as a reserve against possible tax liability in the event the Government did not accept that method of returning the taxes?

A. It is my recollection that that reserve was set up early in 1944—that is right, 1944.

Q. That is right. A. That is right, 1944.

Q. And that is the reserve that has been testified to in this case? A. Yes.

Q. Did you learn about that reserve soon after it was in fact created, in March of 1944?

A. Yes, I did. Mr. Schumacher told me about it. He was a trustee. [366]

Q. What was your understanding of the reason for setting that reserve up?

A. Well, the possibility of contingent tax liabilities, that was all. The settlement with the Government on those tax returns had not been determined or decided.

Q. At that time, namely, in March of 1944, did you know that it was contemplated to use the corporation's stock loss in a consolidated return to save taxes for the railroad company?

A. That was my knowledge at the time.

Q. You knew that was the plan? A. Yes.

(Testimony of Michael J. Curry.)

Q. Had you seen the annual statement of the railroad company for the year 1943 prior to the time you signed the consolidated returns for 1943?

A. You mean the annual report that they publish?

Q. Yes, to stockholders.

* * *

The Witness: What is the question again?

Q. (By Mr. Clark): Did you see the annual report of the [367] railroad company for the year 1943 at about the time it came out? A. Yes.

Q. Did you notice the statement in it regarding the proposed use of the stock loss of the corporation? A. Yes.

Q. For tax purposes? A. Yes.

Q. You knew these things prior to the time you signed the 1943 return, did you not?

A. I did.

Q. Did it occur to you at that time to ask anyone about retaining independent counsel for the corporation? A. Did it occur to me?

Q. Yes. A. I do not recall that it did.

Q. Did you seek advice from anyone at all before you signed these returns other than you have testified to?

Mr. MacKinnon: Your Honor, the question is vague and indefinite. Advice as to what?

Q. (By Mr. Clark): Did you consult anyone with respect to whether or not you ought to sign those returns prior to signing them?

(Testimony of Michael J. Curry.)

A. No, I did not, and as I have testified before——

Mr. MacKinnon: I move to strike out everything after "No, [368] I did not," on the ground it is not responsive.

The Court: It has already been covered.

Mr. Clark: Very well.

We will next offer in evidence, if it please the Court, as Interveners' Exhibit 5, I believe, a copy of a letter addressed to Pierce & Greer, 40 Wall Street, dated February 21, 1945, with a stamp "(Signed) M. J. Curry," which has been marked as Railroad Company Defendant's Exhibit 407-A on the deposition.

(The letter referred to was received in evidence and marked Interveners' Exhibit 5.) [369]

Mr. Clark: This is the copy produced from the corporation's files.

Q. Mr. Curry, at the time you signed the returns for 1943, on July 15, 1944, did it occur to you that the holding corporation, of which you were president, might possibly have some claim to share in the tax savings that you knew were being effected?

A. It did not occur to me at that time, no.

Q. Did that ever occur to you?

A. No, it never occurred to me.

Q. At any time? A. At any time.

Q. Not right up to the present time?

(Testimony of Michael J. Curry.)

A. Oh yes, it occurred to me in 1946.

Q. What was the occasion for——

A. When the suit was filed in the New York court.

Q. You mean it first occurred to you after the VanKirk action was filed in New York?

A. That was the first time that it ever occurred to me that we might possibly participate or had rights in that tax saving.

Q. Is that the first time that anyone ever mentioned to you, that is, anyone on behalf of the corporation, ever mentioned to you that the corporation might possibly be entitled to some share in those savings?

A. It is my recollection that that is the first time.

Q. Never discussed before that, so far as you know? [370] A. No.

Q. Prior to that time, namely, prior to the time the VanKirk case was filed in New York, to your knowledge had any claim been made by any one on the part of the holding corporation for any part of these tax savings? A. That is correct.

Q. Well, had a claim been made or not prior to that?

A. No claim had been made prior to the institution of the suit.

The Court: What do you mean? A claim by a stockholder?

Mr. Clark: By anybody, to these tax savings. This whole litigation was instituted by these inter-

(Testimony of Michael J. Curry.)

veners in New York.

The Court: I understand that, but the question is not clear to me. I suppose what you are trying to get at is this: Had anybody asked the corporation to take any action with respect to its rights, is that what you mean?

Mr. Clark: That was it. I will reframe the question, your Honor.

Q. Prior to the time the VanKirk litigation was filed in New York, Mr. Curry, in June of 1946, was any step taken by anyone to your knowledge to get the corporation to assert this claim?

A. No.

Mr. MacKinnon: I submit, your Honor, that is a responsive answer.

The Court: Give him a chance. Maybe he wants to change it.

Mr. MacKinnon: He gushes forth all the time.

The Court: You will have to be patient. Every witness is not as smart as the lawyers, and sometimes they have difficulty answering questions.

Q. (By Mr. Clark): Do you have anything to add, Mr. Curry?

The Court: Are you bothered about whether your answer it correct or not?

A. Yes, I am a little bit. I just want to explain my answer a little bit. That is all. I had no idea we had any rights. I relied entirely on our tax counsel——

The Court: That is not what he wants to know. What the lawyer wants to know who is examining

(Testimony of Michael J. Curry.)

you now is, did anybody, stockholder or otherwise, make any demnad or request or claim upon the corporation of which you were president and assert a claim on behalf of the corporation for a share in any savings that might result from that return?

Mr. Clark: Prior to the VanKirk aetion.

The Court: Prior to the time you heard about this suit filed in New York.

A. Well, I know that some stockholders had brought the question up, and I referred them to Mr. Nicodemus because they were asking me legal questions.

Q. (By Mr. Clark): You have in mind Mr. Offerman? A. Yes.

Q. Mr. Jaffin and Mr. Wershil?

A. Correct. [372]

Q. At a time they appeared in your office in December 1943? A. Correct.

Q. Beyond that, were there any other efforts made, so far as you know, to get the corporation of which you were president to take action in this matter? A. No.

Q. Referring, Mr. Curry, to the letter which has just been received as Interveners' 5, dated February 1, 1945, addressed by you to Pierce & Greer, I want to direct your attention to this portion of it, and this has to do with the franchise taxes due the State of Delaware.

Do you have some recollection of that problem?

A. I have.

Q. Was it a constantly recurring one?

(Testimony of Michael J. Curry.)

A. Yes, yes, it was.

Q. The point I have in mind is this, and this is your letter:

"The question I have in mind is whether we should pay these taxes or let them go by default. If we default and our charter is voided, the question arises what would be the effect on the consolidated income and excess profits tax returns filed by the corporation as parent for the years 1942, 1943 and 1944 (to May 1),"

which is struck out on the copy——

The Witness: Yes.

Mr. Clark: "As you know, a very large deduction was taken [373] in 1943 which wipes out any tax liability for that year and will also have an effect on the 1942 and 1944 consolidated returns. I understand the total tax savings to the Western Pacific Railroad Company will amount to about $15,000,000. Therefore I feel the payment or non-payment of these franchise taxes must be determined particularly from the federal income tax angle. I would suggest that before arriving at a decision in this matter you confer with the firm of Whitman, Ransom, Coulson and Goetz, our tax counsel, who are aware of the situation and are considering the consequences which the non-payment of these franchise taxes would have from an income tax viewpoint." [374]

Q. Now having had that language read to you from your letter, Mr. Curry, as of February 21, 1945, can you tell us what was in your mind at

(Testimony of Michael J. Curry.)

that time with respect to any connection between the continuance of the charter of the holding company and the tax situation of the railroad company?

Mr. MacKinnon: That is a mischaracterization. It wasn't a tax situation of the railroad, it was the affiliated group. I don't think you can expect them to answer that.

The Court: Yes, I can't see how you can expect him to answer that question anyway.

Q. (By Mr. Clark): What did you have in mind, Mr. Curry, in writing the language which I have read to you?

A. Let me say that this paragraph here, referring to——

The Court: Isn't it self-explanatory?

Mr. Clark: Well, I don't know that it is, your Honor.

The Court: Well, it is clear to me what he wrote. Maybe he meant something else; do you want him to develop that he meant something differently in that regard?

Mr. Clark: No, I don't your honor. This witness—perhaps the situation we are laboring under is that we have taken depositons in this case, and we know the answers that have been given on other occasions, and I simply want this witness' answer concerning what he meant when he used that language. It may develop someone else wrote the letter, your Honor.

(Testimony of Michael J. Curry.)

The Court: Well, if that is what you want to bring out you [375] may ask him.

The Witness: I was just about to state that this reference here to the taxes and so forth, I got help from Miss Valouch on those paragraphs, and we had in mind the continuance of the charter for tax purposes.

Q. (By Mr. Clark): And for whose tax purposes?

A. The consolidated return, the corporation and its affiliates.

Q. For whose tax saving?

The Court: Well doesn't that speak for itself?

Mr. Clark: I think it does. [376]

* * *

MICHAEL J. CURRY

Direct Examination by Interveners
(Resumed)

By Mr. Clark:

Q. Now, Mr. Curry, at the close of yesterday afternoon's session you were being examined with respect to a letter dated February 21, 1945, addressed by you to Messrs. Pierce & Greer, attention F. C. Nicodemus, Jr., copy to James K. Polk, of Whitman, Ransom, Coulson & Goetz; which letter was received in evidence in this case as Interveners' No. 5. You will remember that that had to do with certain franchise taxes owing by the holding corporation to the State of Delaware.

(Testimony of Michael J. Curry.)

A. Yes.

Q. Now, let me show you a copy of the telegram which has been received in evidence in this case as Plaintiff's Exhibit 45, from you to Mr. Coulson at the Mark Hopkins Hotel, dated March 26, 1945 (handing to witness). A. Yes, sir.

Q. Now, does that telegram refer to the franchise taxes which you discuss in Interveners' Exhibit No. 5? A. Yes. [382]

Q. Now, what was the occasion for your sending this telegram, Plaintiff's Exhibit 45, to Mr. Coulson at the Mark Hopkins Hotel in San Francisco?

A. He requested that I notify him there as to the decision of the Tax Board.

Q. Now, were those taxes as reduced ultimately paid? A. Yes, they were.

Q. And from what source did the holding corporation get the money to pay them?

Mr. MacKinnon: I submit, your Honor, that is not the best evidence. Payment ought to be demonstrated by the documents themselves, rather than relying on the recollection of the witness.

Mr. Clark: I am relying on the witness' recollection, your Honor.

The Court: The witness may know. I will overrule the objection.

A. Well, I am not sure whether it was for those years or not that we borrowed money from the A. C.——

(Testimony of Michael J. Curry.)

Mr. MacKinnon: Your Honor, I object to that on the ground it is not responsive.

Mr. Clark: All right. Just a moment.

Q. Let me direct your attention, Mr. Curry, to some minutes of the board of directors of the holding corporation held on Tuesday, July 31, 1943, being Plaintiff's Exhibit 46. I direct [383] your attention particularly to page 27 of the minute book, the second paragraph from the bottom, and after having refreshed your recollection with those minutes, would you tell us from what source the monies were obtained with which the franchise taxes mentioned in Interveners' Exhibit 5 were paid (handing to witness)?

A. The money was borrowed from the A. C. James Company.

Mr. Clark: Thank you.

Now, may it please your Honor, we will now offer in evidence as Interveners' Exhibit 6 a copy of a letter dated May 31, 1944, addressed to Mr. F. C. Nicodemus, Jr., 40 Wall Street, New York, signed by M. J. Curry, together with a penciled notation on it.

(The letter referred to was received in evidence and marked Interveners' Exhibit 6.)

Mr. Clark: This letter reads as follows, your Honor:

"Dear Mr. Nicodemus:

As you know, (see copies of our letters dated

(Testimony of Michael J. Curry.)

March 21, 1944, State of Delaware, Office of Attorney General; and March 31, 1944, to Corporation Trust Company, Wilmington, Delaware) the State Tax Board granted extension to July 1, '44, for payment of the corporation's 1941 franchise tax, which as of July 1, 1944, will amount to $1262.50 principal plus penalty interest of 4% from July 1, 1942, [384] amounting to $101; a total of $1363.50.

In view of the conditions surrounding the corporation at this time, I should like to have your opinion as to what should be done in the matter of payment or nonpayment of the tax. If not paid on or before July 1, 1944, its charter will be voided.

Yours very truly,

M. J. CURRY."

Mr. MacKinnon: Mr. Clark, the offer includes the notation?

Mr. Clark: I have already stated that, Mr. MacKinnon. I am only interested in the part I read to his Honor.

We will next offer as Interveners' 7 the reply to the last exhibit, being an original letter addressed to Mr. M. J. Curry as President, the Western Pacific Railroad Corporation, 37 Wall Street, New York, signed F. C. Nicodemus, Jr., which letter is marked on the deposition as Interveners' Exhibit 229, the letter being dated June 14, 1944.

(The letter referred to was received in evidence and marked Interveners' Exhibit 7.)

(Testimony of Michael J. Curry.)

Mr. Clark: This letter reads as follows, your Honor: This is from Mr. Nicodemus.

"Dear Mr. Curry:

As I mentioned to you yesterday, I talked with Colonel Coulson about the compromise proposal respecting the Delaware franchise tax, involving the total payment as of July 1, 1944, of the sum of $1363.50. In the course of this talk I explained to Colonel Coulson that it would be necessary to make this payment in order to continue the corporate existence of the company through the current calendar year and that I did not see how we could avoid making this payment out of current available cash.

I told him that I felt quite sure, and he agreed, that Mr. Buckland would recognize the necessity of this payment, should he ultimately succeed in maintaining his claim of a lien on our cash derived from the Standard Realty and Development Company, notwithstanding the fact that his own claim has been satisfied and he has been made whole under the Commission's plan of reorganization. You may therefore arrange for the payment referred to in your letter to me of May 31, 1944.

Yours very truly,

F. C. NICODEMUS, JR."

(Testimony of Michael J. Curry.)

And we also offer the pencil notations on this exhibit.

We will next offer in evidence as Interveners' Exhibit 8 a copy of letter dated March 27, 1943, addressed to the State [386] of Delaware, State Tax Department, 843 King Street, Wilmington, Delaware, and signed M. J. Curry, blind copy, B.C.C., to Mr. F. C. Nicodemus, Jr., together with the pencil notation in green pencil on the second page of this letter.

Mr. MacKinnon: What prior identification?

Mr. Clark: I have stated the date.

Mr. MacKinnon: Did it have an exhibit number on it?

Mr. Clark: I am sorry. Yes. This letter was marked on the deposition as Railroad Company's Exhibit 415.

(The letter referred to was received in evidence and marked Intervenors' Exhibit 8.)

* * *

Q. Now, Mr. Curry, at the time you signed the consolidated returns for 1943, which the record shows was on July 15, 1944, did you know that the Coulson firm represented the A. C. James Company in the reorganization?

(Testimony of Michael J. Curry.)

A. I did not definitely, no.

Mr. Clark: Is Mr. Curry's deposition here?

The Clerk: Yes, it is, counsel.

Mr. Clark: May I have it?

Page 2788. Commencing on page 2787, your Honor.

Mr. Curry, I will read the following questions and answers from page 2787 of your deposition:

"Q. Do you know whether or not that firm (referring to Whitman, Ransom, Coulson & Goetz) represented the James Foundation?

"Mr. Shaw: I will object to that. There is no foundation laid that the James Foundation was in the reorganization proceeding.

"The Witness: The question again, please?

"Mr. Clark: I will reframe it.

"Q. Did you have any understanding at that time with respect to whether or not the firm of Whitman, Ransom, Coulson & Goetz represented the James interests? A. I did not.

(Testimony of Michael J. Curry.)

"Q. You knew nothing about that at all?

"A. Of my own knowledge, that is right.

"Q. What was your understanding in that regard, if anything?

"A. It was my understanding they did.

"Q. Did you have that understanding throughout this period we have been discussing commencing on March 15, 1943? A. Yes."

Do you remember giving that testimony on deposition? A. Yes, I remember.

Q. Are those answers correct? A. Yes.

Mr. Clark: The connection with Plaintiff's Exhibit 66, which is already in evidence and is a letter having to do with the files in the possession of Mr. Curry in December, 1946, we will offer letter dated December 11, 1946, addressed to Allan P. Matthew, Balfour Building, San Francisco, on the letterhead of Whitman, Ransom, Coulson & Goetz, signed Robert E. Coulson, and which is also identified as Interveners' Exhibit 207 on the deposition.

(The letter referred to was received in evidence and [393] marked Interveners' Exhibit 9.)

Mr. Clark: This letter, may it please your Honor, is dated at a time after both the VanKirk and the present litigation had been filed for these tax savings, and while Mr. Coulson's firm was still joint tax counsel for both the plaintiff corporation and the defendant company, and I am reading

(Testimony of Michael J. Curry.)

from the last paragraph in this letter, Interveners' Exhibit 9.

"Naturally my interest in the question discussed in this letter," being the files and the redistribution of them which had been suggested, "Naturally my interest in the question discussed in this letter is solely in protecting the operating company in connection with the VanKirk litigation here in New York of which we have partial counterparts in the actions brought by the holding company in California. In this connection we have received copies of your answers in the California tax action of the holding company, and I have also talked with Mr. Polk about his discussions with your office."

Mr. Adams: Mr. Clark, you will state for the record the portions you have just read, containing a reference to "your answers in the California transaction," refer to the answers which we filed in behalf of the railroad company, defendants in this action? [394]

Mr. Clark: Oh, yes. I think the letter clearly shows that.

Lastly, your Honor, we will offer as Interveners' exhibit next in order, being Interveners' 10, and in connection with the letter already received as Plaintiff's Exhibit 72, a copy of a letter dated February 11, 1947, addressed to James K. Polk, Esq., Carlton Hotel, Washington, D. C., signed with a stamp reading "Original signed Charles Elsey," it having been

(Testimony of Michael J. Curry.)

previously identified on deposition as Railroad Company Exhibit 938. This letter, may it please your Honor, is the railroad file copy of the original letter, which is already in evidence as Plaintiff's Exhibit 72, and I am offering it for only a limited purpose.

(The copy of letter referred to was received in evidence and marked Interveners' Exhibit 10.) [395]

* * *

Cross-Examination

By Mr. Adams:

Q. Mr. Curry, when did you first enter the railroad company business?

A. Around 1898, I believe.

Q. And from that time until your retirement in 1945, were you always engaged in the railroad business? A. That's right.

Q. Now in addition to being vice-president, assistant secretary and assistant treasurer at the Western Pacific Railroad Company, it is a fact, is it not, that you were also a director and a member of the Executive Committee of the Western Pacific Railroad Company? A. That's correct.

Q. And those offices you held from May 6, 1940, until November 20, 1944? I am referring to the offices of director and as a [396] member of the Executive Committee? A. That's correct.

Q. So that you retired from those two offices

(Testimony of Michael J. Curry.)

prior to the time when the railroad properties were returned by the trustees to the reorganized company?

A. I don't quite understand. I retired from what positions?

Q. Those of director and member of the Executive Committee.

A. Of the railroad company?

Q. Yes. A. That's correct.

Q. Were you also a director of the Railway Express Agency as an alternate for Mr. Schumacher?

A. That's correct.

Q. And were you also a director of the Denver, Salt Lake & Rio Grande Junction Railroad?

A. Yes.

Q. Now from 1927 to 1942, Mr. Curry, that period of time during which you, in the New York office, were an officer both of the railroad company and the railroad corporation, was your combined salary for those two companies $9,900 a year?

A. I think that is correct. I can't remember back that far, just what the salaries were. They could change from time to time.

Q. We have an exhibit in the record showing, I believe, that your salary, combined salaries for the two companies in the [397] year 1938 was $9,900 a year. Would that be in accordance with your recollection?

A. That is in accordance with my recollection, yes.

(Testimony of Michael J. Curry.)

Q. Did you also receive compensation as an officer of the Denver & Rio Grande Western?

A. I did.

Q. And was that approximately a thousand dollars a year?

A. Yes, it started out at $900 and I think it reached a thousand.

Q. Now after you became President of the Western Pacific Railroad Corporation, was your combined salary from the company and the corporation $11,700 a year?

A. That is my recollection, yes.

Mr. Adams: And may I ask, Mr. Clerk, that there be handed to Mr. Curry Plaintiff's Exhibit 20-B, the 1943 Annual Report? It is a printed document, one of those annual reports.

The Court: That is the 1943 report?

Mr. Adams: Yes, your Honor. It is the report for the year 1943. You might hand it to him, if you please, if that is convenient to you, Mr. Elkington.

The Clerk: That is all right.

Mr. Adams: Mr. Curry, if you will turn over to the page close to the beginning, where the list of directors and officers is printed?

A. Yes, sir. [398]

Q. Do you find that? A. I have it.

Q. What page is it, just for the record?

A. It is page 1.

Q. Now directing your attention to the names of the officers of the railroad company which appear

(Testimony of Michael J. Curry.)

on that page, does Mr. Schumacher's name appear first? A. It does.

Q. And Mr. Elsey's appears second?

A. Yes.

Q. And your own third? A. Yes.

Q. And were you at that time the third ranking officer in the Western Pacific organization?

A. I wouldn't say that, no.

Q. And the names of what officers appearing below your own, Mr. Curry, would you say were ranked before you?

A. Why, I believe Mason, the Vice President and General Manager and Poulterer, the Vice President in charge of traffic, and the Chief Engineer, were more important officers than I was.

Q. Do you know whether or not their compensation was greater than yours?

A. I do not at the moment, no.

Q. It is the fact, is it not, that you gave instructions from [399] time to time to Mr. DeGraff, the General Auditor? A. Yes.

Q. Tank you, Mr. Curry. That is all about that exhibit.

Do you recall, Mr. Curry, yesterday when Mr. Phleger asked you about the occasion when you signed the power of attorney in behalf of the plaintiff corporation to Mr. Polk, Mr. Noneman and Mr. Cavanaugh? A. I recall it, yes.

Q. That was in late June of 1946?

A. That's correct.

(Testimony of Michael J. Curry.)

Q. And you recall that Mr. Phleger asked you whether you consulted with anyone prior to signing the power of attorney? A. Yes.

Q. Now do you remember that Mr. Clark asked you about that at the time that your deposition was taken in New York last March?

A. Yes, I recall that.

Q. And I would like to refer to the testimony which you gave at that time, when your deposition was taken, and ask you some questions about that. I will refer to page 2929 of the transcript of your deposition and perhaps Mr. Curry might have a copy in front of him.

(Handed to witness by the Clerk.)

The Witness: What is the page number?

Q. (By Mr. Adams): 2929, beginning, Mr. Curry, five lines [400] from the bottom of the page (reading):

"Q. (By Mr. Clark):

"Q. Prior to signing the original power of attorney of June 26, 1946, on that date, did you take up the matter of your signing a power of attorney for the corporation with any of its officers or directors?

"A. I do not recall that I did.

"Q. Did you discuss it with anyone whomsoever other than Miss Valouch? A. No.

"Q. Did you ask Miss Valouch or anyone else whether you, as president, had the authority to sign such a power of attorney?

(Testimony of Michael J. Curry.)

"A. On second thought, my recollection is that I phoned Mr. Nicodemus, corporation counsel, and told him that this power of attorney was before me and asked if it was all right to execute it. That is my recollection.

"Q. What is your recollection conerning what Mr. Nicodemus replied to your inquiry?

"A. That it was o.k. to do it. And then I placed my signature on it.

"Q. Did you tell Mr. Nicodemus during that telephone conversation the reason or necessity for your being requested by Miss Valouch to sign this power of attorney? [401]

"A I do not recall whether I did or not.

"Q. Didn't Mr. Nicodemus ask you why it was necessary for the corporation to give a power of attorney at that time?

"A. I do not remember the conversation at all, sir.

"Q. Do you remember whether or not such a conversation ever took place?

"A. I have said that it was my recollection that I called Mr. Nicodemus and told him about it.

"Q. Is it your recollection that this conversation with Mr. Nicodemus took place on or about June 16, 1946, and prior to the time you signed the original instrument?

"A. That is my recollection."

Do you remember being asked those questions and giving those answers? A. I do.

(Testimony of Michael J. Curry.)

Q. And were they true at the time you gave them?

A. At that time that was my recollection.

Q. And at the time you gave that testimony, you believed it to be true?

A. According to my recollection, yes.

Q. Well, I take it, Mr. Curry, that at the time you gave those answers, you believed them to be true, did you not? A. Oh, yes. [402]

Q. And thereafter, Mr. Curry, after you had completed giving your testimony upon the taking of your deposition, did you read this carefully?

A. I did.

Q. You made a number of corrections in it, did you not? A. I did.

Q. And you read this portion, did you not?

A. I did.

Q. And you made no corrections in that portion?

A. I don't recall that I did.

Q. You have before you the original document, which would show all your corrections, if you will look at it? I think you will see that that is so.

A. Well, there is no correction on this testimony that we have read.

Q. Right. Now at the time you read your deposition and corrected it, you examined it carefully, did you not? A. I did.

Q. And at the time you signed it, did you believe that the testimony I just read to you was true?

A. Yes.

(Testimony of Michael J. Curry.)

Q. Now yesterday, while Mr. Phleger was asking you questions about this same occasion, the following questions were asked and the following answers were given, given at the bottom of page 325 of the transcript of the testimony in this case. May [403] the witness have a copy?

The Court: I will give him a copy. (Handing copy of transcript to the witness.)

Q. (By Mr. Adams): Beginning at the bottom of page 325, Mr. Curry, (reading)

"Q. I now show you, Mr. Curry, Plaintiff's Exhibit 65, a power of attorney of the Western Pacific Railroad Corporation dated June 26, 1946, running to James K. Polk and others. Do you recall having executed the original of that power of attorney?

"A. I do.

"Q. At whose instance did you sign it?

"A. It was brought to me in my office at 40 Wall Street, Whitman and Ransom, 52nd floor, by Miss Valouch, who is on the same floor, and she stated that Mr. Polk desired that this power of attorney be executed; and I signed it.

"Q. Where were you when you signed it?

"At 40 Wall Street in the suite of Whitman, Ransom, Coulson and Goetz.

"Q. Did you consult any of the directors or any officer of the corporation before you executed that power of attorney as to whether or not you should sign it?

"A. I did not, as I depended entirely on our tax counsel for putting those things before us.

(Testimony of Michael J. Curry.)

"Mr. MacKinnon: I move to strike out everything after 'I did not' as not responsive. [404]

"Mr. Phleger: It may go out as far as I am concerned.

"The Court: It may go out.

"Q. (By Mr. Phleger): Did you consult with anyone prior to signing that power of attorney?

"A. Not to my knowledge."

And you recall answering those questions that way yesterday under your examination by Mr. Phleger? A. I do.

Q. And at the time you gave that testimony, did you believe it to be true? A. I did.

Q. Now at the time you gave that testimony, yesterday, Mr. Curry, did you have in mind the testimony you had given upon the taking of your deposition which I have already read to you?

A. Yes, I had that in mind, and I recalled that I was under the impression I talked to Mr. Nicodemus about it, but since that deposition was taken, I have thought a lot about it and I have looked through my files to see if there was a memo, and I am satisfied that I did not talk to Mr. Nicodemus about it.

Q. Was the last answer you were satisfied you didn't talk to him about it? A. Yes.

Q. And what is it that has satisfied you that you didn't talk to him, since you gave your testimony at the time of the deposition [405] that your best recollection was that you did?

(Testimony of Michael J. Curry.)

A. Well, I have thought a great deal about it, and as I say, I have no memo in my files indicating that I did ask Mr. Nicodemus whether or not I signed it, and I seem convinced that I did not discuss it with Mr. Nicodemus.

Q. Is it your thought that your recollection at this time is better than it was a year ago on the subject?

A. I think so, yes, sir. I have had more time to reflect on those things, and that is the way I feel about it now.

Q. You have discussed this subject, I take it, with other gentlemen on your side of the case?

A. Yes.

Q. This particular subject?

A. I have talked to my lawyers about various things in connection with my testimony.

Q. And you have discussed this particular occasion, have you not? That is to say, the occasion on which you signed the power of attorney?

A. I don't recall that I did specifically discuss that matter.

Q. Have you discussed with them at all the question of whether or not you telephoned or got in touch with Mr. Nicodemus to ask his advice prior to signing the power of attorney?

A. I don't recall that I discussed that question with him.

Q. Pardon me, go ahead. I shouldn't interrupt you. [406]

(Testimony of Michael J. Curry.)

A. There is nothing further for me to say.

Mr. Adams: Would you read Mr. Curry's answer, the last answer? I want to be sure he has full opportunity to complete any statement.

(Previous answer read.)

Q. (By Mr. Adams): And is it your best recollection, Mr. Curry, at this time that at no time since giving your testimony upon the taking of the deposition, have you discussed with anybody, any lawyer on your side of the case the question of whether or not you did telephone to Mr. Nicodemus before you signed the power of attorney?

A. It is my best recollection I haven't discussed it with anybody.

Q. And what is it, then, that has occasioned your coming to the conclusion at this time that the testimony which you gave upon the taking of your deposition was erroneous?

A. Well, as I have stated, reflecting on my testimony at that time, after it was given, it occurred to me that after thinking over the matter pretty thoroughly, I had no recollection of talking to Nicodemus about it, and I have convinced myself that that was the situation.

Q. At the time you gave your testimony, you did have such a recollection?

A. I did at that time, yes. [407]

* * *

Q. (By Mr. Adams): Mr. Curry, do you recall

(Testimony of Michael J. Curry.)

yesterday in answer to a question put to you by Mr. Phleger with regard to bookkeeping the question that he put and the answer that you gave in that regard? A. I do.

Q. If I may, I will read it to you, from page 321 of the transcript of yesterday's testimony, line 25:

"Q. Did you ever make any entries upon books?

"A. I never put pen or pencil to any book of the corporation. I depended entirely on the employee who was delegated that work."

A. I remember that, yes.

Q. You recall that testimony. Do you recall the giving of your deposition in New York last March, when I asked you some questions, when I was questioning you, with regard to a journal entry which you yourself prepared reflecting the transfer of the stock of the railroad company to the reorganization committee?

A. I recall that. That was a memorandum, not a bookkeeping entry.

Q. I would like to direct your attention to the testimony that [408] you gave in that connection on page 3,411 of the transcript of your testimony taken at that time.

Mr. Adams: At this time, and in connection with this third question, I will offer as railroad defendant's exhibit 1, in this case a single sheet of handwriting previously identified as Railroad Co. defendant's exhibit 385, and Railroad defendant's 2, in this

(Testimony of Michael J. Curry.)

case, a single sheet of typewriting with some endorsements upon it previously identified as Railroad Defendant's Exhibit 386.

Mr. Phleger: Excuse me for interrupting. Those Journal entries have to do with some material that is covered by one of our exhibits, do they not?

Mr. Adams: That is right. Plaintiff's Exhibit 44, previously offered, and particularly the page identified as Interveners' 36K of Plaintiff's Exhibit 44.

Mr. Phleger: Is it the same sheet?

Mr. Adams: No, not at all. This page of the plaintiff's exhibit, your Honor, is a copy of an actual entry and the documents I am offering are documents that were prepared prior to the making of the actual entry.

If it may be understood that as the "Defendant's Exhibits" are offered by me, we will save putting "Railroad" in front of that word.

(The documents referred to were thereupon received in evidence and marked respectively Defendant's Exhibits 1 and 2.) [409]

Mr. Adams: Mr. Curry, you have in your hands Defendant's Exhibits 1 and 2 just offered in evidence? A. I have.

Q. Would you please state to the Court what Defendant's Exhibit 1 is?

A. It is a handwritten memo by me with reference to the record of transfer of the ownership of the capital stock to the reorganization committee

(Testimony of Michael J. Curry.)

under the plan of reorganization of the Western Pacific Railroad Company, pursuant to order of the Federal District Court for the Northern District of California, dated December 17, 1943; and also under and pursuant to an agreement dated November 22, 1943, between the Western Pacific Railroad Corporation, its secured creditors, and said reorganization committee, and approval of the stockholders of the Western Pacific Railroad Corporation given at special meeting held April 20, 1944. That is the typwritten statement, with the corrections in pencil made by me.

Q. The typrwritten statement is identified for the record as Defendant's Exhibit No. 2. Would you please state to the Court what the pencil record, Defendant's Exhibit No. 1, is?

A. It is a repetition of just what I have read from the typed memo and I, to make sure that the corrections made on this typewritten copy were incorporated, wrote it out for the purpose.

Q. Did you prepare those papers, and particularly Defendant's No. 1, your handwritten copy, for the purpose of preparing an [410] entry to be made upon the journal of the corporation?

Mr. Clarke: I object to that, your Honor, on the ground it assumes something not in evidence. Counsel will note that the evidence in this case shows that the typed memorandum was prepared by Miss Valouch. The question asked assumes the witness prepared both of them.

(Testimony of Michael J. Curry.)

The Witness: I did not. This was merely a rewrite of the memorandum.

Mr. Clark: Prepared by Miss Valouch.

Q. Is that correct?

A. That memorandum was prepared by Miss Valouch and placed before me.

Mr. Adams: If your Honor please, addressing my remarks to the Court, if counsel has objections to my questions, may I request that the objections be stated to the Court and that my examination be not interrupted?

The Court: Yes.

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's No. 2, the typewritten document, is it your recollection that that was prepared by Miss Valouch? A. Yes.

Q. And is it your recollection that you made the corrections upon it, that appear upon it?

A. Yes.

Q. And is it your recollection further, then, that you then [411] wrote the handwritten copy to have a single clear, uncorrected copy of that proposed journal entry? A. That is correct.

Q. Did you do this for the purpose of making up the entry that was to be entered in the journal of the corporation?

A. I did not. I did make the corrections, as I felt it would clarify the statement. That is all.

Q. What was your purpose in making the corrections?

(Testimony of Michael J. Curry.)

A. My purpose was to clarify the statement.

Q. You knew, did you not, that the statement was one prepared for entry in the journal of the plaintiff corporation? A. Yes.

Q. And you corrected it so that it would be a correct entry?

A. Well, not a correct entry, so far as the entry itself was concerned. I corrected it in certain places there that I felt would more nearly express what was intended.

Q. And be a more acurate statement?

A. That is how I felt about it at the time, yes; but I had nothing to do with preparing this memorandum originally.

Q. What you had to do with it, I take it, is what you testified to? A. Just the corrections.

Q. That you corrected it? A. Yes.

Q. Before the time it was entered? [42]

A. Before?

Q. Yes.

A. Before it was entered on the books.

Mr. Adams: May the record show, by stipulation of counsel, that the actual entry shown at the page marked Interveners' 36K of Plaintiff's 44 conforms precisely to the corrected documents, Defendant's Exhibit 1?

Mr. Clark: I think that is true, but the documents will speak for themselves. They are all in evidence, your Honor. I think that is the fact from recollection.

(Testimony of Michael J. Curry.)

Mr. Phleger: I put them in and I will accept counsel's assurance that they are the same.

Q. (By Mr. Adams): Mr. Curry, is it a fact that the bookkeepers and accountants in the New York office were under your supervision and direction as treasurer of the parent corporation?

A. Yes, that is correct.

Q. And that was so during the entire period from 1927 to the end of 1944? A. That is right.

Q. I have no further use for the papers, if you wish to hand them back to the Clerk.

Now, during the period 1927 to 1942, Mr. Curry, was Mr. Schumacher the chief executive officer of the Western Pacific Railroad Corporation?

A. He was. [413]

Q. During that same period did he also occupy the office of Chairman of the Executive Committee of the Western Pacific Railroad Company?

A. He did.

Q. During the period of 1935 to the end of 1944, that is, from November 9, 1935 to the end of 1944, isn't it a fact that Mr. Schumacher was also one of the trustees in the reorganization proceedings of the Western Pacific Railroad Company?

A. He was.

Q. Did he during all that time maintain his office in the joint New York office at No. 37 Wall Street?

A. He did.

Q. During all of that time were you his right-hand man in the New York office?

(Testimony of Michael J. Curry.)

A. What do you mean by righthand man?

Q. Proceed, Mr. Curry. Go ahead.

A. Why, he relied upon me to carry out certain details, and so forth, and to check his papers as they came in and out of my room. He used to throw them over to me to note and check and see if everything and everybody was notified, and so forth, that was my job.

Q. Would you say it is true you were second in command of the New York office during that period?

A. Yes.

Q. Is it correct? [414]

A. That is correct. I was next to Mr. Schumacher and he looked upon me as his chief clerk or his office manager and he handed things to me.

* * *

Q. (By Mr. Adams): Mr. Curry, during that period—I am speaking of the period 1927 to 1942—were you in constant touch with Mr. Schumacher?

A. Yes.

Q. What were your duties?

A. Well, supervision of the office personnel and the carrying out any directions or instructions from Mr. Schumacher or Mr. Elsey of the railroad company. That is about all I did, was to carry out the orders of my superiors.

Q. Was it your responsibility to bring to Mr. Schumacher's attention problems which in your judgment required his decision?

A. Was it my duty——

(Testimony of Michael J. Curry.)

Mr. Adams: Will you read the question? [415]

(Question read.)

A. Yes.

Q. (By Mr. Adams): Did this require you to become familiar in general with the problems within the New York office? A. Generally, yes.

Q. Was this office the head office of the Western Pacific group during that period? A. It was.

Q. Would it be fair to say that you were in general familiar with the problems of the Western Pacific group?

A. Well, not entirely. Mr. Schumacher was Executive officer of the railroad company and of the corporation, and I think I rather looked upon him as being the responsible party for all companies.

Mr. Adams: Mr. Reporter, will you read the question?

(Question read.)

Q. (By Mr. Adams): Do you have in mind any problems with which you were unfamiliar?

A. Which question do you want me to answer first?

Q. The last one I just put to you.

Q. What was that?

(The last question was read by the reporter.)

A. No.

Q. (By Mr. Adams): Who signed the correspondence that went out of the New York office?

(Testimony of Michael J. Curry.)

A. For both companies?

Q. Yes.

A. Well, Mr. Schumacher signed the railroad company letters, and as president of the corporation, anything that was sent out on a corporation matter he signed.

Q. Did you sign any part of the correspondence?

A. Yes, I had correspondence with the general auditor that I signed in behalf of the railroad company, and as treasurer of the corporation I also signed certain letters in the corporation's behalf.

Mr. Clark: May it please the Court, may I ask if this is limited to the period prior to February, 1942?

Mr. Adams: We have been speaking of that time, have we not, Mr. Curry?

The Witness: Yes, sir, as I understand it, from 1927 to 1942.

Q. (By Mr. Adams): Was there any difference as regards the railroad company after you became president of the parent corporation with regard to this matter of signing correspondence?

A. No, that continued right along.

The Court: I should like to ask a question. If I am out of order, you can correct me. Is it in evidence what was the compensation that Mr. Schumacher got as head of the companies?

Mr. Adams: I do not think it is in evidence, your Honor, and I will ask Mr. Curry that question.

Q. Mr. Curry, it is the fact, is it not, that Mr.

(Testimony of Michael J. Curry.)

Schumacher received as trustee in reorganization an annual salary of $15,000?

A. That is correct.

Q. Do you recall the salary he received as president of the corporation during the period 1927 to 1942, when he resigned as president?

A. To my recollection, he was receiving $15,000 per annum.

Q. From that source?

A. From the corporation.

Q. And after he resigned as president, then is it the fact that he did not receive any further compensation from the corporation?

A. That is correct.

Q. Prior to the time when the railroad company went into reorganization, do you have any recollection of what his salaries were at that time from these two sources?

A. Well, it is my recollection he was getting $30,000 from each for a time.

The Court: That would be up to 1935?

A. Well, I can't say up to what year.

The Court: That was the year of the reorganization.

Mr. Adams: That was when the reorganization proceedings began.

The Court: Go ahead. [418]

Q. (By Mr. Adams): Is it the fact that during the period of reorganization Mr. Schumacher was also receiving compensation from the Denver & Rio

(Testimony of Michael J. Curry.)

Grande for his financial responsibilities and employment in that connection?

A. My recollection is that at the time the Denver & Rio Grande went into bankruptcy and his salary was cut off.

Q. Now, we were talking about correspondence out of the New York office which you signed. Did other employees from the office prepare correspondence for your signature? A. Yes, sir.

Q. Was there any other officer or employee in the New York office besides Mr. Schumacher and yourself who was authorized to sign correspondence?

A. No, sir.

Q. It was either Mr. Schumacher or you?

A. Yes, sir.

Q. Did you prepare letters for Mr. Schumacher's signature?

A. Very rarely. He usually dictated his own letters.

Q. To his own secretary?

A. To his own secretary.

Q. Would you please describe in a general way what problems were handled in the New York office during the period 1927 to 1942?

A. Well, it was known as the fiscal office, the executive or fiscal office of the railroad company, and any matters, any [419] problems that came up that the New York office could take care of were referred to the New York office for handling.

Q. Were certain traffic problems also handled through the New York office?

(Testimony of Michael J. Curry.)

A. Yes, but not generally. Mr. Schumacher did not interfere with the operation of the traffic department of the railroad company. He looked to his vice president in charge of traffic to take care of that. Once in a while he would get into some little conversation about it, but I don't think he directed it at all.

Q. Were problems relating to the obtaining of credits in the Reconstruction Finance Corporation handled through the New York office?

A. They were handled by Mr. Schumacher, yes, sir.

Q. And you were familiar with that?

A. I was familiar with that, yes.

Q. And did the New York office also handle problems relating to the purchase of equipment for the railroad?

A. Yes, Mr. Schumacher had considerable to do with the purchase of equipment for the railroad company.

Q. And you were familiar with that?

A. Generally, yes.

Q. And was the matter of the annual budget for the railroad also dealt with in the New York office?

A. Yes, it was submitted to Mr. Schumacher for approval each year.

Q. And you were familiar in a general way with the annual [420] budget?

A. In a general way, but I had nothing to do

(Testimony of Michael J. Curry.)

with the makeup of the budget at all. He was the one that examined it and approved it.

Q. He also took it up, did he not, with the principal creditors, including RFC and the institutional bondholders?

A. Yes, he handled all those matters himself.

Q. So would you say it was a fair statement that the New York office dealt with all the major questions relating to the Western Pacific?

A. Yes, I would.

Q. Now, did you, as secretary of the plaintiff corporation, perform all the functions of that office as defined in the by-laws?

A. Yes, as faithfully as possible.

Q. And did you, as treasurer of the corporation, perform all the functions as defined in the by-laws?

A. I did.

Q. And you are familiar with the duties prescribed in the by-laws for each of those offices?

A. Yes, sir.

Q. As an assistant secretary and assistant treasurer of the railroad company, did you perform the functions of those offices?

A. Yes, but they were no definite functions. Under the [421] by-laws, as I stated I think a day or two ago, the board could appoint one or more vice presidents, and they would be delegated certain duties or authorized to sign papers. That was about what I was, a signing officer.

Q. You are speaking now of your office as assis-

(Testimony of Michael J. Curry.)

tant secretary and assistant treasurer of the railroad company? A. Yes, sir.

Q. Now, is it the fact, Mr. Curry, that you were responsible for all the funds and expenditures of the New York office?

A. Yes, all the funds received and disbursed were under my supervision.

Q. And it was your responsibility to see that the accounts were well kept and to authorize the expenditures? A. Yes.

Q. Now, is it the fact, Mr. Curry, that Mr. Schumacher's resignation as president of the plaintiff corporation was occasioned by the corporation's financial distress? A. Yes.

Q. When you became president, did you feel that in general you were familiar with the corporation's problems?

A. I didn't feel entirely at ease about it, but as Mr. Schumacher said, there was nothing facing us but liquidation and dissolution, and he felt I could carry through that period.

Q. Yes. Now, you told us something a little different from what I asked you. [422]

Mr. Adams: Will you read the question, please?

(Question read.)

A. Yes.

Q. (By Mr. Adams): As the president of the corporation, have you attempted to the best of your ability to discharge the duties of that office?

A. I have.

(Testimony of Michael J. Curry.)

Q. Have you attempted to the best of your ability to protect the interests of the stockholders of the plaintiff corporation? A. I have.

Q. When did you become a director of the corporation? A. I think it was in 1927.

Q. And you have ever since been a director of the corporation? A. Yes, sir.

Q. As a director of the corporation, have you always exercised your best judgment in voting on matters which came before the board?

A. I certainly have, yes, sir.

Q. Did anyone ever tell you how to vote as a director of the corporation? A. No, sir.

Q. Did anyone ever undertake to control your activities as the president of the corporation?

A. No, sir. [423]

Q. Did anyone ever tell you not to vote on any matter coming before the board of directors?

A. No, sir.

Q. Did anyone ever tell you not to bring any matter before the board of directors for its consideration? A. No, sir.

Q. Did anyone ever ask you to stay away from any meeting of the board? A. No, sir.

Q. Did you know Arthur Curtis James?

A. I did.

Q. When did your first meet him?

A. I first met him about the time I came to New York, in 1914.

(Testimony of Michael J. Curry.)

Q. That was before your association with Western Pacific? A. Oh, yes.

Q. That was during the period of your association with the El Paso and Southwestern?

A. That is correct.

Q. And during that period you were assistant to the president of that company? Not during all of it, but for the latter period?

A. During a short period of time.

Q. During the latter part?

A. During the latter part.

Q. When Mr. Schumacher was the president of that company? [424] A. That's right.

Q. Now, how often did you see Mr. James?

A. You mean during all that period?

Q. Yes.

A. Very infrequently. He used to come in to see Mr. Schumacher and I would see him going in and out of Mr. Schumacher's office.

Q. Mr. James' death occurred in June of 1941, did it not? A. That's right.

Q. Did you know Robert E. Coulson?

A. I did.

Q. When did you first meet Mr. Coulson?

A. While he was a director of the corporation, and at the time that I came to New York, I believe; and I have known him since then.

Q. Mr. Coulson resigned as a director at or about the time when you became president of the plaintiff corporation?

(Testimony of Michael J. Curry.)

A. Yes, it is my recollection he resigned early in 1942.

Q. Did you know W. W. Carman?

A. Yes.

Q. And who was Mr. Carman?

A. Well, Mr. Carman was an associate in Mr. James' organization. Just what his position was or his association was, I couldn't describe.

Q. Was it your understanding generally that he was a general and financial secretary to Mr. James? [425]

A. I can't say as to that. I don't know just what his functions were, with him. I understood he was a secretary to Mr. James for a long time.

Q. And when did you first meet Mr. Carman?

A. I met Mr. Carman about the time I came to New York in 1914.

Q. Did you see him frequently?

A. Very infrequently.

Q. And Mr. Carman was also a director of the plaintiff corporation, was he not?

A. He was.

Q. And his resignation was early in 1942, as a director? A. Correct.

Q. And aside from being a director, he was never at any time an officer of the plaintiff corporation?

A. No, Carman never was an officer.

Q. That is likewise true with regard to Mr. Coulson, is it not? A. That is correct.

(Testimony of Michael J. Curry.)

Q. Now, did Mr. James, Mr. Coulson or Mr. Carman ever tell you what you should or should not do as a director of the corporation?

A. They did not.

Q. Did they or any of them at any time ever tell you—strike that. [426]

Did Mr. Coulson or Mr. Carman at any time ever tell you what you should or should not do as president of the corporation? A. They did not.

Q. Did any representative of the James interests ever tell you what you should or should not do as a director? A. No.

Q. Or as the president? A. No.

Q. Do you have any reason to believe that the board of directors of the corporation was ever dominated or controlled by anyone?

A. I have no reason to believe that that was so.

Q. What is your belief in that regard, as to whether or not the board of directors of the corporation was ever dominated or controlled by anyone?

A. It is my belief that it was not dominated by anyone.

Q. Do you have any reason to believe that the officers of the plaintiff corporation were ever dominated or controlled by anyone other than the directions of the board of directors of the corporation?

A. I have no reason to believe that such was done.

Q. Were you, as president and director of the

(Testimony of Michael J. Curry.)

corporation, ever dominated or controlled by anyone? A. I was not. [427]

* * *

Afternoon Session, Friday, February 4, 1949

Direct Examination

(Resumed)

By Mr. Adams:

Q. Mr. Curry, prior to the time the railroad company went into reorganization in 1935, what was the source of income for the parent company?

A. We had securities of both companies from which we received income.

Q. When you speak of both companies, you mean the Western Pacific and the Denver & Rio Grande? A. I do.

Q. And the income was interest and dividends on those securities? A. Yes, sir.

Q. What was the effect of the Western Pacific and Denver & Rio Grande reorganization on the income of the parent, the plaintiff herein?

A. Beginning in the latter part of '34, our income ceased from those sources, and we gradually used up what we had.

Q. Do you recall writing a series of memoranda to Mr. Schumacher during the years from 1935 to 1938 about the financial problems of the plaintiff corporation? A. Yes.

Q. Do you recall suggesting in those memoranda the advisability [429] of seeking to arrange for the reorganization trustees of the Western Pacific to

(Testimony of Michael J. Curry.)

pay a larger percentage of the expenses of the New York office? A. I do.

Q. And why did you make this suggestion?

A. Because the funds of the company were gradually diminishing to such an extent that it didn't look like we would be able to keep alive.

Mr. Adams: Now at this time, your Honor, I would like to make an offer into evidence as defendant's exhibit 3 of a number of documents following within the description just discussed with the witness. They are Railroad Exhibit's 131 to 138, as identified during the taking of the deposition of Mr. Curry. I would like to make a brief statement about the purpose of this offer, and I hope that these documents may be put in without going to the time of reading them in detail at this time.

These exhibits are memoranda prepared by Mr. Curry to Mr. Schumacher during that period, the first three years of the reorganization, and the offer has a number of purposes: first, one of the purposes is to show Mr. Curry's familiarity with the financial affairs of the Western Pacific, and his competence in dealing with those affairs, his origination of ideas for meeting the corporation's problems, and his understanding of those matters. I might illustrate that by referring to the [430] first of the exhibits, identified as Railroad's 131, and read very briefly from this memorandum of Mr. Curry's, in which he says: (reading).

"We have prepared a statement showing the setup

(Testimony of Michael J. Curry.)

of assets of the corporation, if and when the present proposals for readjustments of the two companies mentioned——"

The Court: When is this, Mr. Adams?

Mr. Adams: Back in 1935. (Continuing.)

"——become effective. There are two statements herewith. One, securities as signable by proposed readjustment of capitalization of the Western Pacific Railroad Company, and the Rio Grande Western Railroad Company, in exchange for existing securities owned, and list of other assets owned remaining unallocated."

And then Mr. Curry's correction to change that word to "undisturbed."

"Second, schedule of securities owned, if proposed readjustment of capitalization of Western Pacific Railroad Company and the Denver & Rio Grande Western Railroad Company is effected."

I shall not take up your Honor's time to read much further, but this is indicative of the capacity in dealing with these matters which this current record evidences. Another purpose I have in mind in making this offer is that it does develop the fact that; as early as this time, and I shall show continuously, [431] the plaintiff corporation was progressing in a chronic state of difficulty about funds. It became in greater and greater difficulty, and during this period it went to its creditors to be supplied with the funds to keep it alive and finally it went to the Court's trustees. In fact, it went to

(Testimony of Michael J. Curry.)

them from time to time about the adjustments. So that another purpose of the offer of this portion of the record is to show that the arrangements for the trustees to pay an additional portion of the expenses of the New York office was undertaken at the suggestion of the plaintiff corporation and for its benefit.

I think I have stated substantially the purposes of this offer and, as I say, I do not want to take the Court's time up to detail the papers, but I make the offer for those purposes.

Mr. Phleger: I might state our position with respect to offers of this kind. I think, first of all, the offer is not within the scope of proper cross-examination of this witness. In the second place, I think the offer is immaterial because, in our view of the case, it does not make any difference what these people knew. But the third objection is this: second purpose stated by counsel is certainly a matter of affirmative defense on their part and has no part in connection with cross-examination. He has stated as second purpose here of showing that these arrangements came about due to the impoverishment of the plaintiff corporation and at its suggestion. I do not think I covered any such matter on direct examination. [432] I would just like to have my position known. We are going to get in such a realm of remoteness here—this is 1935—that we are going to have the 2000 exhibits if you do not look out.

(Testimony of Michael J. Curry.)

The Court: You did develop on direct examination, however, the extent of the activities of the witness on the stand.

Mr. Phleger: That is right. You are quite right.

The Court: Of course, it has not yet been demonstrated to me what the materiality of that phase of the case is.

Mr. Phleger: That is quite right.

The Court: But there were questions asked of the witness concerning the nature and extent of his position and his activities that is a material issue in the case, I suppose the other side would have a right in cross-examination to show whatever relevant facts it has to indicate that the picture drawn in that respect is not wholly as the plaintiffs have pictured it.

Mr. Phleger: I do not wish to press the point except to state again that our theory of the case, and our development of it is it doesn't make any difference what these people said or did. It would not operate to lose the plaintiff any of its rights, and hence testimony of this character is not material. What we attempted to develop was the position of this person, and these parties and officers as a basis for that legal contention.

The Court: I do not want to unduly prolong the introduction [433] of evidence in this case. It might be that a discussion of what are really the issues of the case might be profitable. I do not know. I always have a horror of getting into arguments

(Testimony of Michael J. Curry.)

in a case before all the evidence is in. Sometimes, however, it saves the building up of a record which in part is not necessary to be considered in arriving at a decision. It is sometimes difficult to distinguish between those two opposing viewpoints. From what I have heard of arguments so far in this case, not only now but at the pre-trial and other times, and the nature of the evidence, it has seemed to me it did not make any difference who these people are, whether they were good, bad, indifferent, or how their functions were carried out. It is just who they were and the positions they occupied, and from that, are there legal rights and obligations that flow in this unusual situation that is presented in this case? Maybe we will on both sides be unnecessarily considering factual matters, the resolution of which is not necessary at all.

Mr. Adams: Your Honor, just one remark. The documents I am offering are the contemporaneous record, the very evidence of the things done and the state of mind, the talents and the competence of the witness. They bear upon questions that developed upon the plaintiff's examination of Mr. Curry in that regard, and we regard the contemporaneous record as the best evidence. It is better than the testimony of witnesses can be, with regard to their own qualifications; which is a matter of [434] their own definition. The documents speak and are proof. And as I say, I do not want to labor this too much, but we have this in mind in offering the record,

(Testimony of Michael J. Curry.)

which to us is the best evidence on the basis of which these issues are going to be determined if there are any issues in the case of the character spoken of both by the plaintiff and the intervener in their opening statement.

The Court: I gather from what Mr. MacKinnon said yesterday that you have considerable other material you wish to present along that line?

Mr. Adams: That is correct, your Honor.

The Court: Unless that right arises by virtue of the relationship of the two companies, it would not otherwise arise, would it, because of the particular activities of any particular individuals who occupied positions or performed duties for either company?

Mr. Adams: We believe that to be true.

The Court: I understand Mr. Phleger to say that, too, but yet there has been evidence—you have got ahead of presenting some evidence with respect to this witness as to his personal activities.

Mr. Phleger: I think my opening statement made our position perfectly clear. We contend that the defendant took over and handled these tax matters.

The Court: You have presented the evidence along that [435] line.

Mr. Phleger: On that taking over, yes, and we have also presented evidence that those who acted in behalf of the plaintiff corporation were also acting in dual capacity for the defendant corporation.

(Testimony of Michael J. Curry.)

The purpose of that was to show that it doesn't make any difference what their knowledge was or what their activities may have been. They could not by their acts or activities or lack of activities lose the plaintiff any rights. Now, that is all laid out very carefully in our opening statement, and we consider them germane and we consider that they are proved. I therefore say that any evidence that the defendant, by way of cross-examination or otherwise, may offer to show knowledge or activities is immaterial, unless they intend to use that as a foundation to show that they made some contract or made some gift or took some other action, and even then it is not material because there is no corporate authority shown.

Mr. MacKinnon: May I be heard, your Honor?

The Court: Yes.

Mr. MacKinnon: The plaintiff, at the outset of its case, stated what I believe to be the legal issue. I told you that I thought there were four categories. The first I perceive to be a pure legal question, that is, Do they have a right to share in the tax background? That issue could have been presented without color. There has been, however, a complete selection of [436] documents by the plaintiff, not with the idea of giving your Honor the full story, not by any means, but to present the worst possible light. And I am not criticizing plaintiff for that. That is their prerogative. But that is the case they have made. They have had this witness, and this

(Testimony of Michael J. Curry.)

witness has protested vehemently that he was incompetent, that he was everything else. He said he was a figurehead in response to your Honor's question. Now, here is a concurrent series of documents and events and this proves in its entirety that this man was other than a very incompetent individual. It is the concurrent record. They have made this case. There is only one way in which the defendants can meet it, and that is to put the proof in. As long as this issue is being presented with color, your Honor has to have the full facts before you can sit in judgment. That is why all this material in my opinion is clearly competent.

The Court: Of course, there is no sinister connotation as to the fact that the witness was in a subordinate position. That does not in itself have, from a moral point of view, any dire results. It is merely a statement of fact that there was someone else that was in higher authority who directed these things to be done. I do not quite see the significance or the relevancy of whether they were competently done or not.

Mr. Adams: Your Honor, may I respond? You have heard arguments made here in Court on behalf of the plaintiff that this plaintiff corporation was in what has been described as a corporate coma, meaning in effect that its own officers, this witness on the witness stand in particular, the one who signed these returns, did so in a coma, in a mental daze, not knowing what he was doing. That I un-

(Testimony of Michael J. Curry.)

derstand to be a part of the contention made by our adversaries.

Mr. Phleger: That is not so at all.

Mr. Adams: I have heard the expression "coma" used here.

Mr. Phleger: That is right. I did not accuse any of the individuals of being in a coma. We were endeavoring to show the financial condition of the company, and it was very pertinent as part of the proof of showing that the tax matters of the plaintiff corporation were taken over and handled by the defendant and its attorneys and officers. Now you talk about sinister things. That is a fact. I am not connoting it at all. But it does bear upon the equities, and as I have said before, the only wrong that we complain of in this case is that they have not accounted to us for the fruits of all of these acts and transactions. If at the time they did this they had some sinister idea, then I think that was wrong. We make no such charge. We say they took over and they handled it, they used our property and they received this benefit and this advantage. We say they should account for it. They refuse to account for it. Therefore we say we have a cause arising under a quasi contract for the benefit or advantage that they achieved through the use of our property. Now, if they want to say that is bad, well, that is [438] their own connotation. I do not say that there was any malice or bad faith on their part, but they did take over and handle

(Testimony of Michael J. Curry.)

this matter at a time when these people were occupying dual positions, and when the plaintiff corporation, to use the language of our honorable counsel here, was an object of charity. [439A]

Mr. Adams: If your Honor please, counsel has just spoken to the effect that they took over, and he means by that, as I understand it, that the trustees, and following the trustees the reorganized company took this thing and dealt with it as their own. That I understand to be the effect of his statement. Now, I take it that when we have general officers and directors of the plaintiff corporation, as the present witness and others who will testify are, that the question is going to be fairly within the text of that argument: Is that so? We deny it, your Honor. We do not concede for a minute the primary statement made by counsel that this was anything taken, that this was taken over in any sense. The fact of the matter is that the corporation's officers and directors knew what was going on, understood what was going on, thought what was going on was right, and still think so, and that they were presently, then and there active representatives, duly performing the functions of their official positions in behalf of the plaintiff corporation.

Now, in order to attempt to prove that they made an opening examination of Mr. Curry suggesting that he did not know much about bookkeeping, that he did not know much about taxes, that he did not regard himself as the responsible head of this cor-

(Testimony of Michael J. Curry.)

poration but only as the figurehead, and so our endeavor, your Honor, is to bring to the Court the fact in regard to this witness that he was competent, that he was [440] diligent, that he was faithful, that he was able to do the things required of him in his official position in regard to this corporation, and that he did then and acted throughout in good faith.

The Court: Of course, there is no dispute, is there, Mr. Adams, really, that the same people were handling the affairs of both corporations, in a general sense?

Mr. Adams: Your Honor, may I state briefly—and I do not want to argue this; I know your Honor has heard it before—there was no duality with the reorganized company. The duality in the sense of the gentlemen occupying positions—and I understand that is what is meant by "duality"—was the fact that these gentlemen occupied positions of responsibility to the plaintiff and likewise occupied positions of responsibility to the trusteeship. That much is undoubtedly correct on record. We do contend, however, that that relation did not give rise to any of the disabilities that an interlocking arrangement between private corporations does give rise to.

Mr. Phleger: May your Honor please, this witness sat for three years and a half in the office of the attorney for this defendant corporation and was paid by the defendant corporation, and we showed

(Testimony of Michael J. Curry.)

a bill in here yesterday in which they are being charged for payment for his services, captive in the office of the attorney for the defendant and paid by [441] the defendant. Now, if that does not create duality, I do not know what does.

Mr. Adams: That is the contention that we have to meet, your Honor. That is the purpose. We propose to show that Mr. Curry was free, independent, talented, industrious and capable.

Mr. MacKinnon: And that the written record that was currently made demonstrates it right up to the hilt.

Mr. Levy: Your Honor, if the interveners may be heard so that we may be clear on the record: As your Honor noticed, I was standing here with Mr. Adams on my left and Mr. Phleger on my right, and our table is in the center, and that is about where we are. We are in the middle. And I think that is not mere hyperbole. I think that represents what is the position of the stockholders in this case, and it has been one of our troubles in presenting this case to you, and it has significance in this sense——

The Court: May I interrupt you for a moment to get something clear in my mind? You say the interveners are stockholders. Now, I take it that the attorneys for the plaintiff represent the corporation: they must represent the stockholders of that corporation.

Mr. Levy: They also represent Mr. Curry.

The Court: He is not a party to this litigation.

(Testimony of Michael J. Curry.)

Mr. Levy: No, sir, but he is their employer as the [442] president who hired them. I do not mean anything invidious by that, your Honor. I am just demonstrating to you that we who have the stockholders——

The Court: You say the stockholders. How many of the stockholders does the intervenor represent?

Mr. Levy: Roughly 30,000 shares of which they are the owners.

The Court: And out of how many stockholders is that?

Mr. Levy: Well, the preferred stock is roughly 400,000 shares.

The Court: Well, now, concededly the attorneys, when they represent the corporation, represent the stockholders of the corporation also?

Mr. Levy: They definitely do, your Honor.

The Court: Now, the stockholders that they represent, are they in some different position than the other stockholders of the company?

Mr. Levy: No, but they are in a different position from that legal entity that sits up there and is known as a corporation. Let me take one moment to develop that, because there is some importance to it.

The Court: I am only asking you this question because it again brings up the matter that gave me some concern before, and that is what is the relation of these stockholders you represent? Are they old

(Testimony of Michael J. Curry.)

stockholders of the company or are [443] they new stockholders, or do they have a long-time interest?

Mr. MacKinnon: They are new stockholders.

Mr. Levy: Mr. Offerman goes back to 1942, and you know that. All of the other stockholders go back to 1944 whom we represent, and if that constitutes new, then Mr. MacKinnon isn't as aware of the corporate facts of life as I thought he was, because stockholders buy and sell in corporations.

But let me get back to the essential thing, your Honor, which I think is this: Let's momentarily go back to when this action was started. I don't go back for the purpose of emphasizing the fact that it was the interveners who started this case and not the corporation. Let's go back to the position of the stockholders at that time. When they looked at the facts about their corporation, which had had no stockholders' meetings for years other than the one when the James Foundation took over what was left of the corporation, they found that their officers, Mr. Curry and Miss Valouch, had been for most of their natural lives employees or officers of the railroad company. They found that Mr. Curry and Miss Valouch were employed in Whitman, Ransom, Coulson & Goetz with Mr. Coulson as a director of the railroad, with Mr. Coulson as the chief representative of the James interests, who owned 28 per cent of this railroad company. If they had stopped right there, as businessmen, they would have said to themselves that so far as there are any inter-

(Testimony of Michael J. Curry.)

relationships [444] between this railroad and this corporation, "we can't rely on either Mr. Curry or Miss Valouch to speak for the stockholders."

The Court: Let me interrupt you a minute. I have heard this type of argument in this and many cases before. But what is there about this representation of the plaintiffs by any of these people that is of any importance here except in connection with this tax matter? There is no claim, is there, that there was ever any conflict between the holding company and the defendant railroad company in any matters in any other respect, that there has been any conflict in interest, is there?

Mr. Levy: We are litigating the one question before your Honor only, and that is that these tax transactions——

The Court: The holding company owned the railroad company, and up to this point where the tax situation arose, I suppose it was a very happy family, because it was the same family.

Mr. Levy: Up until the Supreme Court's decision, it was a family. But after that, by all the normal laws, when a holding company is kicked out of a railroad, to put it in the vernacular, they go this way (indicating). That is the end of their marriage. But the normal laws didn't operate. Instead of going this way, they stayed just like they had been, this way (indicating), in the same offices, common attorneys, common officers. Now, there is nothing invidious [445] about that, your Honor, necessarily.

(Testimony of Michael J. Curry.)

But the fact does remain that from time immemorial the courts have said that when you have dual relationships, you create duties, and the duties, if they are breached, give rise to causes of action. We say that what has happened here is that this relationship has so colored and so deprived the corporation of its independent officers, that there was an unfair transaction that resulted, and this is it, and we are litigating it.

The Court: Well, all right, suppose that you were strangers at the time and there wasn't a complete separation of the officers and directors of the two companies, and the time came to file the affiliated return. If you were the attorney for the holding company, what would you have advised your client to do?

Mr. Levy: That is a perfectly good question. Momentarily I will assume the responsibility which I wasn't asked to do at this time.

The Court: I am not asking this for any reason but to see how far we should go in the taking of this kind of evidence.

Mr. Levy: All right, I will give a perfectly frank answer as to what I would have done as counsel, if this situation were presented to me, with my ignorance of taxes. I would have said this, and I will try not to be a hindsight general. I think I would have said this: "Gentlemen, you are asked to contribute to a company out of which you have just been evicted, a $75,000,000 loss so

(Testimony of Michael J. Curry.)

that they may make $17,000,000. Now, that is the nub of what you are being asked to do. The first thing you ought to do, before you say Yes or No, is to take a look at what is the purpose for which the Government of the United States, under its tax laws, has enabled two companies to file one tax return so that $17,000,000 would be saved." And I would go get myself a good tax lawyer, if I didn't think I was qualified to do it, an independent one. And I say that had he looked at these books as we have looked at them, the tax books, he would have come to this conclusion, that the purpose of these two companies joining together in this consolidated return would be to give the parent that suffered the loss the benefit of an offset by reducing its taxes, and the tax saving would be a reduction of the loss. Now, that is what I would advise a client. Now, that is the basis for the complaint that——

The Court: I don't get that. What do you mean by that?

Mr. Levy: Let me clarify it if you don't get it.

The Court: You mean the parent company should join in the return provided that it got the benefit of the saving?

Mr. Levy: I am not getting to that, your Honor. I want to give you a full answer on this. I think it is an extremely important question, and goes right to the guts of this case, as I see it and as I have seen it for two years, and we have [447] struggled with this many nights and long days.

(Testimony of Michael J. Curry.)

Now, having concluded what is the basis for permitting the consolidated returns to be filed, and having deduced from that who should be the ultimate beneficiary of those savings, I would have turned to Mr. Adams, had he then represented the railroad company, and said to him, "Jim"—if I may be familiar for the moment, in the light of the hypothetical question—I would have said to him, "Jim, I have analyzed this tax law and I find that if any benefits that result from this consolidated return, in my best judgment the only people who are supposed to be benefited from it is the parent company, not this railroad company." Now, he would have probably turned to me and said, "Well, now, assuming for the moment that you are right, do you want me to recommend to my clients that they should join in a consolidated return and pay to you all of the benefits of this consolidated return? In other words, substitute you for Uncle Sam?" And being realistic about it, I would have said to him, "Well, Jim, I hardly think that your clients want to be Santa Claus, any more than mine. But you can't ask my clients to join in a consolidated return the purpose of which is to benefit my client, so that you may keep $17,000,000." And I would say, "Well, then, let's sit down and look at the equities here." And then, sitting down and looking at the equities, I think that no one could conclude that it is fair or that it would have been fair for an [448] independent manage-

(Testimony of Michael J. Curry.)

ment, who have duties to stockholders, who have just lost $75,000,000, for that independent management to say, "I will sign my name, you can have the $17,000,000."

I have challenged Mr. Adams repeatedly, and I did it, I think, in this courtroom on the injunction motions, to give me one economic justification for this railroad company having $17,000,000 worth of savings when every other railroad company paid taxes.

Now you ask me the question, your Honor, and I have given you what I conceive to be the answer.

The Court: So far in your argument you have completely convinced me that it hasn't been necessary for you to have introduced any of this sort of testimony that you have introduced, then, because the question resolves itself down into a legal issue, which has equitable facets to it, and what really has to happen is that the Court has to go back, project itself backwards, and say, if it has the power to do it, according to legal authority, to say what should have been the just transaction that should have been made at the time.

Mr. Levy: Let me just continue this. I agree wholeheartedly that that is one theory, and one approach, to this case. I think that the resolution of those questions as you have just posed them hasn't the slightest thing to do with whether Mr. Curry acted in good faith or in bad faith, or Mr. Coulson acted in good faith or in bad faith. Not the

(Testimony of Michael J. Curry.)

slightest. And I think that the case could stop there and your Honor could resolve that issue.

Now, we have taken lengthy depositions here in an effort to find the whole story, as you do when you take a deposition. You don't stop short on any narrow legal theory in the hope that the judge will agree with you, or if the judge doesn't agree with you, that the Circuit Court of Appeals will agree with you. So we went on to get the facts, the story, forgetting the legal conclusions. "Let's get the facts first." And when we got the facts, looked at them objectively, as objectively as we could, we thought that over, in the light of this position that you and I have just been talking about, and over and above that there were facts in this record that appear to us to require presentation on an additional theory, namely, that there was a conscious appropriation by some of the actors in this picture of this corporation at a time when a lot of people had given up the ghost for it and were willing to use it for the benefit of someone else. Now, your Honor knows that we have stressed that point of view and we have sought to present facts on that point of view.

The Court: I don't think that upon that issue any of the testimony is relevant. It may be upon the theory that Mr. Phleger advanced, that it would serve maybe to meet the defense that in the reorganization proceedings this matter should have been presented and received an adjudication there [450]

(Testimony of Michael J. Curry.)

on its merits, and that it is being presented for the purpose of showing that there was this measure of control on the part of the defendant which prevented that from being done. Upon that theory some of this evidence might possibly be admissible. But then it is only anticipatory.

Mr. Levy: Well, your Honor, when I read the cases, as you will undoubtedly do, on interlocking managements, the judgments that have resulted therefrom, I somehow have never found a court which would put a chart (indicating) in at the beginning of the opinion and say, "This man was president of one company, was president of the other, you had an interlocking board, now let's get to the legal issue." Because in all of these cases, you want to give not just the charts as they sit right there, because that is the duality; you want to give, "What are these men doing, what were they doing while they were handling these transactions?" There is a desire to know how they mentally functioned on these questions. And I think that a judge shouldn't necessarily be required to stop short on a legal presumption, such as the cases say there is, that there is a lack of undivided attention, a lack of independent judgment, hence there is a fiduciary relationship, hence there is a right to review for unfairness. Now, that is the narrow syllogism. But in all of these cases you have got to give some flesh and bone to it, both as a matter of trial presentation and as a matter of

(Testimony of Michael J. Curry.)

the judge wanting to [451] know what happened here. You have got to present the facts.

Now, I think that there is room for a second theory in this case, and a conscious overreaching is a second theory, and that then has this effect: It doesn't require your Honor to project and view this transaction from the point of view of fairness. It then says that if somebody consciously took, in breach of his duty, there is a prophylactic rule. What he consciously took, he cannot keep. He has to give it back, all of it, even though had he originally acted in a fair fashion, he might have been able to keep a part of it.

The Court: Well, I don't know whether I would follow you on that. I should think, offhand, that a right would have to exist first, because the mere manner of doing the thing wouldn't create a right unless there was a right in the first place. It might be evidence to support the right, but I don't think you can create a right out of the manner in which a thing is done unless the right existed already.

* * *

The Court: Well, I think under the state of the record, this has been an interesting discussion, of course, and it is [457] something that we will have to go over again more fully when all of the evidence is in. There is no doubt about that, because it is an interesting and unquestionably a somewhat difficult question. But I think that under the state of the record as it stands now, that the defendant is

(Testimony of Michael J. Curry.)

entitled to offer this testimony. I don't see any escape from that. I will overrule the objection.

Mr. Adams: At this time, your Honor, I will repeat the offer. I think I stated it some while back. It is an offer, as Defendants' Exhibit 3, of the exhibits identified as Railroad Company Defendant's Exhibits 131 to 138, both numbers inclusive, upon the taking of the deposition of Mr. Curry. And in making this offer, I am making the offer of the documents, including the penciled notations upon them, and upon the stipulations entered into at the time of the taking of the depositions as to the authenticity of the documents.

The Clerk: No. 3.

(Documents previously identified as Railroad Company Defendants' Exhibits 131 to 138 inclusive were received in evidence and marked Defendants' Exhibit 3.)

Mr. Adams: I will have another set shortly, your Honor, but I have one or two questions intermediately.

Q. Mr. Curry, you recall, do you not, that during the years 1935 to May 1, 1944, the corporation was heavily indebted to the Chase National Bank, the Central Hanover Bank and the Curtis [458] Southwestern Company? A. I do.

Q. And that indebtedness totaled, did it not, many millions of dollars? A. It did.

Q. Do you recall that during 1941, 1942 and 1943 efforts were made to obtain funds to operate

(Testimony of Michael J. Curry.)

the corporation and to obtain those funds from those creditors? A. I do.

Q. And were those efforts successful in part?

A. In part, yes.

Mr. Adams: At this time, your Honor, and by way of amplification of the testimony just given and for the purposes to which I have previously referred in offering previous documents, I offer Railroad's Exhibits 140 to 178 inclusive, as taken upon the depositions, as Defendants' Exhibit No. 4, and I would state briefly some of the things they show.

Thew show the increasing financial difficulty of the plaintiff corporation. They show that the corporation received its financial assistance not only from the James interests but also from the Central Hanover and the Chase Bank, and that those institutions followed its activities closely; this being a matter which negatives any inference of domination or control by the James interests. They show that Mr. Schumacher, Mr. Curry, Mr. Nicodemus and his partner, Mr. Campbell, were [459] all thoroughly familiar with the financial problems of the corporation and were active and industrious in looking after its interest. They are offered also to show that the corporation was not in a position to pay for the independent tax counsel or the independent legal representation which the interveners apparently believed the corporation should have had.

Mr. Phleger: I object to that. I do not think

(Testimony of Michael J. Curry.)

that is proper cross-examination. He said it shows that Mr. Nicodemus and Mr. So-and-so and Mr. S-and-so else knew this, that and all the rest. It is remote in time. It is something like 48 exhibits now that he is dumping in in one offer. It seems to me matter of this kind should be presented as part of the defendant's case. I do not think they have any impertinency whatever.

Mr. MacKinnon: It goes to the credibility of this witness and this material has been selected with that purpose in mind.

Mr. Adams: And for the other purposes stated.

The Court: You say it goes to the credibility of the witness. In what respect? On what subject?

Mr. Phleger: If that is the purpose of it, it should be presented to the witness. You cannot dump in 48 exhibits and say it goes to the credibility of the witness. You must confront him with them.

Mr. Adams: Written current documents, your Honor, will show that this witness was right in the middle of every corporate step that was had, that he was an active participant, that not a single thing was done with respect to corporate management that he was not right in the middle directing it.

The Court: He has not said very much to the contrary.

Mr. MacKinnon: He said he was just a figurehead.

The Court: Maybe I am to blame for asking the

(Testimony of Michael J. Curry.)

question in [460] that form. He has also in answer to questions stated he was the office manager and he was familiar with the various matters that had to do with the fiscal and other effective functions.

* * *

Mr. Adams: In response to plaintiff's questions directed to that end. In any event, he is here. Those suggestions have been advanced in his opening statement, and we seek to prove in the best fashion we can the activities and competence of the witness.

The Court: You have a perfect right to cross-examine the witness concerning the nature of the activities which he has testified to on direct examination, but I do not think you can put in a whole bunch of exhibits, some of which have nothing to do with that matter. It may serve, and properly so, to sustain some of your other contentions in the case. That is the only point that is before us at this time. [470]

* * *

Q. Now, Mr. Curry, referring to the document identified as Railroad Defendant's Exhibit 140, a memorandum of January 11, 1941, is that a document which you prepared at or about its date?

A. Yes, sir.

Q. And the endorsement at the upper lefthand corner is Mr. Schumacher's initials upon it?

A. His initials—stamped initials, yes.

Q. No, in the upper lefthand corner in blue pencil, do you not find Mr. Schumacher has writ-

(Testimony of Michael J. Curry.)

ten—that is correct—"M.J.C.," your initials, that is correct; is it not?

A. Yes, "M.J.C." with a question mark.

Q. And you have marked in your handwriting, "discussed January 13, 1941"? [471]

A. Correct.

Q. Was that a discussion with Mr. Schumacher that you had?

A. Along the lines of the memorandum, yes.

Q. And you signed the memorandum on the bottom? A. I initialed it, yes.

Q. Turning to the next paper, which is Railroad Defendant's Exhibit No. 141, is that a document which was produced from the files of the Western Pacific Railroad Corporation? A. It is.

Q. That is a copy—— A. A copy.

Q. A copy of a letter addressed by Mr. Schumacher to Mr. Coulson under date of January 14, 1941? A. Yes, sir.

Q. With a notation of a blind copy to Mr. Nicodemus? A. Yes, sir.

Q. Beyond the identification of the document as one produced from the files of the plaintiff corporation, do you have any present recollection of it?

A. Yes.

Q. Please state your present recollection.

A. Well, my present recollection is that Mr. Schumacher discussed the question of the cash situation of the corporation with the Central Hanover Bank.

(Testimony of Michael J. Curry.)

Q. And you discussed that matter with Mr. Schumacher and were [472] familiar with it in a general way? A. In a general way, yes.

Mr. Adams: Your Honor, perhaps I should say what I have in mind is to offer this in a group, but on further thought it might be simpler to deal with them one by one and we can dispose of them one by one so that counsel may be afforded an opportunity to object singly and not have too complex an objection. So if I may go back to the document identified as Railroad Co. Defendant's Exhibit 140, being a memorandum of January 11, 1941, I now offer that document as Defendant's Exhibit 4.

The Clerk: Do you wish these marked in a series, 4A, 4B, and so forth?

Mr. Adams: Yes.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 4A.)

Mr. Adams: Referring to a document identified as Railroad Defendant's Exhibit 141, a letter from Mr. Schumacher to Mr. Coulson, dated January 11, 1941, I will offer that as Railroad Defendant's Exhibit 4B.

Mr. Phleger: If your Honor please, with respect to that, that is letter from Mr. Schumacher to Mr. Coulson.

Mr. Adams: The witness has testified with regard to his general acquaintance with the subject matter.

(Testimony of Michael J. Curry.)

Mr. Phleger: Yes, but I do not think that is proper cross-examination. He can ask the witness whether this matter was [473] discussed and he would say yes. You do not have to put in the letter. May it please your Honor, during the recess I went through these. There are not more than two or three out of these 38 odd items that are letters or memorandums made by this witness.

Mr. Adams: I wonder if we can submit them one by one?

The Court: I do not see the point of cross-examining the witness on this letter. It may be material with respect to the subject matter of the letter, as a part of your case, but in the cross-examination of this witness I do not think that is correct.

Mr. Adams: May I develop the offer?

The Court: Yes.

Q. (By Mr. Adams): Referring to Railroad Defendant's Exhibit 141, I direct your attention to the second paragraph on page 1 of the letter. You have it before you.

A. The copy of the letter of January 14?

Q. 1941. A. 1941?

Q. Yes.

A. That is Railroad Co. Defendant's Exhibit 141?

Q. Right. You have that before you?

A. I have it before me.

Q. I direct your attention to the second para-

(Testimony of Michael J. Curry.)

graph of that letter on the first page, and reading the third sentence of that paragraph, "This was brought about through conference our [474] treasurer Mr. Curry had with Olyphant, vice president of the Central Hanover, and in accordance with resolution adopted at meeting of Board of Directors on January 10, 1935."

Q. Directing your attention to that portion of the letter, and asking your attention to the letter, do you recall at this time that the matters spoken of in the letter were brought about by your conference with Mr. Olyphant? A. Yes.

Mr. Adams: I will offer the document, your Honor.

The Court: Any objection?

(No response.)

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 4B.)

Q. (By Mr. Adams): The next document, Mr. Curry, is Railroad Defendant's Exhibit 142, being original letter of August 7, 1941 addressed by Mr. Coulson to Mr. Schumacher. Was this document produced from the files of the plaintiff corporation?

A. It was.

Q. Were you familiar with the matters that are stated in this letter at or about its date?

A. I know generally the matters mentioned, but this letter does not indicate that I saw it at the time of its receipt.

(Testimony of Michael J. Curry.)

Q. There is nothing upon that particular letter that indicates that you saw this particular letter?

A. There is nothing to indicate it came to my attention. [475]

Q. You notice the letter speaks of the fact that since 1936 there has been advanced to the corporation something over $200,000 by the Western Realty Company? A. Yes, sir.

Q. Were you familiar with that?

A. Yes, I was familiar with the advance.

Q. Were you familiar also with the fact that the stock of the company was all held by the Curtiss Southwestern Company as collateral?

A. With the stock of the Western Realty Company——

Q. Yes? A. I was familiar with that.

Q. And the fact that it was an under-collateralized loan which was in default?

A. I can't say as to that at this time.

Q. There was some time when that loan came in default to your knowledge, was there not?

A. Well, I am not so sure that that was under-collateral.

Q. I was speaking of the matter of its being in default. Do you recall that that loan became a default? A. Yes.

Q. There was a time, was there not, when the loan was substantially under-collateralized?

The Court: I do not quite see the point of this.

(Testimony of Michael J. Curry.)

Mr. Adams: This is part of the corporation's financial [476] troubles, your Honor.

The Court: The witness has already testified that he had a general familiarity with all the financial affairs.

Mr. Adams: That is right, your Honor.

The Court: That, I do not think, makes any difference.

Mr. Phleger: May I point out, your Honor, that this is a letter from Mr. Coulson to Mr. Schumacher? The witness has said that he does not recall ever having seen it, and defendants then make it the basis of a series of questions of this witness with the idea it will be put in evidence. I think that is wholly improper. It is not proper cross-examination.

The Court: Do you object to it upon that ground?

Mr. Phleger: Yes.

The Court: I will sustain it.

Mr. Adams: Very well, your Honor. Will you hand the document to the Clerk, please?

The Court: Do you want that identified in some way?

Mr. Adams: Yes, your Honor. May the record show the ruling just made sustained an objection to the offer of the document identified as Railroad Co. Defendant's 142.

The Court: We will mark it 4C for identification so the record will show what it is we have been talking about.

(Testimony of Michael J. Curry.)

(The document was thereupon marked Defendant's Exhibit 4C for identification.)

Q. (By Mr. Adams): Now you have Railroad Co. Defendant's [477] Exhibit 143, next in order, Mr. Curry? A. Yes, sir.

Q. That is a copy of a letter produced from the files of the plaintiff corporation? A. Yes.

Q. Addressed by Mr. Schumacher to Mr. Coulson under date of August 14, 1941? A. Yes.

Q. Is there anything upon that letter which would enable you to say whether or not you saw the letter at or about its date? A. Yes.

Q. What is that, please?

A. The underscoring of this date "August 11" with my green pencil.

Mr. Adams: With that identification, your Honor, I offer the document as Defendant's Exhibit 4D.

Mr. Phleger: May it please your honor, this is a letter from Mr. Schumacher to Mr. Coulson dated August 14, and he is proving that the witness saw the letter. I do not think that is proper cross-examination. I do not think it is any pertinent evidence. I spent days trying to get these exhibits down to a reasonable compass so they would not overburden and overwhelm the Court. I do not think this is proper. If he wants to ask the witness whether he knew about certain things, the witness can answer. [478]

(Testimony of Michael J. Curry.)

Mr. Adams: The witness saw the document at the time and therefore it is a part of the witness' transactions.

Mr. Phleger: But he does not even characterize the document.

The Court: Counsel, what difference does it make whether the witness saw the document or not?

Mr. Adams: He shows his familiarity with all the transactions the corporation had at that time, your Honor. This is a part of that proof.

The Court: What does that involve, the familiarity of the witness with the transaction?

Mr. Adams: And participation, your Honor. The question has been raised by the affirmative proof offered here by the plaintiff, upon examining this witness, as to the attention and competence of Mr. Curry, the things he was able to do, the things that he did. It has even been suggested here that he was a kept man.

Mr. Phleger: He stayed in Coulson's office for three and a half years.

Mr. Adams: My own statement, then, meets with the same view that our adversary states. I am endeavoring to show that, far from being a person of that character, this man at all times was most diligent in looking after the affairs of the corporation.

The Court: I do not think that there has been anything to the contrary developed.

Mr. Adams: The assertion is that he was a kept

(Testimony of Michael J. Curry.)

man, the [479] inference being, therefore, that he was in possession or control of his adversary.

The Court: Is this during the period when the tax returns were prepared?

Mr. Clark: No, your Honor, this was in 1941.

Mr. Phleger: This is in 1941. The period he was in Mr. Coulson's office commenced in May, 1945, and ended December of last year, and the characterization is counsel's own. I have made no such assertion. I proved the fact that this witness was paid by the Coulson firm and in its office from the middle of 1945 until the end of 1948. I do not see what it has to do with the point we have under discussion, and it is your own characterization and not mine.

Mr. Adams: Then it should be withdrawn because I understood it to be my adversary's. Certainly I do not make that characterization. I propose to prove to the contrary, that at all times he was independent.

The Court: I suppose we ought to get some semblance of order out of this. I think I should be inclined to hold, Mr. Adams, it would be incompetent, irrelevant and not proper cross-examination to exhibit a series of documents to the witness during the period up to 1943 and ask him whether or not he saw these documents in the course of the performance of his duties. I do not see any point in my having before me a record of every transaction, letter and document that passed under this

(Testimony of Michael J. Curry.)

witness' [480] nose except at some critical time that is involved in this litigation.

Mr. Adams: That is not the purpose, your Honor, to put before your Honor a record of every transaction that Mr. Curry dealt with. These are the selected transactions that we considered material and relevant to issues in the case that are brought forward by our adversary.

The Court: Suppose the witness read a letter that his superior wrote and was familiar with it in 1941: What has that got to do with this case?

Mr. Adams: It depends upon the subject matter of the letter, your Honor.

The Court: No matter what the subject matter was, what difference does it make? He might have been a good man in 1941 and a bad man in 1943. I am just saying that colloquially. What has it got to do with this particular matter?

Mr. Adams: This witness has been examined as to his competence. It certainly deals with that matter, his competence in financial affairs. Further, it has to do with the contention that is advanced both by the interveners and, I understand, to the same extent by the plaintiff, that these gentlemen were in control of their adversaries.

The Court: But your opponents' evidence was confined to this period between 1943 and 1945. Now, that is the same old argument that is made in a lot of cases: This man was a good man at [481] some other time. We get that in criminal cases.

(Testimony of Michael J. Curry.)

He did not beat his wife, even though he might have forged his checks. What is the competence of that?

Mr. Adams: Your Honor has been told in June of 1943 the trustees took over the entire payroll, for instance, covering Mr. Curry's salary and so on—even, they say, the salaries these gentlemen received when they were officers of the plaintiff corporation—and they point that out to your Honor with a good deal of emphasis that it is significant. These things show the background.

The Court: I can save you a lot of worry on that score. I heard the witness on the stand so far and I am satisfied that he is a perfectly competent man, intelligent, and probably a pretty good railroad man. We could get into an academic discussion on that subject in connection with the particular issues that we have here; so that I do not think you need to labor the point by putting in 40 odd exhibits to show that Mr. Curry knew what was going on and participated in the affairs of the railroad company and advised concerning them during the period of time that you are referring to. That I do not think there is any necessity to do. [482]

* * *

Mr. MacKinnon: I would like to make this statement. You say with respect to the time in question. I am turning to page 295 of the record. Now, this is when he became president. That is February 1, 1942: (reading)

(Testimony of Michael J. Curry.)

"Q. Did you engage in any discussions of policy matters personally in the directors' meetings?

"A. I did not."

This goes back to '42. But there is interrogation prior to that time, and it is perfectly proper that your Honor asked him the question whether he considered himself a figurehead. All this is designed to prove that when he says that, it just isn't so.

The Court: Well, I was intending my inquiry to be directed toward the period with which we are concerned. I don't care whether he was a figurehead in 1927 or 1934 or not. What difference does it make?

Mr. MacKinnon: Well, if the plaintiffs want to limit the issues, and the interveners, we will meet whatever issues they present. But let them frame them.

Mr. Clark: May it please your Honor, in order to obviate this very thing, at the pre-trial conference we specifically limited these issues and stated it in letter form, because the original pleadings necessarily were broad. We limited the period to that commencing March 15, 1943, because we [489] realized on the discovery proceeding, under the broad issues, that this material covered clear back, in some instances, to 1917. So in order to present the case to your Honor, we specifically limited the period of time to that commencing March 15, 1943, which is the date adopted by Mr. Phleger in his presentation as the start of the period.

(Testimony of Michael J. Curry.)

Mr. Adams: Your Honor, a good deal of time has been consumed, occasioned no doubt by the view I had that it was appropriate to offer papers to which various and sundry objections, some of them found good by your Honor, have been made. I suggest in the interest of saving the Court's time and trying to get ahead with the case, that, it being now about closing time, we see what we can do with the papers so as to bring the matter before your Honor tomorrow morning in a way that we, from our standpoint, will think is most conducive to moving along and not absorbing too much time. I think we have your Honor's general views, and we will try to conform to them. Where we have different views, we will simply go through the appropriate procedure of making the offer and having a ruling. If your Honor feels that that is a good plan to follow, I think it will save some time.

The Court: Well, I will say to you, so that there cannot be any misunderstanding about it, that anything that this witness testified to in direct examination, be it of a preliminary or other nature, I am not giving any consideration to that [490] except as to the period that is involved here. And as to that, you can examine him. Now, merely because he testified that he was the president, became the president or occupied such and such an office in 1940 or 1939, and that at that time he only did so and so in connection with his activities, doesn't mean that that opens up on cross-examination to a

(Testimony of Michael J. Curry.)

showing that at that time he did something else; because even though he may have been mistaken at that time, when we are on the subject of credibility of witnesses in the cross-examination, we confine ourselves to the material periods. A man may have testified falsely or made a mistake with reference to some other period, but unless it is material to the issues in the case, we don't pay any attention to it. We tell juries that constantly, in cases tried in these courts, that they are entitled to disregard the testimony of a witness who has testified falsely in a matter that is material to the issue of the case. A man may have said, "I was born in 1892," when in fact he was born in 1885. If that hasn't got anything to do with the case, all right, he made a mistake or testified falsely. But it isn't germane to the case. So that what is the good of our taking up time here at this stage of the proceeding in connection with this witness' testimony on matters that haven't got to do with the material part of the direct examination?

I think you should confine yourself to the presentation [491] of any documents, in your cross-examination, that you want, or to the exploration of facts that were testified to in the periods with which we are concerned—unless there is some other tie-up that I can't conceive of at the moment that might make some inquiry into prior times proper. [492]

* * *

Tuesday, February 8, 1949—10:00 a.m.

MICHAEL J. CURRY

Cross-Examination
(Resumed)

By Mr. Adams:

Q. Mr. Curry, do you recall that in March, 1943, after the Supreme Court decision in the Western Pacific Reorganization case, the creditors of the plaintiff, the parent corporation, finally refused to provide further funds to pay the current expenses of the plaintiff corporation? A. I do.

Q. Do you recall that in June, 1943, an arrangement was made for the reorganization trustees to pay all of the current expenses of the New York office from then on? A. Yes, I do.

Q. Did the corporation at that time have any other source available to it from which it might obtain funds to pay those operating expenses?

A. No, sir.

Q. Did Mr. Schumacher discuss this arrangement with you?

A. The arrangement for the taking over by the company? Is [496] that what you are referring to?

Q. The expense take-over in June 1943.

A. He talked to me after he came back to San Francisco, yes, and the arrangement had been made while he was out there.

Q. Did you discuss the idea with him before he went to San Francisco? A. No, sir.

Q. It is a fact, is it not, Mr. Curry, that shortly

(Testimony of Michael J. Curry.)

before that you did discuss with Mr. Schumacher the fact that the corporation was just about out of all money and had no resources to which to go?

A. That is right.

Q. Do you know who first suggested the possibility of obtaining the current expenses from the court's trustees?

A. It is my impression it originated with Mr. Schumacher.

Q. Do you recall whether you had any discussion with Mr. Nicodemus or his partner, Mr. Campbell, about the arrangement? A. I did not, no, sir.

Q. Were the directors of the corporation in general informed as to its financial condition about the middle of 1943?

A. It is my recollection they were.

Q. Did any one at any time suggest to you that there was any impropriety in arranging for the trustees to pay all of the expenses of the New York office? A. No, sir. [497]

Q. Did it occur to you that there might be anything inappropriate in doing that?

A. It did not.

Q. Do you believe now that there was anything inappropriate in making that arrangement?

Mr. Phleger: Just a moment. I object to that as calling for the conclusion of this witness. His present state of mind certainly is not a factor in this case.

(Testimony of Michael J. Curry.)

Mr. Clark: And incompetent, irrelevant, and immaterial, your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Adams): When this arrangement was made in June 1943, did it occur to you that it would in any way affect the loyalty of the corporation's officers and directors to the corporation?

A. It did not.

Q. Did anyone make such a suggestion to you?

A. No, sir.

Q. So far as you know, was the loyalty of the corporation's officers and directors to the corporation in any way affected by that arrangement?

A. No.

Mr. Phleger: Just a moment. That calls for the conclusion of the witness.

The Court: Well, it does. You can ask him what, if anything, was said or done in that regard [498]

Q. (By Mr. Adams): Was anything said or done, Mr. Curry, to your knowledge, which indicated in any way that the loyalty of the corporation's officers and directors to the corporation was affected or impaired by that arrangement?

A. Not to my knowledge.

Q. Mr. Curry, you recall that you became president of the plaintiff corporation in early 1942?

A. February 1, 1942.

Q. After you became president of the corporation, from whom did you seek advice with regard to its problems?

(Testimony of Michael J. Curry.)

A. Up to the time that Mr. Schumacher retired, in May 1942, I sought his advice as well as our counsel's advice, Mr. Nicodemus.

Q. You did consult with Mr. Schumacher and with Mr. Nicodemus?

A. Every step that was taken after I became president was done after consultation with either or both, Nicodemus and Schumacher.

Q. And Mr. Nicodemus and his firm, the firm of Pierce & Greer, were the counsel to the plaintiff corporation? A. That is correct.

Q. And you have consulted with them as such counsel? A. I did.

Q. And Mr. Campbell was at the time, also, was he not, a director of the plaintiff corporation?

Strike that.

Mr. Adams: Your Honor, I think the exhibit is in evidence, and that will be the best evidence of that fact. [499]

Q. (By Mr. Adams): Do you, Mr. Curry, recall just when it was when Mr. Campbell retired from the directorship of plaintiff corporation?

A. I don't recall the exact time, no.

Q. Now, did you also discuss the corporation's problems with Mr. Osborn from time to time?

A. From time to time, yes.

Q. And did you discuss them with Mr. Wood?

A. Yes.

Q. And did you receive advice from the members of your organization?

(Testimony of Michael J. Curry.)

A. From the directors?

Q. If that is your answer, Mr. Curry, state it that way. A. Yes, sir.

Q. All right. You recall, do you not, that Mr. Nicodemus and the firm of Pierce & Greer were engaged as counsel to the corporation in the year 1934? A. Yes, sir.

Q. Do you know at whose suggestion Mr. Nicodemus and his firm were engaged in that capacity?

A. At Mr. Schumacher's.

Q. Is it your understanding that Mr. Schumacher had known Mr. Nicodemus prior to that time? A. Yes.

Q. And from that time, 1934, did Mr. Nicodemus and his firm [500] also represent the railroad company and the other members of the Western Pacific group? A. Yes, sir.

Q. And do you know at whose suggestion Mr. Nicodemus and his firm undertook the representation of the members of the group other than the corporation?

A. At Mr. Schumacher's, I recall.

Q. And is it the fact that the firm's engagement, both in the capacity of counsel to the corporation and also in the capacity of counsel to the railroad company, was approved by resolution of the Board of Directors of each of those concerns?

A. It is my recollection they were.

Q. During the period from 1934 until 1942, was Mr. Nicodemus frequently in the New York office?

(Testimony of Michael J. Curry.)

A. Yes, sir.

Q. And when we speak of the "New York office," we mean the joint office you have spoken of heretofore? A. Yes, sir, 37 Wall Street.

Q. Was Mr. Schumacher frequently in communication with Mr. Nicodemus or his partner, Mr. Campbell? A. Yes, he was.

Q. Were you from time to time in communication with Mr. Nicodemus or Mr. Campbell?

A. I was.

Q. After you became president of the corporation, did you rely [501] on Mr. Nicodemus and Mr. Campbell for advice on legal matters?

A. Absolutely.

Q. Did you frequently communicate with them upon such matters? A. I did.

Q. What would you say, Mr. Curry, as to whether or not Mr. Nicodemus and Mr. Campbell were generally well informed with regard to the affairs of the corporation?

A. I would say they were.

Q. Do you know of any major problems of the corporation of which they were not informed? And I am speaking now of the time since you became president.

Mr. Phleger: Just a moment, I think that is objectionable as calling for the conclusion of the witness.

The Court: Yes, I will sustain the objection to the last question.

(Testimony of Michael J. Curry.)

Q. (By Mr. Adams): Do you recall receiving tax advice from Mr. Nicodemus and Mr. Campbell in connection with the franchise taxes of the plaintiff corporation? A. I do.

Mr. Adams: Now at this time, your Honor, I will hand the witness a document identified as Railroad Defendant's Exhibit 726 upon taking of the depositions, being a letter, or a copy of a letter, from Mr. Curry to Messrs. Pierce & Greer, dated May 20, 1943.

(Document described above was handed to the witness through [502] the Clerk.)

Q. (By Mr. Adams): Mr. Curry, do you recall that this is a copy of a letter produced from your files which you wrote to Messrs. Pierce & Greer on May 20, 1943? A. Yes.

Q. And will you note the handwriting endorsement on the bottom of the letter, reading:

"Mr. Campbell suggested that we make reply stating that the corporation does not file New York State franchise tax.

M.J.C., 5/24/43."

Did you endorse that on the letter on or about that date? A. I did.

Q. And do you recall that that was a memorandum you made of the advice you received from Mr. Campbell at or about that time? A. Yes, sir.

Mr. Adams: I will offer the document in evidence as Defendant's 5A.

(Testimony of Michael J. Curry.)

(Letter dated May 20, 1943, from Mr. Curry to Messrs. Pierce & Greer, was received in evidence and marked Defendant's Exhibit 5A.)

Mr. Adams: Now at this time, your Honor, I will hand to the witness certain letters dealing with taxes, tax matters, of plaintiff corporation, which I will describe as follows: [503] Railroad Defendant's Exhibit 729, as introduced upon the deposition, 730, 731 and continuously through to No. 740. These documents I shall expect to offer in a moment as Defendant's 5B, and I will describe them briefly. The first is a letter of May 18, 1944, addressed to Mr. Curry by Whitman, Ransom, Coulson and Goetz.

Mr. Phleger: Mr. Curry, in what capacity?

Mr. Adams: It appears on the face of it, "Mr. M. J. Curry, Vice-President, Western Pacific Railroad Company, 37 Wall Street, New York, New York."

Mr. Phleger: That is the defendant company.

Mr. Adams: Subject to any commentary as to the reorganized company, that is correct.

The next letter, May 23, 1944, addressed by Mr. Curry to Mr. Nicodemus, and inclosing a copy of the letter just previously referred to.

The next letter, a letter of June 14, 1944, addressed by Mr. Nicodemus to Mr. M. J. Curry, President, the Western Pacific Railroad Corporation, being a response to the last preceding letter from Mr. Curry to Mr. Nicodemus.

The next letter, a copy of a letter from Mr. Curry

(Testimony of Michael J. Curry.)

to Messrs. Pierce & Greer, of October 5, 1944, referring to the same subject matter, the subject matter of all these letters up to this point being the New York State Franchise Tax. [504]

The next letter, a letter from Mr. Brua Campbell, on the letterhead of Pierce & Greer, to Mr. M. J. Curry, President, The Western Pacific Railroad Corporation, responding to the letter last mentioned.

Mr. Phleger: Will you note the fact that on the last item the receipt stamp is a receipt by the Western Pacific Railroad Company, although the letter is addressed to the Western Pacific Railroad Corporation?

Mr. Adams: That is correct.

The next letter, copy of letter from Mr. Curry to Messrs. Pierce & Greer, dated March 26, 1945, and so far all these letters refer to the New York State franchise tax.

The next letter, a form letter addressed by Tri-Continental Corporation to Western Pacific Railroad Corp., which is included in this list because it is referred to in other documents.

Mr. Phleger: Will you note that the receipt on the top of it, although the letter is addressed to the railroad corporation, the receipt is that of the Western Pacific Railroad Company?

Mr. Adams: That is correct. The document so shows.

The next letter, a letter of April 9, 1945, ad-

(Testimony of Michael J. Curry.)

dressed by Mr. Nicodemus to Mr. Curry as President of The Western Pacific Railroad Corporation, refers to the letter last mentioned, and contains this paragraph:

"My suggestion is that you call Mr. James K. Polk [505] and ascertain whether any of the James corporations are concerned with the same request that has been made by the Tri-Continental Corporation and be guided by his recommendation as to the answer to be made pursuant to this inquiry."

Mr. Phleger: Mr. Adams, will you also please state or admit that the stamp on that letter is the stamp of receipt by Western Pacific Railroad Company, although the letter is addressed to Mr. Curry as President of the Western Pacific Railroad Corporation?

Mr. Adams: All these things appear on the face of the documents I am offering. That, of course, is correct.

Mr. Phleger: That is not the point. The point is as you characterize these documents I take it you are assuming to state the essential and important facts. You take great care to point out that the letter is addressed to Mr. Curry as President of the corporation, and I think it important and pertinent to state that the receipt is in the name of the company. I think that is important.

Mr. Adams: Mr. Phleger's view as to what is important——

Mr. Phleger: I would not interrupt if I did not think it was important.

RECORD

P. 798-873

(Testimony of Michael J. Curry.)

Mr. Adams: I take it Mr. Phleger would not interrupt if he did not regard it as important. I have called to the Court's attention the designation of Mr. Curry when a letter was [506] addressed to him because in the case Mr. Phleger pointed out there was a letter addressed to him as Vice President of the railroad company.

The next letter is a copy of a letter from Mr. Curry of April 10, 1945, addressed to Mr. James K. Polk of Messrs. Whitman, Ransom, Coulson & Goetz and refers to the Tri-Continental form letter of March 23, 1945 and says:

"I referred this to Mr. Nicodemus of counsel for this corporation for advice as to nature of reply to be made and he suggests I ascertain from you whether any of the James corporations are concerned with the same request that has been made by the Tri-Continental and advise me, if you will, please, as to answer to be made to the inquiry."

The next letter is one of April 11, 1945, addressed by Mr. Curry to Tri-Continental Corporation, and I will read it and the endorsement upon it:

"In response to your letter of March 23 this is to advise that The Western Pacific Railroad Corporation did not file a New York state franchise tax report during the year 1944.

"Yours very truly,

B.C.C. Mr. F. C. Nicodemus, Jr.

"See your letter of April 9. The above letter was written on suggestion made by Mr. Polk over the phone [507] today."

(Testimony of Michael J. Curry.)

The next letter is one of April 23, 1945, addressed by Mr. Curry to Messrs. Pierce & Greer, attention Mr. F. C. Nicodemus, Jr., and I will read it:

"I will refer you to my letter of October 5, 1944, your reply dated October 11, 1944, in regard to the franchise tax imposed by Article 9-A of the amended New York tax law.

"As the first return required to be made will be due May 15, 1945, which date is rapidly approaching, I would appreciate your prompt advice as to what should be done in the matter so far as the Corporation is concerned.

"Mr. Polk of the firm of Whitman, Ransom, Coulson & Goetz, as I understand, has this question under consideration and I suggest you consult him in the matter.

"Yours very truly,

"'Copy to Mr. James K. Polk,
"Whitman, Ransom, Coulson & Goetz."

And the last one on the list is a letter, a copy of letter of April 26, 1945, addressed by Mr. Curry to Messrs. Pierce & Greer, referring to his of April 23, and quoting for Mr. Nicodemus' information an item which appeared in the New York Times on the New York State tax, with copy to Mr. James K. Polk. I will ask the clerk to hand these letters to Mr. Curry so that he [508] may identify them.

Q. Mr. Curry, will you please look at each of those documents, being marked consecutively Rail-

(Testimony of Michael J. Curry.)

road Defendant's 729 to 740, both numbers inclusive, and state whether or not the documents were produced from your files.

Mr. Phleger: Just a moment. When you say "your files"——

Mr. Adams: That is a fair question, and I will ask Mr. Curry to designate what files in answering the question.

Q. Where are the files now located?

The Court: Why take all the time of the witness looking through these? Is there any question about where they were produced from?

Mr. Phleger: No.

The Court: Where were they produced from?

Mr. Adams: My understanding is that these documents were all produced from the files of the Western Pacific Railroad Corporation.

The Court: Is that correct?

Mr. Phleger: I would not dispute that.

Mr. Clark: Located, though, your Honor, in the offices of Whitman, Ransom, Coulson & Goetz.

Mr. Phleger: The testimony already shows that. That is where the files were.

Q. (By Mr. Adams): It would appear they were there from about June 1, 1945, to some date in September 1948, as I understand it; [509] that is correct, is it not, Mr. Curry?

A. I beg your pardon?

Q. The corporation's files during the period from the time you entered in the office in the suite

(Testimony of Michael J. Curry.)

of Whitman, Ransom, Coulson & Goetz in June 1945, remained in your office and there until you removed them from that place in September of 1948?

Mr. Phleger: Just a moment. This assumes a fact which is contrary to the evidence. Exhibit 2 shows that the tax files are still there.

Mr. Adams: I am speaking of the corporation's files from which these documents were produced, and I think Mr. Curry understands this.

Mr. Phleger: We want the record to be clear.

Mr. Adams: Surely. We are both cordially in agreement about that.

Q. Mr. Curry, you were asked generally about the corporation's files. Do you recall Mr. Phleger asked you some questions on your direct examination? A. Yes.

Q. Are these the facts, that the corporation's files, excluding Federal income tax files and Federal excess profits tax files, exclusive of such files were the corporation's files after the New York office was closed removed to your office in the suite of Whitman, Ransom, Coulson & Goetz?

A. That is correct. [510]

Q. And did you from that time forward have those files in your office in that suite?

A. I did.

Q. And you had control over them?

A. I did.

Q. And you had keys to those files?

A. There were really no keys—well, yes, there

(Testimony of Michael J. Curry.)

was one key that locked all the files, that is right. I had charge of that.

Q. You had charge of those files. And is it the fact that they remained there in that office until, at Mr. Coulson's request, you vacated that office?

A. That is correct.

Q. When you vacated that office you referred to the fact that those files were removed from that office? A. I did.

Q. And taken to your new office as president of the corporation? A. I did.

Q. That is correct, is it not?

A. That is correct.

Q. And all of these papers were produced from those files, is that the fact?

A. That is my belief, looking these over.

Mr. Adams: I will offer the documents upon the stipulations previously entered. Excuse me, Mr. Curry. Did you want to say something further? [511]

The Witness: Inasmuch as they are tax matters, I am not so sure that they were taken out of my general file. Some of them may have been in the tax files.

Mr. Adams: I think the depositions identify the documents, but if there is any question about it, your Honor, as to the source from which these papers were produced, I would have to refer back to the depositions, and at which time stipulations were made on each of these papers, and we will

(Testimony of Michael J. Curry.)

identify the source from which they were produced. I would like to make the offer of this exhibit, which is Defendants' 5-B, upon the stipulation that was entered into at the time of the taking of the depositions, of the authenticity of the documents and the fact that letters were sent and received at or about their dates.

(The letters referred to were received in evidence and marked Defendants' Exhibit 5-B.)

Mr. MacKinnon: As one exhibit, Mr. Adams, 5-B?

Mr. Adams: As one exhibit.

Q. Mr. Curry, do you recall receiving tax advice from the firm of Pierce & Greer concerning the capital stock tax of the plaintiff corporation?

A. I do recall, yes.

Q. Do you recall corresponding with Messrs. Nicodemus and Campbell, and also with Mr. Polk in connection with that subject matter? [512]

A. Yes.

Mr. Adams: At this time, if your Honor please, I will hand to the witness letter of January 11, 1943, addressed by Moody's Investors Service to Mr. T. M. Schumacher, Trustee, Western Pacific Railroad Co., 37 Wall Street, New York City, wherein——

Mr. Phleger: Have you the number, please?

Mr. Adams: Oh, yes. Railroad Defendant's 439.—wherein the following appears:

(Testimony of Michael J. Curry.)

"In analytical work, dealing with railroad securities, the Federal income tax liability (past, present and future) and the correct method of computation based on accurate knowledge of the various basic factors is today more important than ever. We in our work here at Moody's have naturally had to make estimates, but sometimes, due to inadequate knowledge of the facts, our tax calculations have not been as accurate as we would wish. We wonder if you would be willing to be of help to us regarding the above, and on the possibility that you would, we are returning a tax form, a return of which, filled out (even on a tentative basis) would be of great assistance. We should be glad to hold any information furnished us in confidence if you desire."

And there is attached to this letter a list of particular items of the character described. In connection with that [513] letter I will also hand to the witness a copy of a letter dated January 13, 1943, addressed to Mr. Walter F. Hahn, Manager, Railroad Department, Moody's Investors Service, signed M. J. Curry, and containing in part these statements:

"Your letter of January 8, addressed to Mr. T. M. Schumacher, Trustee, has been turned over to the undersigned for reply.

"As the Western Pacific Railroad Company is included in the consolidated income and excess profits tax returns filed by the Western Pacicfic Rail-

(Testimony of Michael J. Curry.)

road Corporation (parent company), we show below estimated consolidated figures of which the companies pre-tax net income is $15,290,248."

And then there follows some computations, the last line of which is:

"Accrued in 1942—estimated, $3,693,994."

And then follows:

"No provision has been made for accrual of excess profits tax since it appears whatever excess profits net income there may be will be more than offset by the excess profits credit and the unused profits credit carryover."

"It will be appreciated if you will treat the above information confidentially."

I will ask the clerk to hand these to Mr. Curry. [514]

(Two letters handed to the witness by the clerk.)

Q. (By Mr. Adams): Do you recall the fact that Mr. Schumacher handed you the Moody's letter, Mr. Curry, for reply? A. I do.

Q. And is Railroad Defendant's Exhibit 440 the reply which you made to Moody's with respect to its inquiry? A. Yes.

Mr. Adams: I will offer the documents, your Honor, as Defendants' 5-C.

(Letter, January 11, 1943, Moody's to Schumacher; and letter, January 13, 1943, Curry to Moody's, were received in evidence and marked Defendants' Exhibit 5-C.)

(Testimony of Michael J. Curry.)

The Witness: Am I permitted to make some explanation of this letter?

Q. (By Mr. Adams): Do you wish to make some explanation? A. Yes.

Q. Go ahead.

A. It was not prepared by me, it was prepared by Miss Valouch.

Q. Which one are you now referring to?

A. I am referring to the reply to the Moody's Investment Service.

Q. Did you read it before you signed it?

A. I read it before I signed it.

Q. Did you understand it?

A. Miss Valouch was Mr. Schumacher's secretary, and she prepared it and then placed it before me and I signed it. [515]

Q. Mr. Curry, would you please look at the Moody's letter. A. Yes.

Q. What is Mr. Schumacher's endorsement on it? A. He just hands it over to me.

Q. Read it, please.

A. He turned it over to me and requests——

Q. Does it state anything? I mean, Mr. Schumacher's endorsement?

A. It doesn't say anything to me, it just questions——

Q. No, read it, whatever it is. I don't have it before me.

A. Well, in his blue pencil, "M.J.C.," with a question mark in blue, and under that, "M.C.V." in green, which was my pencil.

(Testimony of Michael J. Curry.)

Q. Your signature? A. Yes.

Q. Turning to Railroad's 440, which is the second letter in Defendants' 5-C, you have said that Miss Valouch prepared that letter for you?

A. Yes, sir.

Q. Did you read it before you signed it?

A. I did.

Q. Did you understand it?

A. Yes, generally; but as for the assembly of the figures, and so forth, you know, Federal tax matters or any tax matters were wholly Greek to me. I didn't understand them at all, and any time I got any question about taxes, it was always referred [516] to Miss Valouch or Mr. Polk.

Mr. Adams: I move to strike out the last statement as wholly volunteered.

Mr. Phleger: Well, no, I think that is responsive. He asked him whether he understood the letter.

The Witness: I am telling you why I didn't.

The Court: You asked him if he understood it. It calls for perhaps a Yes or No answer. It is not too far afield to allow the answer to stand. I will allow it to stand.

Q. (By Mr. Adams): Mr. Curry, would you please tell me what in your letter, this letter of January 13, 1943, you did not understand, aside from the computation of the particular figures in it?

A. I would say there wasn't hardly any of it,

(Testimony of Michael J. Curry.)

that I understood, because it is all tax, "pre-tax net income and apportionment of tax," and I didn't understand just what those things were. I relied on our tax counsel and Miss Valouch.

Mr. Adams: Move to strike out the last portion. This question was, What in the letter was it that he didn't understand, and I would like to have his attention devoted to answering my question.

The Court: I will allow the answer to stand.

Mr. Adams: Very well.

Q. Now, Mr. Curry, again I ask you to point out to me the things in the letter that you didn't understand. Do I [517] understand you—Strike the question, first.

Do I understand that you say you didn't understand what apportionment of taxes meant?

A. Yes, I understand what apportionment means.

Q. Please state what it means.

A. It is division between the various companies.

Q. And did you understand that? A. Yes.

Q. The fact is you had understood that since 1927, isn't that true?

A. There are some things generally that I understood in Federal taxes.

Q. Would you answer my question, please. You understood what was meant by apportioning income taxes between members of the group since 1927, isn't that true? A. That is true.

Q. Now, what is in the letter, besides the figures, that you didn't understand?

(Testimony of Michael J. Curry.)

A. Well, the statements in there were, it says, "No provision has been made for accrual of excess profits tax, since it appears whatever excess profits net income there may be will be more than offset by the excess profits credit and the unused excess profits credit carryover."

Those are things that I just couldn't seem to understand in Federal tax matters. [518]

Q. Did you understand what was meant by "excess profits tax"? A. Generally, yes.

Q. Do you have any doubt about that?

A. No.

Q. Do you understand what is meant by "excess profits net income"?

A. I don't—I can't say that I did.

Q. What you mean by that, I take, is that you were not familiar with the precise provisions of the tax law which enter into the computation of excess profits net income, is that what you have in mind?

A. Yes, I believe that is what I have in mind.

Q. You did know, did you not, that there was an excess profits tax and that was levied against the net income as defined by the regulations?

A. I am a little confused. I didn't attempt to know the detail or to learn the detail of those things, because, as I say, Federal tax matters were Greek to me and I didn't attempt to study the regulations or know the regulations. As I stated, I depended on our tax counsel to see that the proper

(Testimony of Michael J. Curry.)

returns were filed and figures assembled, and so forth.

Mr. Adams: I take it, your Honor, that—I have made motions to strike, and there have been these explanations afforded by the witness. I don't want to take up your Honor's time by moving to strike these things each time they come along. [519]

The Court: Well, Mr. Adams, maybe I am as stupid about this as the witness is about tax matters, but I don't see where we are getting. If you tell me that you are attempting to show that this witness was fairly conversant with tax matters and thoroughly competent to make the decisions on taxes themselves, then of course the examination would be clearly pertinent.

Mr. Adams: Well, I have some such object in mind.

The Court: But if, as usually is the case, apparently that is what you are getting at here, you have got all kinds of tax lawyers in the case that tend to these matters; now, do you want to show that this witness was competent to make all these decisions himself, without the tax lawyers?

Mr. Adams: Oh, no, your Honor.

The Court: Well, what is it that you are trying to show?

Mr. Adams: What I want to show is that this witness knew more about taxes—he knew considerable about taxes, and I will go ahead with my proof. I don't want to take up too much time in details about a particular document.

(Testimony of Michael J. Curry.)

Mr. Phleger: I am not making objections as we go along, because I don't want anything pertinent not to be in the record, and I don't want to make myself objectionable by making objections. But our theory of this case is that it doesn't make any difference what this witness knew. It is utterly a false quantity in the case. There isn't anything this witness could [520] have done, either by himself affirmatively, by taking affirmative action or not taking action, that would destroy this plaintiff's claim in this case.

Mr. Clark: That is also the intervener's theory.

Mr. Phleger: It is just utterly immaterial, but I am not objecting to all those things. I just think they are wholly and utterly immaterial.

Mr. Adams: Your Honor, I have only one purpose, and that is to confine myself to cross-examination within the limits of the original interrogation, and I will read to your Honor what was stated by counsel when he opened that examination. He said, "I want to establish the general nature of the functions of this witness in order that your Honor may have some general idea of his capacity and have the manner in which he conducted the various positions which he held."

The Court: I don't think that counsel was referring to capacity in the sense of ability.

Mr. Phleger: That's right.

The Court: But in a legal sense, what position he occupied and what authority he had. I have

(Testimony of Michael J. Curry.)

thought right along that there has been too much time spent on this. If you lawyers think there is something important in that which goes to the heart of the case, I don't want to stop you, but what difference does it make whether this man knew taxes, or how much he knew or how little he knew? It is not a question of his competency, it [521] is a question of his capacity in the legal sense, what position did he occupy, what were his functions. It is not whether he did them well or did them poorly or whether he knew more about taxes than he is willing to tell you now on the witness stand. What has that got to do with it?

Mr. Adams: I did not understand the statement about capacity in the way just stated by your Honor, and apparently neither did interveners' counsel, whose statement appears in the transcript, page 338, saying with reference to Mr. Curry: "As he is painted by Mr. Phleger's examination, he was simply a figurehead and knew nothing."

We understand we have to address ourselves to that on cross-examination. Now, I would further state—we are speaking of taxes themselves—that it was developed upon the direct examination that Mr. Curry signed the returns that were put before him. That was all. And it was developed that he had done that for a number of years. Now, those facts were developed, you heard argument now that it is immaterial. But the facts have been developed, and we think it is material, your Honor, to

(Testimony of Michael J. Curry.)

show that Mr. Curry had a considerable acquaintance with Federal taxes. That was done in response to the direct examination which opened up the question of his knowledge and experience in that field.

The Court: Well, I will hold now, so that it will save time for all concerned, that I give no weight to any testimony [522] heretofore introduced by the plaintiff or the intervener that goes to the question of the special competency of the witness or his ability to perform functions, but that I am only giving weight to such testimony as heretofore has been presented that goes to the legal position that the witness occupied and what his functions were as such. Therefore it is unnecessary for you to conduct a cross-examination to show how much or how little this witness knew or what his intellectual or other capacities or abilities were; because I will hold now that I am not giving any weight to that. So that it would therefore be redundant to offer any further testimony along that line. I didn't consider that the plaintiff's testimony was along that line, although it might have had that implication to you.

So in order to clear that up, I will make that ruling now so that the decks will be cleared of that matter. You needn't put any cross-examination in on it, because I am not going to give any weight to any part of the plaintiff's testimony that is concerned with that field. [523]

* * *

(Testimony of Michael J. Curry.)

The Court: I did not want to make that too narrow a distinction. In other words, there may be cases where the functions that were performed, and that were explored in the direct examination were of such a nature that it might be difficult to wholly separate the manner of doing from the function itself. But I merely wish to indicate that I did not see any point in just developing the theme as to the competence which functions were performed, because I felt that that was immaterial.

Mr. Adams: At this time I will proceed with a new subject.

Q. Mr. Curry, do you recall that in December, 1942, and January of 1945 there were estimates made of the 1942 income and excess profits tax liability?

A. I do not recall it definitely.

Q. Don't you recall, Mr. Curry, that there was correspondence between Mr. Schumacher and Mr. Elsey at or about that time with respect to estimates of the tax liability for the year 1942?

A. I have a recollection of that, yes, sir.

Q. I would like to show you Railroad's Exhibit 273, a telegram to DeGraff, dated March 2, 1943. Is that a copy of a telegram which you sent to Mr. DeGraff at or about that date? A. Yes, sir.

Mr. Adams: I will now read this to the Court:

"New York, March 2, 1943, D. C. DeGraff, Western Pacific Railroad Company, 526 Mission Street, San Francisco, California. Wire date.

"At the conference with accountants here yester-

(Testimony of Michael J. Curry.)

day decided file consolidated tax returns including subsidiaries you list. In view this we filed yesterday request for extension time to May 15. Am hopeful will be granted and will advise you promptly. Glad you are preparing necessary working schedules and tentative declared value excess profits tax returns and expect forward latter part this week. Our understanding regarding that consent not in accord with yours. See Paragraph I, Page 2, instructions for form 1120 which in our opinion requires such consent. This has been confirmed with the revenue agent here, [525] who states forms of consent have been printed and are available for 1942 returns. Procedure same as last year. Signed M. J. Curry."

I will offer the document as Defendant's 6.

Mr. Clark: If it please your Honor, may we also have the notations offered as a part of this exhibit, particularly the writing "M.C.V., o.k., M.J.C."

Mr. Adams: That is correct. That appears upon it.

Q. Mr. Curry, that is in your handwriting, is it not? A. It is.

Mr. Phleger: And also the notation that the telegram was charged to the Western Pacific Railroad Company.

Mr. Adams: The document is offered in its entirety. It carries also Mr. Curry's office stamp "M.J.C. March 3, 1943." Will you hand it to the Clerk so that it may be marked?

(Testimony of Michael J. Curry.)

(Telegram referred to was thereupon received in evidence and marked Defendant's Exhibit 6.)

Mr. Phleger: Your Honor, I do not like to interrupt, and perhaps it is wrong, but the telegram to which this is an answer is an important part of this series. For instance, it is addressed to Mr. Curry in his capacity as vice president of the Western Pacific Railroad Company, which I think is important. I do not like to break in, but if he introduces a wire which is an answer to another, it might save time if he would introduce the wire to which it is a reply. [526]

Mr. Clark: They were separate exhibits on the deposition, your Honor.

Mr. Adams: I have no objection, your Honor. It seems as if this were a one way street, however, and my purpose in offering this document hasn't anything to do with the fact just announced by counsel. Does your Honor feel that it is necessary for me to introduce papers requested by counsel?

The Court: I do not think so. It would be up to the other side to put in the other telegram. Sometimes we can facilitate matters if it will save time.

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's Exhibit 6, your telegram to Mr. DeGraff of March 2, 1943, you see in the first line it reads "at conference with accountants here yes-

(Testimony of Michael J. Curry.)

terday decided file consolidated returns including subsidiaries you list." Do you note that?

A. I do.

Q. At the date that telegram was sent, Mr. Curry, March 2, 1943, it is the fact, is it not, that neither the firm of Whitman, Ransom, Coulson & Goetz nor Mr. Polk had been retained to do any tax work?

The Court: That is an established fact. This was about three weeks before that.

Mr. Adams: I am just directing the witness' attention to that.

Q. That is a fact, is it not? [527]

A. Well, they were employed early in 1943 but I can't recall just what date. But if this was before or after, it is my impression it was before they were appointed.

Q. Referring to the conference mentioned in the telegram of March 2, 1943, do you recall the conference which is referred to there?

A. I do not.

Q. You have no recollection of it whatever?

A. I have no recollection of it.

Q. Who were the accountants to which the telegram referred?

A. Lybrand, Ross Bros. & Montgomery, I believe.

Q. You knew that at the time? A. Yes.

Q. Now, it is the fact, is it not, that this conclusion to file a consolidated return was reached

(Testimony of Michael J. Curry.)

before the Whitman Ransom firm had been employed as tax counsel?

A. That is my recollection.

Mr. Phleger: Perhaps it will help if I make this statement:

Mr. Adams: May I ask that objections be stated in the ordinary style?

Mr. Phleger: I will object to further questions along this line. It is our theory that all of these occurrences which took place prior to March 15, when the economic unity was severed, that is, the decision of the United States Supreme Court which destroyed the economic unity, are irrelevant and immaterial. At the time that is just being testified to, the plaintiff corporation was the owner of all of the stock and there was outstanding a decision of the Circuit Court of Appeals which in effect said that it was going to have the equity or an interest in the equity of the reorganized road. The event which made the change had not yet taken place. Now, I did not make that objection, because I did not want to be in a position of making objections, but that is our position and I think all of this is not material, just as I think that all the evidence they are going to introduce of what happened back in 1917 with respect to consolidated returns is also not material. The thing that is material is what was done after the economic unity was severed on March 15, 1943.

Mr. Adams: Mr. Phleger, counsel in his opening examination asked these questions:

(Testimony of Michael J. Curry.)

"Q. Now, Mr. Curry, did you ever prepare a tax return? "A. No, sir.

"Q. For either the corporation or the company?

"A. No, sir."

Later on:

"Q. Mr. Clark, this testimony is directed to what time?

"Mr. Phleger: I will do that.

"Q. What period of time are you referring to in the testimony you have just given?

"A. Up to the year 1942, as I recall." [529]

And another question asked by counsel for the plaintiff, the witness' attention was directed to the returns for '42, '43 and '44, and he answered that to them. In each case he saw the returns, he answered, when Miss Valouch presented them to him. He inquired of her whether they were in satisfactory form and if Mr. Polk approved them, and then he signed them. My cross-examination is within the lines just opened.

The Court: Now what was the question?

Mr. Phleger: If I may say, I did not object to a question. I wanted to state my position with respect to this line of testimony, and there was no question before your Honor at the moment.

Mr. Clark: I think the subject of inquiry, was, your Honor, as to whether or not Whitman, Ransom, Coulson & Goetz were tax counsel at the time this telegram was sent.

Mr. Adams: I have the question, your Honor.

(Testimony of Michael J. Curry.)

The Court: All right.

Mr. Adams: The question is this:

Q. As a matter of fact, Mr. Curry, this conclusion to file a consolidated tax return for the year 1942 was reached, was it not, before Whitman, Ransom, Coulson and Goetz firm had been employed as tax counsel?

The Court: You mean the decision that is referred to in this telegram, Defendant's Exhibit 6?

Mr. Adams: Yes, your Honor. [530]

The Court: Written on March 3, was it?

Mr. Adams: March 2.

The Witness: March 2.

The Court: Well, that is obvious. The answer is "yes." I will answer for the witness.

The Witness: That is right.

The Court: Of course it was before. It was on March 2 and the Coulson firm wasn't employed until the 25th.

Mr. Adams: March 23 is the date of the letter which initiated the suggestion of employing that firm. I think the record accurately shows that.

Q. Now, Mr. Curry, did you, pursuant to the decision that was made at this conference, file a tentative consolidated return on or about March 15, 1943? A. It is my recollection we did.

Q. And that tentative consolidated return was the return of the parent company?

A. Yes, sir.

Q. And included the subsidiaries? A. Yes.

(Testimony of Michael J. Curry.)

Q. Including the Western Pacific Railroad Company, is that right? A. Yes, sir.

Q. Did anyone tell you to sign that return?

A. Tell me to sign it? [531]

Q. Yes.

A. I don't know that I understand just exactly what is meant by telling me to. It was placed before me and I asked if it was all right, and if it had Mr. Polk's o.k., and when I was told "Yes," then I signed it.

Q. And you bear in mind that you are now speaking of the tentative return that was filed March 15, 1943? A. Yes, sir.

Q. And is it your testimony that you were told that return had Mr. Polk's approval?

A. Yes, all returns that were placed before me had his approval. I always inquired of that.

Q. How about the return for the year 1941? Did that one have Mr. Polk's approval?

A. No.

Q. Now bearing in mind we are speaking of the tentative return of March 15, 1943, did that one have Mr. Polk's approval? Was that your understanding?

A. No, that was before the time they were employed.

Q. Now then, my question was, relating to that tentative consolidated return, did anyone tell you to file that return—strike that—to sign that return?

A. Well, Miss Valouch informed me of the de-

(Testimony of Michael J. Curry.)

cision, and I signed the tentative return.

Mr. Adams: May I have an answer to my question, your Honor, [532] whether anyone told him to sign the return?

The Court: Well, what was the witness' answer?

(Answer read by the reporter.)

The Court: Well, it is in part an answer.

Mr. Adams: Could I have yes or no along with the explanation, please?

The Court: Can you answer that yes or no? Did someone tell you to sign the returns?

The Witness: Yes.

Q. (By Mr. Adams): Who told you to sign the returns? A. Miss Valouch.

Q. Did you customarily receive instructions from her?

A. I customarily didn't receive instructions, but I relied on her in the tax matters.

Q. Isn't it the fact, Mr. Curry, that she was working on those income tax returns under your supervision and direction?

A. Yes, that is true.

Q. You were her boss in regard to those matters? A. That's right.

Q. No one else told you to file the returns?

A. No.

Q. Now the tentative consolidated returns show an estimated tax, did it not, of $4,209,948, and in that connection I will refer to Railroad Defendant's Exhibit 282, as introduced on the taking of the depositions, being a letter or copy of a [533]

(Testimony of Michael J. Curry.)

letter, addressed by Mr. M. J. Curry, Treasurer, to the Collector of Internal Revenue, Second District of New York, Customs House, New York, of March 15, 1943, and ask that the Clerk hand this document to the witness.

(Document handed to witness by the Clerk.)

A. Yes, sir.

Q. And it is a fact, then, that the tentative return showed an estimated tax in that amount?

A. Yes.

Mr. Adams: May I offer the document as Defendant's Exhibit 7?

The Clerk: Exhibit 7.

(The letter of March 15, 1943, Curry to Collector of Internal Revenue, was thereupon received in evidence and marked Defendant's Exhibit 7.)

Q. (By Mr. Adams): Was a quarter of this estimated tax paid when the return was filed?

A. Yes, sir.

Q. Where were the funds obtained to make that payment? A. From the railroad company.

Q. That is to say, from the railroad company then being administered by the trustees?

A. Trustees, that's right.

The Court: Did the holding company have any income at that time? [534]

Mr. Adams: No, your Honor, the holding company had a loss which was entered in that return and which operated as consolidated returns always

(Testimony of Michael J. Curry.)

operate, as one of the deductions.

The Court: Yes, I understand that. Did this loss of the holding company, in connection with the other stock—was that in connection with the other stock it held?

Mr. Adams: No, your Honor, it had no relation to the stock loss. The amount was, as I remember, approximately $350,000 and it was a current operating loss. I cannot give your Honor the details of that.

The Court: The expenses exceeded the income?

Mr. Adams: Yes, the expenses and more than the expenses—the current interest on the indebtedness of the plaintiff corporation was a part of that net loss.

The Court: I see.

Mr. Clark: It was accrued interest on the debts of the corporation that are subject of that November 22 agreement, later.

Mr. Phleger: The loss didn't come in, your Honor, till the claim for refund was filed in 1945, March 9.

Mr. Clark: That is the stock loss.

Mr. Phleger: The stock loss, I am referring to.

The Court: Yes. But we are talking now about——

Mr. Phleger: The other loss?

The Court: The other loss. That was what prompted my [535] inquiry, what was this loss upon which the tax of $4,000,000, or some odd dollars, was calculated.

(Testimony of Michael J. Curry.)

Mr. Clark: It was chiefly accrued interest on these loans.

The Court: That is the loss of the holding company, aside from the loss of the stock.

Mr. Clark: Yes, your Honor.

The Court: In the operating. All right, go ahead, Mr. Adams.

Q. (By Mr. Adams): Was the balance of the 1943 tax also paid with funds obtained from the reorganization trustees? A. Yes, sir.

Q. Now I would like to direct your attention to Plaintiff's Exhibit 39A, a letter from Mr. Schumacher to Mr. Nicodemus, dated March 23, 1943.

(Document handed to witness by the Clerk.)

Q. (By Mr. Adams): Now, Mr. Curry, directing your attention to Plaintiff's Exhibit 39A, being an original letter from Mr. Schumacher to Mr. Nicodemus, March 23, 1943, I call your attention to the first paragraph (reading):

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942."

Do you recall that talk?

A. I don't recall it. [536]

Q. You have no recollection of it?

A. I have not at the present time.

Q. When you say you have not at the present time, Mr. Curry, do you have any qualification in your mind?

(Testimony of Michael J. Curry.)

A. No, I have no recollection of the talk.

Q. Now do you have any recollection of discussing the subject matter of this letter, Plaintiff's 39A, with Mr. Schumacher?

A. I don't recall it.

Q. You have no recollection of it?

A. I have no recollection of it.

Q. Do you recall that in April, 1943, the firm of Whitman, Ransom, Coulson & Goetz was employed by the trustees to act as tax counsel?

A. Yes, sir.

Q. And do you know who originally recommended the employment of that firm as tax counsel?

A. I don't know who originated it.

Q. And you have no recollection of discussing that subject with Mr. Schumacher?

A. No, it is my recollection that he and Mr. Nicodemus discussed the matter.

Q. What is your recollection about that?

A. Well, my recollection is that Mr. Nicodemus and Mr. Schumacher talked over the matter of employing tax experts to handle our tax matters. [537]

Q. Did you participate—strike that. Were you present during any such discussion between Mr. Schumacher and Mr. Nicodemus?

A. No, not as I recollect.

Q. And when you speak of recollection about it, do you have in mind that either Mr. Schumacher or Mr. Nicodemus told you about that?

A. That's right.

(Testimony of Michael J. Curry.)

Q. And do you have a recollection as to which one told you? A. Mr. Schumacher told me.

Q. Now I hand you a copy of a telegram, Railroad Defendant's 293, dated May 7, 1943, addressed by you to Mr. DeGraff, charged to the account of the Western Pacific Railroad Company, and I will read the first sentence of this telegram (reading):

"Reference question income and excess profits tax returns 1942 colon tax lawyers have decided we should file consolidated returns, which will do on or before May 15."

Mr. Adams: Will you hand this to the witness, please?

(Document handed to witness by the Clerk.)

Q. (By Mr. Adams): Up in the upper left corner, the initial in green "M.C.V."; did you write that on the document? A. Yes.

Mr. Phleger: That is Miss Valouch?

Q. (By Mr. Adams): That is Miss Valouch?

A. That's right.

Q. And did you have in mind, in putting her initials on the document, to make sure that she saw it after it had been sent?

A. No, my recollection is that the copy was on my desk, and I read it and then marked it back to her for the tax files.

Q. The fact is, is it not, Mr. Curry, that no telegrams were sent out over your signature until you had seen them? A. That is correct.

(Testimony of Michael J. Curry.)

Q. Now you notice that portion which I read in the second line, beginning the second line, "Tax lawyers have decided we should file consolidated returns, which will do on or before March 15."

Do you recall the basis on which you made that statement, the information you had?

A. The information received from Miss Valouch, who received this telegram—that is, who wrote this telegram and placed it before me.

Q. Is your recollection clear that she prepared it? A. Yes, sir.

Q. Who were the tax lawyers to whom you refer?

A. Whitman, Ransom, Coulson & Goetz.

Q. Had you, prior to that time, received any advice from them with regard to the taxes for 1942? A. No.

Q. You have no recollection of any discussion with Mr. Polk prior to that date? [539]

A. I have no recollection of any discussion with Mr. Polk at that time.

Mr. Adams: I will offer the telegram as Defendant's Exhibit 8.

The Clerk: Exhibit 8.

(Telegram dated May 7, 1943, referred to above, was received in evidence and marked Defendant's Exhibit 8.)

Q. (By Mr. Adams): Where were the consolidated returns for 1942 prepared, Mr. Curry?

(Testimony of Michael J. Curry.)

A. At the 37 Wall Street office.

Q. And was data obtained from San Francisco, from the general auditors there, in connection with the preparation of the returns? A. Yes, sir.

Q. From whom did you obtain that data?

A. From Mr. DeGraff, the general auditor.

Q. Who did the actual work of preparing the return? A. Miss Valouch.

Q. And did Mr. Reilly also work on the preparation of the return?

A. Yes, Mr. Reilly did.

Q. And he worked in the New York office upon that? A. Yes, we provided a desk for him.

Q. Had Miss Valouch, in prior years, worked on the preparation of tax returns?

A. Yes, sir. [540]

Q. Did you consider that she was competent to do that work? A. I did.

Q. And when she was working on the returns, is it the fact that she was working under your supervision? A. Yes.

Q. You were treasurer of the parent corporation; is it the fact, is it not, that for many years you had under your charge the preparation and filing of the income tax returns? A. Yes, sir.

Q. When we speak of Mr. Reilly we are speaking of the accountant who was engaged after Mr. Polk and the firm of Whitman, Ransom, Coulson & Goetz were engaged as counsel? A. That is correct.

Q. Do you know whether or not Mr. Polk him-

(Testimony of Michael J. Curry.)

self took any part in the actual preparation of the returns? A. I do not.

Q. Who signed the 1942 tax returns?

A. I did.

Q. Who brought them to you for signature?

A. Miss Valouch.

Q. Do you recall any discussion with her at the time you signed the returns?

A. I do not recall any particular discussion. I just asked her if they were in proper shape for my signature, and she said, "Yes," and had Mr. Polk's approval, and so I signed them.

Q. Do you recall testifying upon the taking of your deposition as to the discussions which took place with respect to your signature upon the returns?

A. I recall the statement I made at that time.

Q. The reference I have refers to the following year, so I won't take it up at this time.

Do you recall noting the amount of tax due at the time you signed the 1942 returns?

A. Yes, sir. [542]

Q. Did you note that it was approximately the amount of the taxes shown upon the tentative returns that had been filed in the preceding March?

A. Yes, it was my practice to note those figures on the original of the return.

Q. Did you express satisfaction that these final returns indicated that the work done on the tentative returns had been rightly done?

(Testimony of Michael J. Curry.)

A. I do not recall what my reaction was.

Q. Do you have any recollection of that one way or the other? A. I have not.

Q. Do you have any recollection of expressing satisfaction of that sort at any time in reference to the 1942 returns?

A. I have no such recollection.

Q. Do you recall the occasion on or about May 18, 1943, when you met with Mr. Polk and Mr. Nicodemus and others in Mr. Nicodemus' office to discuss the 1942 returns? A. I recall the conference.

Q. Do you have any recollection whether or not at that time you expressed satisfaction that the work done on the tentative returns before Mr. Polk was engaged had been well done, as was indicated by the work done after he was engaged?

A. I have no such recollection.

Q. Would you say you did not express that satisfaction? A. No, I have not. [543]

Q. You have no recollection about it one way or the other? A. I have not.

Q. Have you any recollection about feeling satisfied about the tentative returns coming out the way the final returns did? A. No, I have not.

Q. Did Mr. Polk at any time tell you to sign the 1942 returns? A. No.

Q. Was he present when the returns were signed? A. No.

Q. Did you consider that you were signing the returns in the ordinary course of business?

(Testimony of Michael J. Curry.)

A. Yes.

Q. Do you now have any objection to the manner in which the returns for 1942 were prepared?

Mr. Phleger: If your Honor please, I submit that this is obviously not a proper question. It is not within the scope of the direct examination and hasn't any application to any issue in the case. What the witness believes about it now, it seems to me, is utterly and wholly incompetent, and immaterial.

Mr. Clark: We object to it upon the ground it is incompetent, irrelevant and immaterial. [544]

* * *

The Court: I do not quite see the point of that question. I will sustain the objection.

Mr. Adams: I will ask the next question, which will [545] doubtless meet the same ruling, but for the purpose of the record has anyone occupying any position with the plaintiff corporation, to your knowledge, ever criticized the returns?

Mr. Phleger: I object to that also on the ground it is irrelevant, incompetent and immaterial.

Mr. Adams: I understand the ruling to be the same.

The Court: You say, has anyone ever criticized the returns. Now, that is a pretty broad question.

Mr. Clark: We will add to the objection that it is vague, indefinite and unintelligible.

The Court: Isn't that one of the ultimate questions the Court has to decide?

(Testimony of Michael J. Curry.)

Mr. Adams: What I am seeking to get is a statement which I think we can establish better in some other fashion, if your Honor thinks these questions are objectionable. But no one has ever criticized, and there is no criticism in this case of the returns that were filed. The only question in the case is brought forth by our adversaries predicated on the fact that the returns filed were well filed, that all the work done in that regard was well done, and the claim here is to a share in the accomplishment, treating the matter as an accomplishment and getting the tax liability settled with the Federal Government. But I take it there is no criticism, can be no criticism, of the returns as filed, and, on the contrary, plaintiff's own case and the interveners' own case is [546] predicated upon the returns as filed.

The Court: You mean as to the amount involved?

Mr. Adams: As to all the work done in filing the returns. I take it it is conceded that had it not been for the fact that consolidated returns had been filed, these gentlemen would not be in court with a claim.

The Court: Of course not; that is obvious.

M. Adams: And the returns themselves as filed are not criticized in any respect or in any particular, in view of our adversaries' contention, as I understand it, that everything done in that connection was well done.

(Testimony of Michael J. Curry.)

The Court: You are trying to get the witness to say that it was a perfectly lawful thing to have filed the returns in the way they were filed, and that by doing so the plaintiff thereby debarred itself from prosecuting this suit? That is a question I have to decide.

Mr. Adams: Your Honor, I am not seeking an argument that bars the plaintiff from filing the suit. I want to establish a fact in the case, which is, as I understand it, that there is no criticism of these returns whatever.

The Court: You mean that as filed the returns were correct?

Mr. Adams: And the job was well done. There is no criticism of anything that was done in the way of filing the returns and the making of the settlement.

The Court: You mean the skill with which the returns [547] were prepared and filed?

Mr. Adams: I mean the accuracy, the compliance with regulations in all respect.

The Court: There is probably no dispute about that, is there?

Mr. Phleger: No, inasmuch as the net result was that there were no taxes for any of the years, I do not see how anybody could criticize the final result taxwise.

The Court: Then you are in agreement on that, if it is material.

Mr. Phleger: It is not material at all.

Mr. Adams: The taxes were paid, Mr. Phleger.

(Testimony of Michael J. Curry.)

There was $4,200,000 paid for 1942, and then there was a stipulation that that should be treated straight across the board and try not to change it.

Mr. Phleger: Yes, and also a claim for refund for the entire amount also.

Mr. Adams: Which was disallowed in the course of the settlement.

Mr. Phleger: It was disallowed by your agreement or by the agreement of the parties.

Mr. Adams: By the stipulation entered into. The whole matter has been stated in the stipulation.

Mr. Phleger: That is right.

The Court: Let us get ahead. [548]

Q. (By Mr. Adams): When you filed the 1942 returns, Mr. Curry, you knew, did you not, that the plaintiff corporation on a separate return basis would have had no tax to pay?

A. The parent?

Q. Yes. A. I did, yes. [549]

* * *

Q. (By Mr. Adams): Mr. Curry, bearing in mind that you knew when you filed the 1942 returns that the corporation on a separate return basis would have had no tax to pay, did it occur to you at that time that this was any reason why the corporation should have filed a separate return?

A. It did not occur to me at that time.

Q. Who arranged for the filing of the 1942 consolidated returns?

A. Who arranged for the filing?

(Testimony of Michael J. Curry.)

Q. Yes.

A. On my instructions, they were filed.

Q. That is to say, it was done under your supervision and direction? A. That is correct.

Q. As the officer in charge of that matter?

A. That is right.

Q. Where were they filed?

A. They were filed at the Customs House, Second District, in New York City.

Q. Who wrote the letter transmitting the returns to the collector at the Customs House?

A. It was the custom for Miss Valouch to write the letters and [551] place them before me for signing.

Q. Is that what happened in this case?

A. It is my recollection, yes.

Q. And you saw those letters at that time?

A. Yes, sir.

Q. And signed them yourself? A. Yes, sir.

Q. Before you signed the 1942 returns you discussed them with Mr. Schumacher, did you not?

A. I have no recollection of discussing them with them. I might have informed them what the net result was, and so forth.

Mr. Adams: May that portion of the statement beginning, "I might have" go out?

The Court: Very well.

Mr. Adams: I will ask that the deposition of Mr. Curry be handed to him and direct his attention to page 2822, and particularly at page 2823.

(Testimony of Michael J. Curry.)

Q. Do you have that before you, Mr. Curry?

A. I have that before me.

Q. Directing your attention to page 2822, the third, fourth, fifth and sixth lines, being a portion of a letter identified in the deposition as Interveners' Exhibit 6, and which I believe is Plaintiff's 39A——

Mr. Clark: That is correct, Plaintiff's trial exhibit 39A.

Q. (By Mr. Adams): Do you notice the statement, "Mr. Curry has [552] told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942"?

A. Yes, sir.

Q. Does that refresh your recollection that you did discuss that subject with Mr. Schumacher before the returns were filed? A. Yes, it does.

Q. Do you have any recollection of what the subject of that discussion was?

A. No, sir, I have not.

Mr. Phleger: May the record show you are referring now, Mr. Adams, to the tentative return?

Mr. Clark: Filed on March 15, referred to in the letter of March 23, whereas your other interrogation was directed toward the time of filing, which was May 15, months later.

Mr. Phleger: The letter you are quoting from shows that right on its face, "with reference to the tentative tax return."

Mr. Adams: I will read the whole letter:

(Testimony of Michael J. Curry.)

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942. The return filed was a tentative one, an extension having been granted until May 15, 1943, to file a final return. As one of the trustees of the Western Pacific Railroad Company, I am looking to you [553] to cooperate with Mr. Matthew, general counsel for the trustees, in protecting the trust estate in the preparation of the final returns,"

this being a letter dated March 23, 1943, addressed by Mr. Schumacher to Mr. Nicodemus.

Q. Did Mr. Schumacher offer any objection to the filing of consolidated returns for the year 1942?

A. No, sir.

Q. Do you remember that on May 18, 1943, a conference was held at the office of Mr. Nicodemus at which you, Mr. Polk and Mr. Nicodemus and Miss Valouch and Mr. Reilly were present?

A. Yes.

Q. What was discussed at that conference, according to your best recollection?

A. Well, it was tax matters, but as I recall it was mostly on the question of depreciation.

Q. What was discussed on the subject of depreciation?

A. I was a listener, I did not take part in the discussion at all.

Mr. Adams: Would you read the question?

(Question read.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Adams): Your answer, Mr. Curry, referred to what you did; my question was, if you will please tell me, what the discussion was so far as you recall it?

A. I don't remember.

Q. Have you any recollection of it at all? [554]

A. I have not.

Q. What other tax matters besides depreciation do you recall were discussed at that conference?

A. I have no recollection.

Q. You have no recollection of any of them?

A. No.

Q. Do you have any recollection that there was discussed at that conference the consolidated returns for the year 1942 which had been filed three days prior to that time?

A. I do not recall that that was discussed.

Q. You have no recollection about it one way or the other?

A. I have no recollection about it.

Q. Do you have any recollection that there was discussed at that conference anything relating to the advantages of filing the consolidated return instead of separate returns for 1942?

A. No, I have no recollection.

Q. No recollection about that at all?

A. No.

Q. Do you have any recollection of knowing at or about that time that there were substantial advantages in the filing of consolidated instead of separate returns covering the year 1942?

(Testimony of Michael J. Curry.)

A Generally I understood there were advantages, yes, sir.

Q. Did you understand that they were substantial in the way of tax monies? A. Yes, I did.

Q. Do you have any recollection at that conference—I asked you this before but I will again—whether or not you expressed satisfaction that tentative returns filed under your supervision before Mr. Polk was engaged turned out, according to his word, to have been well done?

A. I have no such recollection.

* * *

Tuesday, February 8, 1949—2:00 P.M.

* * *

Q. (By Mr. Adams): Mr. Curry; continuously from the year 1927, is it the fact that you had in charge, and it was your responsibility, the filing of the income tax returns for the Western Pacific group? A. It was.

Q. Was it the practice of the group to file consolidated or separate returns?

Mr. Phleger: Now, may it please the Court, I don't want to, because I am not objecting to this, waive any objection. In fact, I will interpose an objection to the point that the practice prior to the critical day of March 15, 1943, with respect to the filing of tax returns; is irrelevant, incompetent and immaterial. All during that period they were in the relationship of parent and subsidiary, and after this date they were strangers.

(Testimony of Michael J. Curry.)

The Court: Well, of course, that really goes to the effect of the testimony, doesn't it, Mr. Phleger? The fact is not disputed, is it?

Mr. Phleger: Not whatever. I would so stipulate. I consider it, however, absolutely immaterial.

The Court: You are simply reserving your right to argue [537] the effect of that, if it is not material; then it wouldn't have any effect in that case.

Mr. Phleger: That's right. But I don't want to see the record encumbered with immaterial evidence.

The Court: Well, you have preserved the record so far as your claim is concerned.

Mr. Clark: Well, may it please your Honor, so far as the fact is concerned, it is true that all through this period consolidated returns were filed. But that doesn't necessarily connote an automatic practice. There is certain evidence which could be produced before your Honor to the effect that at least in 1941, with respect to excess profits taxes, they sat down and considered whether a separate or consolidated return would be more advantageous for the group. And if we are going to get into that as being an automatic practice followed, then even in addition to Mr. Phleger's point—which we concur in, that it is immaterial, directed to any time before——

The Court: Well, the witness wasn't asked about an automatic practice, he was asked whether or not from 1927 on consolidated returns were filed.

Mr. Clark: I thought the question involved the word "practice", your Honor.

(Testimony of Michael J. Curry.)

The Court: Well, it may be. Would you read that?

(Question read by the reporter.)

The Court: I will sustain the objection on the ground of [558] "practice" but if you wish to bring out the facts, if in fact consolidated returns were filed,——

Mr. Clark: That is the fact.

The Court: Then that is stipulated to, is it?

Mr. Clark: Yes, so far as we are concerned.

Mr. Phleger: And so far as we are concerned.

* * *

The Court: It has been already agreed that consolidated returns were filed from that time on, while the witness was connected with the companies. Now if you want to ask some more questions following that, go right ahead. [560]

* * *

Q. (By Mr. Adams): What was done about filing the returns, Mr. Curry, from 1927 forward, as far as you know, in the way of consolidated or separate returns?

A. Consolidated returns were filed during that period.

Q. And you knew that at that time, that the returns were filed? A. I did, yes. [561]

Q. What is the difference between a consolidated and a separate return?

A. A consolidated return takes into account the net results of the affiliated companies and a separate

(Testimony of Michael J. Curry.)

return would not consider those things at all. The corporation would file its own return.

Q. Where were the consolidated returns customarily prepared?

A. In the office at 37 Wall Street, New York.

Q. Was it customary to file them without their being sent back to the San Francisco office for checking?

A. I think the final work was done in the New York office and a copy of the return sent to San Francisco.

Q. After it had been filed?

A. After it had been filed, yes, sir.

Q. Was data obtained from San Francisco in connection with the preparation of the returns in the New York office? A. Data were, yes, sir.

Q. Who conducted the correspondence with the San Francisco office on the subject?

A. It was conducted over my name invariably. I think sometimes Mr. Schumacher asked for information of Mr. Elsey.

Q. Aside from the occasions when Mr. Schumacher asked Mr. Elsey for information, it is a fact, is it not, that every letter that was sent to the San Francisco office with respect to taxes was a letter which you sent? [562] A. Yes, sir.

Q. And every telegram was a telegram sent under your name? A. Yes, sir.

Q. And you read the telegram before it was sent? A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. And every bit of correspondence coming to the New York office, other than such as Mr. Elsey might write Mr. Schumacher in regard to income tax, was correspondence addressed to you?

A. Correct.

Q. Was that for the reason that you were in charge and responsible during all those years for the tax returns for the group?

Mr. Phleger: May I interrupt here to ask counsel to fix the time? Are you referring to right up to date or are you referring up to the filing of the 1942 returns or the 1943 returns? The testimony by this witness has been very clear and especially to the contrary with respect to these later years.

Q. (By Mr. Adams): Mr. Curry, you may answer the question and make a distinction as to time, if you have any.

A. May I have the question, please?

(Question read.)

A. Yes, sir.

Mr. Clark: May it please your Honor, we still haven't the time fixed. Does this relate to the period prior to March 15?

Mr. Adams: Let us ask the witness.

Q. What period of time did you have in mind, Mr. Curry, when [563] you answered the last question? A. The entire period from 1927 on.

Q. And when you say "on" you mean until the closing of the New York office? A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. Who did the actual work of preparing the returns in the New York office?

A. Miss Valouch did, in collaboration with certified public accountants.

Q. There was a time, was there not, a considerable period of time, before Miss Valouch worked at this? A. Yes.

Q. Prior to the time when she worked at it was there a Mr. Andrews in the office who worked at it?

A. That is right.

Q. And he was an accountant in that office under your direction and supervision?

A. That is correct.

Q. So during the years when he was doing that work, he was doing it under your direction and supervision? A. Yes, sir.

Q. And thereafter when Miss Valouch came on, she similarly worked in the same fashion?

A. That is right.

Q. Were the returns to your knowledge ever submitted to the [564] board of directors of the parent corporation before they were filed?

A. No.

Q. The fact is, is it not, that the returns were filed without being taken up with the board of directors? A. Yes.

Q. Who signed the returns for the years 1927 to 1941?

A. They were signed by me as treasurer of the

(Testimony of Michael J. Curry.)

corporation, and I believe by Mr. Schumacher as president of the corporation in the early years.

Q. What was the customary method of allocating the tax among the members of the group that was due under the consolidated returns?

Mr. Phleger: I am going to object to that. He uses the word "practice" again. The facts speak for themselves with respect to the returns, and I think it is utterly immaterial what the practice was or what was in fact done prior to this date.

The Court: I am inclined to agree with that. Do you think anything could be gained by discussing that matter? What difference would it make what the practice was? I know that in the opening argument you and Mr. MacKinnon also argued that there was a relationship here that existed throughout the years, and that that has a bearing upon the issues here. Do we need a lot of evidence on that? [565]

* * *

Mr. Adams: The simple things are all you need to know. The idea that the plaintiff corporation has a claim is not a tax expert's idea at all. It hasn't any source in taxes. Part of our case is the tax loss is not involved at all. This claim is an afterthought that occurred years later, and yet the only facts that you needed to know to have that thought were the [569] very facts that were published and known to everybody who participated in the transaction.

(Testimony of Michael J. Curry.)

The Court: But that is not the claim of your opponents. The issues which they raise are that they did not get a chance to do that, that is all. They may have known about it.

Mr. Adams: This witness is one of our adversaries, the president of the plaintiff corporation.

The Court: Did you have any stock in any of these companies?

A. I did not.

Q. And did you represent any group of stockholders whose interest you were particularly concerned with? A. No, your Honor.

Q. Now, how about Mr. Schumacher? Was he a stockholder?

A. I don't know as to that. I don't think so. I might qualify my previous statement; the only stock I had in the corporation were qualifying shares.

Q. Now did Schumacher represent any particular group of stockholders in any of these companies?

A. Not to my knowledge, your Honor. [570]

* * *

Mr. Phleger: May I make a very brief statement? We conceive it utterly immaterial what this witness or any other witness may have known about the tax incidents of these returns, because we do not believe people lose rights because they know something.

We further submit that neither this witness nor any other witness knew the legal or economic consequences of the matters just mentioned; namely, the

(Testimony of Michael J. Curry.)

consolidated return and the utilization of the loss—knowledge that a consolidated returns is filed or that a loss is used in it is entirely different than a realization of what rights, if any, that may give rise to.

But finally, we press this point again. Counsel seems to assume that this witness is the president of the plaintiff [571] corporation. But during all of this time he was also the vice-president, assistant treasurer, and assistant secretary of the defendant corporation. And how what he knew could in any way bind the plaintiff in this litigation or its stockholders is beyond me.

The Court: Well, I am inclined to believe knowledge hasn't got anything to do with this case.

Mr. Adams: Well, if that is so, your Honor, how does it happen that the plaintiff on the examination of this witness took up the very question of his knowledge? Because this is directed to the inquiry opened by the plaintiff. Let me read to your Honor some of the examination by the plaintiff in this case, in which it is said first:

"I want to establish the manner in which the witness conducted the various positions which he held."

Then the Court asked:

"What you are trying to show is that the president was just a presiding officer and a sort of figurehead?"

And counsel said:

That is correct."

And then, when it came to tax matters, your Honor, on his own examination counsel said: (reading):

(Testimony of Michael J. Curry.)

"Q. Did you ever prepare a tax return?"

That is over this whole period of years. Now counsel opened that up. And then I asked the witness, and the witness uses [572] this ambiguous expression: "Taxes are Greek to me." And that is on the record.

Now I think within the fair scope of cross-examination, I should be entitled to show the facts which were opened by opposing counsel, and with respect to which my present inquiry is now related.

The Court: Well, of course, I think that whether it was opened by plaintiff or not is really immaterial in this case. It wouldn't make any difference how much or how little knowledge. Knowledge would neither create nor defeat the cause of action here.

Mr. Adams: Well, your Honor, as our opponents have said,——

The Court: If they had a cause of action and it existed and they did not assert it and thereby lost their right to assert a cause of action because of something that happened, then they lost it. It wouldn't make any difference whether they knew about it or not, would it?

Mr. MacKinnon: Yes, definitely.

The Court: It would?

Mr. MacKinnon: Certainly it would. If this man knew of his rights and failed to assert his rights,—not this man, but this corporation—after all is said and done, irrespective of what else you say, he was the president of the corporation. The

(Testimony of Michael J. Curry.)

corporation was responsible for making him its president, and what this witness knows is imputable to the corporation. [573] His knowledge and the knowledge of the corporation is of very substantial moment on the basis of the bankruptcy bar, to say only one thing; also on the basis of whether or not they have the right and lost it.

The Court: Well, I never heard of that doctrine before. You mean that a person either has or hasn't a right, depending upon whether he knows he has one or not?

Mr. MacKinnon: I didn't say that, your Honor. I said at the inception of my argument in this case that you had what I conceive to be a basic legal question. That basic legal question is untrammelled by the color that has been injected into the case. I said there was a second step, and the second step is whether or not their failure to act when they should have acted precludes them from acting today. That is before you get down to duality, domination.

The Court: That is a different matter, Mr. MacKinnon, from knowledge. Yes, if a person has a cause of action and fails to take a step which he should have taken, he may lose his cause of action. But his knowledge hasn't got anything to do with it unless there has been some overreaching on someone else's part that has caused him, or prevented him, from doing it. But whether he knows that he has a cause of action or not, whether you know or

(Testimony of Michael J. Curry.)

you don't know that you have got a cause of action, if the Statute of Limitations runs, for example, you are finished.

Mr. MacKinnon: That is right. [574]

The Court: And I don't think it makes any difference in this case, either, whether there was any knowledge or not. What difference does that make? It is a question of whether or not there was a failure to assert in the proper forum a claim if one existed.

Mr. MacKinnon: That is right.

The Court: And if there was a failure to do it, if it is excusable on equitable or legal grounds, that is recognized.

Mr. MacKinnon: That is right. I will go along on that.

The Court: So knowledge hasn't got anything to do with it. I don't think it makes any difference who knew what and how much each man knew.

Mr. MacKinnon: I think it is a matter of considerable moment what knowledge a person possesses, because in evaluating the conduct or lack of conduct on the part of a person, his knowledge and his competency is a matter of considerable moment.

The Court: Well, let's assume he had very full knowledge of the matter. Now wouldn't that be just as much to your disadvantage as to your advantage?

Mr. MacKinnon: I don't think so, your Honor.

Mr. Levy: That is why the interveners are in

(Testimony of Michael J. Curry.)

the middle, your Honor; the stockholders sitting here are not chargeable with this man's knowledge, any more than the railroad company who held him as their vice-president.

Now if he knew everything that was involved in this matter, [575] couldn't Mr. MacKinnon say he knew it as president but didn't know it as vice-president, or that he didn't use his knowledge for the advantage of one rather than the other?

The Court: Well, I think I am still of the view that that knowledge is purely an immaterial issue here. But I think each side should be permitted to make whatever record you want within reasonable limit, so that it doesn't take too long, and so that it cannot be said that there wasn't proper opportunity to make the necessary record of what you want to present.

Mr. MacKinnon: May I just make one remark, your Honor, and then I will sit down, because I don't see any sense in prolonging this discussion. This case, in my opinion, could have been made in a very different way if plaintiffs in stating what they now state that they had that as their objective. Now bear in mind, I told you as these documents were going in, that they wanted coloring. They put in coloring. They have attempted to develop the fact that this man was a thorough incompetent. They have done that. Now then, can the defendants do other than meet that?

The Court: I don't think that is so, Mr. Mac-

(Testimony of Michael J. Curry.)

Kinnon. I didn't get any impression that there was any attempt to show he was an incompetent. It was developed that he was the kind of man that he was, and Mr. Schumacher took him over because he knew him, he had had experience, and he put him in charge of certain activities of this company. He had certain authority, [576] and certain authority he didn't have. I don't think there was any attempt to show inherently that the cause of action arose because of any lack of ability or competence on the part of this man; but that it arose just because of the fact that that was the position that he was occupying. I didn't get any such impression from the testimony.

Mr. MacKinnon: I am glad your Honor didn't because I believe it to be a concerted effort.

Now then, one more word, and let me say another thing——

The Court: Oh, I think this witness did nine or ten thousand dollars' worth of work for this company, without any question.

Mr. MacKinnon: I haven't any doubt about it.

The Court: Whatever he did, he didn't have to be a big shot to earn that much money, not according to some of the salaries we read about in the papers.

Mr. MacKinnon: Well, in railroad parlance, I think he had to be pretty big. But one thing more. We are not only meeting the plaintiff's case here, your Honor, we are meeting the interveners' case.

(Testimony of Michael J. Curry.)

The Court: Well,——

Mr. MacKinnon: Now, if your Honor says that the interveners cannot state their case, then obviously we could materially revamp our case. But we have got to meet whatever they present. [577]

The Court: Well, I think you should do that, and I am not going to prevent you in any way from doing it. The only trouble is, I think we are spending too much time on cross-examination of this particular witness when we should be getting to the issues of this case. We should be getting down to the point where you are going to present the matters upon which you have spent time in preparation, and as a part of your case. But there is too much being dragged into the cross-examination of this particular witness that is really out of place in cross-examination.

Mr. Adams: Your Honor, I don't think there is anything yet that I have asked that is not fairly within the scope of the direct examination.

The Court: Well, of course, if you want to stretch the rubber band far enough, I suppose you can ask anything under the guise that it is cross-examination.

Mr. Adams: I don't think I have asked anything, your Honor; I would say most seriously that the effort of which we have been conscious since the pre-trial on the part of the plaintiff to do what he calls "streamline the case", and bearing in mind the knowledge we have of this record, has been

(Testimony of Michael J. Curry.)

what appears to us an effort to substitute for the real facts an artificial picture.

The Court: Well, the witness was only asked in detail concerning the tax transactions in 1943, '44, and '45.

Mr. Adams: He was asked, your Honor, over the whole period. [578]

The Court: Oh, yes, he was asked some general question that was preliminary.

Mr. Adams: Right.

The Court: And then within the guise of the argument that you are entitled to cross-examine on that, you want to go back and take up year by year everything that was done in tax matters. I won't allow it in cross-examination because I just think it is too far afield to go into every year and every tax return that was filed in all the years before the critical period; merely because the witness on direct examination said that he didn't have very much knowledge of taxes, or that he signed the returns that were prepared for him in this particular matter, in this particular critical period, relying upon the advice of those who prepared them for him. Now just to go back over all the prior years and go into that seems to me to be too wide a latitude in cross-examination.

Mr. Adams: Your Honor will, I am sure, indulge me if I should make some offers and perhaps dispose of a matter that way, bearing in mind that some of these matters are material.

(Testimony of Michael J. Curry.)

The Court: Suppose you ask another question now so we can get the record in shape. What is it you have particularly in mind now?

Mr. Adams: The question was, What was the customary method of allocating the tax under the tax returns?

The Court: Now you are speaking of the years prior to 1943? [579]

Mr. Adams: I am speaking of the customary practice, the method that was pursued all the way through, including the year 1942.

Mr. Clark: Going back as far as 1927, your Honor, is that correct?

Mr. Adams: Prior to that, yes, that's right. That was when Mr. Curry's knowledge of the matter begins. That is correct. It begins in '27 and goes through '42.

The Court: Now was there an objection to that?

Mr. Phleger: There was an objection upon the ground it was not proper cross-examination and it was irrelevant, incompetent, and immaterial.

The Court: I will sustain the objection.

* * *

Q. (By Mr. Adams): Now, Mr. Curry, it is the fact, is it not, that during the very years in question here, that is, 1942, 1943 and 1944, also 1945, you personally examined tax data, tax clippings, matters related to taxes that came through your office? A. I personally saw it, yes.

Q. Yes, and checked it off? [580]

(Testimony of Michael J. Curry.)

A. And checked it off.

Q. And why did you do that?

A. For the simple reason that I wanted it to come to the attention of Miss Valouch and our tax counsel. I did not understand tax matters.

Mr. MacKinnon: I move to strike out that remark on the ground it is not responsive.

Mr. Clark: I think it is, your Honor.

The Court: He asked him why he did it. Now when you ask the witness why he does something, he can tell you everything and throw in the kitchen stove besides.

Mr. Adams: Very well.

Q. Was it because you didn't understand taxes that you underscored particular portions of those pieces of publicity?

A. That is right, that is quite right; because at times Miss Valouch would bring my attention to the matter of depreciation, and if I saw a clipping that mentioned depreciation, I would send it in to her. I might not have understood it myself.

Q. Now, Mr. Curry, turning to the 1942 returns, you recall we were discussing that before, at the noon hour? A. Yes, sir.

Q. Did Mr. Polk discuss with you the problem of changeover from retirement to depreciation accounting?

A. I have no recollection that he did.

Q. Do you recall we were speaking of the conference of May 18 in [581] Mr. Nicodemus' office?

(Testimony of Michael J. Curry.)

A. Yes, I had in mind qualifying that statement.

Q. Yes, go right ahead and do so.

A. I wanted to say that at this conference the matter of depreciation and retirement was discussed.

Q. Did Mr. Nicodemus participate in the discussion? A. He did.

Q. Did you? A. I did not.

Q. Did Mr. Polk discuss the reasons for filing consolidated returns? A. I don't recall.

Q. You have no recollection about that?

Mr. Phleger: I submit that that question has been asked and answered three times.

The Court: Yes, I think so.

Mr. Adams: This is cross-examination, your Honor.

The Court: Well, I know, but it still was asked and answered before on cross-examination.

Q. (By Mr. Adams): Did Mr. Nicodemus discuss at that meeting, to your recollection, anything having regard to the reasons?

Mr. Clark: Just a moment, the reasons for what, your Honor?

Mr. Adams: For filing consolidated returns. I had reference to the last preceding question. The answer was "no", as [582] far as you recall?

A. I don't recall that he did.

Q. (By Mr. Adams): Now do you have any recollection that it was agreed at the conference that Mr. Polk would write a letter setting forth

(Testimony of Michael J. Curry.)

the information that he had presented at the conference?

A. It is my recollection that he stated he would.

Q. And I would like you now to look at Plaintiff's 50, a letter of May 20, 1943, addressed to you by Mr. Polk, and I will also show you Interveners' Exhibit 29A, a letter dated May 21, 1943, and addressed by you to Mr. Nicodemus.

The Court: That is Interveners' Exhibit on deposition?

Mr. Adams: On the deposition, yes, your Honor. I will have it in a moment.

(Documents handed to the witness by the Clerk.)

Mr. Adams: Interveners' 29A, your Honor, is a letter of May 21, 1943, on the letterhead of the Western Pacific Railroad Company, 37 Wall Street, New York, from M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, addressed to Mr. F. C. Nicodemus, 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"Enclosed is copy of Mr. Polk's letter of May 20, 1943, in re: tax matters. Very interesting! I suggest it might be well for you to drop over Monday morning, the 24th, and discuss with Mr. Schumacher, who will [583] leave that afternoon for San Francisco.

"Yours very truly,

M. J. CURRY."

(Testimony of Michael J. Curry.)

And there is attached to it, the letter which I have just read, Interveners' 29B, a copy of plaintiff's Exhibit 50, namely, Mr. Polk's letter to Mr. Curry of May 20, 1943.

Now there is also annexed to Interveners' 29B, Interveners' 30, but I take it that has no part in this.

Mr. Clark: Oh, I think not. No, that has no part of that portion of the exhibit, or the purpose for which it was put in. That copy of the letter, your Honor, is an identical copy to Plaintiff's trial Exhibit 50 already in evidence.

The Court: I understand that. But counsel is referring to something else, though?

Mr. Adams: Yes, with counsel's permission, I would like to remove Interveners' 30 which is annexed to this.

Mr. Clark: That is all right. Interveners' 30 doesn't bear on this particular situation.

Mr. Phleger: I would like to recall that on direct testimony, this fact that that letter was sent was testified to.

Mr. Adams: I don't understand that that is any objection to cross-examination.

Mr. Phleger: Well, I don't know. We think it is. It is already in evidence.

(Document handed to witness.) [584]

The Court: It does make the record a little bigger.

Mr. Adams: Very well. I haven't asked any

(Testimony of Michael J. Curry.)

question about it, I have just handed it up to the witness, your Honor.

The Court: You are not offering it in evidence?

Mr. Adams: No, I am about to offer Interveners' 29A, the letter of May 21, 1943, which I have just read to your Honor, as Defendant's Exhibit 9.

The Clerk: Exhibit 9.

(Letter dated May 21, 1943, referred to above, was received in evidence and marked Defendant's Exhibit No. 9.)

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's 9, your letter of May 21, 1943, addressed to Mr. Nicodemus—that is correct, isn't it?

A. Yes, sir.

Q. You notice your letter begins by saying: "Enclosed is a copy of Mr. Polk's letter of May 20, 1943, in re: tax matters. Very interesting!"

When you wrote this letter to Mr. Nicodemus, had you read Mr. Polk's letter of May 20?

A. I had.

Q. Had you called it to the attention of Mr. Schumacher? A. I had.

Q. What was Mr. Schumacher's comment?

A. He returned it to me with the notation, "Interesting letter" and my recollection is that he handed it to me and directed that [585] I send a copy to Mr. Nicodemus.

Q. And do you recall any further discussion with Mr. Schumacher at that time about Mr. Polk's letter? A. I do not.

(Testimony of Michael J. Curry.)

Q. Did you discuss it with Mr. Schumacher at any later date? A. Not that I can recall.

Q. Now when you said in your letter to Mr. Nicodemus, "Very interesting!", what were you referring to?

A. Well, it was an extensive letter on tax matters and Mr. Schumacher remarked it was very interesting, and I felt the same way.

Q. You hadn't anything particularly in mind beyond that?

A. No, I had nothing in mind particularly. It was a long letter, and some of it I didn't quite understand. [586]

Q. Don't you think it is likely that you were referring to the paragraph in the letter which related to the possible use of the corporation's stock loss in the 1943 return?

A. When I stated "Very interesting"?

Q. Yes.

A. No, I do not recall that that was particularly in my mind.

Q. Do you recall that it was in your mind at all?

A. I do not, no.

Q. You have no recollection about that one way or the other? A. No, I have not.

Q. I would like to show you Railroad's Exhibit 313.

This, your Honor, is Mr. Curry's file copy of Defendants' 9 just offered in evidence, so I do not want to encumber the record with an additional

(Testimony of Michael J. Curry.)

piece of paper, but I will read from the file copy the notation on the file copy that I wish to bring to your Honor's attention. The notation is "Mr. Nicodemus came to office Saturday a.m. 22," and I will hand the document to the witness and ask if that is his memorandum (handing document to witness). A. It is.

Q. You wrote that on your file copy at or about that date? A. Yes, sir.

Q. Do you recall that Mr. Nicodemus did come to the office on the 22nd of May in reference to that letter?

A. I am quite sure he did. I stated here specifically that [587] he came to the office.

Q. Do you have any present recollection of it beyond what is stated in your memorandum?

A. No, my present recollection is that he discussed the matter with Mr. Schumacher and I was informed that he had done so, and I noted it on the file copy.

Q. When you say "discussed the matter," what matter do you mean?

A. The matter of that letter of May 20, 1943.

Q. Do you recall sending a copy of Mr. Polk's letter of May 20 to anyone else other than Mr. Nicodemus?

A. I do not recall, but the copy of my letter would show if it went to anybody else at the time.

Q. I will hand you Exhibit 9, and you have before you the copy of your letter right there in your hand, have you not, Mr. Curry?

(Testimony of Michael J. Curry.)

A. No, there is nothing to indicate on here that a copy went to anybody else but Mr. Nicodemus.

Mr. Adams: I would like to have Railroad's Exhibits 404 and 405. These are documents, your Honor, made a part of the depositions and I will try to describe them briefly. No. 404 is a letter from Mr. Elsey to Mr. Schumacher dated July 20, 1943, enclosing a copy of a letter from a man named Arthur Jansen of Barron's Weekly. Mr. Elsey also encloses a draft of a letter and memorandum prepared for Mr. Schumacher's signature in reply. The subject matter is "Income Tax." No. [588] 405 is Mr. Schumacher's letter to Mr. Jansen, together with Mr. Curry's letter to Messrs. Whitman, Ransom, Coulson & Goetz, and Mr. Polk's letter to Mr. Curry in reply, having reference to the same subject matter. These exhibits contain statements and I will read briefly one statement in here to give your Honor an idea of why we bring this before the Court.

Mr. Phleger: From what?

Mr. Adams: From 404-B.

Mr. Phleger: 404-B?

Mr. Adams: The draft of answer that was sent forward by Mr. Elsey to Mr. Schumacher, proposed to be given to Mr. Janson, and actually afterwards given to him. [589]

* * *

Mr. Adams: Your Honor, I would like to hand to the witness Railroad's Exhibits 404-A to F and 405.

(Testimony of Michael J. Curry.)

The Court: Is this the correspondence we have been talking about?

Mr. Adams: Yes. 405-A, -B and -C. I will ask him one or two questions about them. I have not made the offer because I want to identify the witness' own notation.

Q. Mr. Curry, referring to Defendants' 404-A, Mr. Elsey's letter to Mr. Schumacher of July 20, 1943, will you please read into the record your own memorandum notation appearing upon the face of that letter?

A. It reads "Discussed 7-26-43. Consulted counsel F. C. N. [593] (Read this.) He suggested I take up with tax counsel. Signed, M. J. C. 7-26-43."

Mr. Phleger: Will it be stipulated that tax counsel was Mr. Polk of the Coulson firm?

Mr. Adams: Yes.

Q. That is correct, is it not, Mr. Curry?

A. That is correct.

Q. Turning to 405-A, the file copy of the letter as actually sent out by Mr. Schumacher to Mr. Jansen on July 30, 1943, will you please read your own notation appearing at the top of that letter?

A. 405-A?

Q. Right.

A. The notation in my handwriting reading "M. C. V."

Q. That refers to Miss Valouch?

A. That refers to Miss Valouch. "Note last paragraph Polk's letter. When you are ready for him let me know and will arrange conference. Signed, M. J. C."

(Testimony of Michael J. Curry.)

Underneath that, "Mr. Schumacher, note Mr. Polk's letter next attached." Initialed, "M. J. C."

Q. Mr. Polk's letter next attached is the letter marked Exhibit 405-B that you have in your hand?

A. 405-B?

Q. Yes. A. Yes, sir. [594]

Q. Will you read into the record your notation appearing on the left-hand side of the paragraph?

A. It states in my handwriting "Discussed 8/4/43, M. J. C. to M. C. V."

Q. Does that refresh your recollection that you had a discussion at or about that time with regard to the application to change over from retirement to depreciation basis for tax purposes?

A. Yes, it refreshes my recollection. [595]

* * *

Mr. Adams: What Mr. Phleger asks is that it be noted that Exhibit 405-B, Mr. Polk's letter to Mr. Curry, is addressed to Mr. Curry as Vice President, Western Pacific Railroad Company.

Mr. Phleger: That is the document as to which the witness has just been interrogated.

Mr. Adams: That is correct.

Q. One question, Mr. Curry, about these papers. In view of the fact that Mr. Jansen's inquiries related to taxes, how did it happen that you took the matter up first with Mr. Nicodemus rather than Mr. Polk?

A. I do not recall the circumstances, but it might have been due to the fact—I will change that. It was probably due to the fact that Mr. Schu-

(Testimony of Michael J. Curry.)

macher asked me to confer with Mr. Nicodemus about it.

* * *

Q. (By Mr. Adams): Mr. Curry, do you recall during the course of your examination by Mr. Clark, you referred to a call which Messrs. Offerman, Jaffin and Wershil made upon you?

A. I do.

Q. In that connection I would like to call to your attention a portion of your deposition, pages 3567 and 3568.

May Mr. Curry have the deposition?

(Deposition handed to witness by the clerk.)

Q. (By Mr. Adams): Now, Mr. Curry, beginning 8 lines from the bottom of page 3567, I will read the questions and answers as [596] put to you by Mr. Clark, the answers as you gave them:

"Q. Were you present at the meeting in Mr. Nicodemus' office with Mr. Jaffin, Mr. Wershil and Mr. Offerman? A. No, sir.

Q. Directing your attention to the first paragraph of that memorandum, does that first paragraph refresh your recollection in any way?"

Now, your Honor, I see I read something referring to a memorandum, and I must now read what precedes the part I have just called to Mr. Curry's attention to make it plain.

The Witness: May I ask what page?

Q. (By Mr. Adams): It is the same page, 3567.

As Mr. Curry did not have the page before him, suppose we start afresh.

(Testimony of Michael J. Curry.)

The Court: Very well.

Q. (By Mr. Adams): Mr. Curry, at the top of page 3567, the following question appears by Mr. Clark:

"Q. Mr. Curry, I show you our exhibit No. 61 in this proceeding, which is copy of a memorandum made by Mr. Nicodemus on December 8, 1943, and ask you if that would serve to refresh your recollection as to the time when Mr. Wershil and Mr. Jaffin and Mr. Offerman came to your office at 37 Wall Street (handing to witness)?

A. Yes, sir, it does. [597]

Q. Would you please state first in what way this memorandum refreshes your recollection?

A. I recall the circumstances as stated in this memorandum.

Q. Have you read the entire memorandum?

A. I have.

Q. Were you present at the meeting in Mr. Nicodemus' office with Mr. Jaffin, Mr. Wershil and Mr. Offerman? A. No, sir.

Q. Directing your attention to the first paragraph of that memorandum, does that first paragraph refresh your recollection in any way?

A. Yes. I recall distinctly that it was late in the afternoon, that they did come in, and I did state to Mr. Nicodemus at the time that I did not feel competent to answer their questions and I was sending them over to him.

Q. Do you recall what questions they discussed with you?

(Testimony of Michael J. Curry.)

A. They were in my office but a short time, and they wanted to know if I didn't think that the corporation should get something for the stock that they were turning over to the reorganization committee. And at that time I saw that it was going to be something that perhaps I couldn't answer properly, and I turned [598] them over to Mr. Nicodemus."

Mr. Clark: Suppose you read the next question.

Mr. Adams: I will. The next question, your Honor, is:

"Q. Do you have in mind, Mr. Curry, the agreement of November 22, 1943?

A. Did I have in mind or do I have in mind?

Q. I am asking if you now have it in mind. Do you know what it is I have in mind in mentioning the agreement of November 22, 1943?

A. Yes, sir."

Did you suggest that anything further be read, Mr. Clark?

Mr. Clark: No, that is fine.

Q. (By Mr. Adams): Now, at the time your deposition was taken, Mr. Curry, did you give those answers to those questions? A. I did.

Q. And were they true?

A. Yes, they were.

Q. And are they also true now according to the best of your recollection? A. They are.

Q. Now, then, I would like to direct your attention to a portion of your deposition, the one you

(Testimony of Michael J. Curry.)

have in your hand, beginning at page 3582, beginning three lines from the top of page 3582, and I will read it:

"Q. What was the first occasion, Mr. Curry, upon [599] which you ever heard of the idea that the corporation might share in tax savings on account of the consolidated returns?"

Mr. Adams: And I may say, your Honor, these questions were put at the time by Mr. Clark.

"A. Well, as I remember, it never occurred to me until the time the suit was filed.

Q. When you say at the time the suit was filed, you are referring to the stockholders' suit that was filed in New York in the middle of 1946?

A. Yes, sir.

Q. Do you mean that the first time that you heard any discussion of that was after the suit was filed? A. Yes, sir."

Q. Now, at that time, when your deposition was taken, did you give those answers to those questions? A. Correctly, yes, sir.

Q. And were they true?

A. Yes, they were.

Q. And are they true now, according to your best recollection?

A. According to my best recollection, they are.

Q. Now, you will notice that in your last answer on that page 3582, that I just read, you say that the first time you ever heard any discussion of the idea that the corporation might share in tax savings on

(Testimony of Michael J. Curry.)

account of the consolidated return was after [600] the stockholders' suit began in New York in 1946?

A. Yes.

Q. Now, that being so, Mr. Curry, it means, does it not, that at the time you had the discussion with Messrs. Offerman, Jaffin and Wershil in December, 1943, that idea was not discussed at that time?

A. The matter of the tax saving was not discussed at that time.

Q. And in your answers that you gave to Mr. Clark when he examined you a day or so ago in connection with this subject, I take it that you did not then intend to say you discussed that subject with Messrs. Offerman, Jaffin and Wershil?

A. I don't quite follow you on that.

Mr. Adams: Would you read it, please. If you don't follow it, Mr. Curry, you are entitled to say so and tell me what is not clear about my question.

(Question read.)

Mr. Adams: Well, I don't wonder that you didn't understand it. It is a little hard to understand. I stated it too long, possibly.

Q. You have in mind, Mr. Clark asked you upon your testimony here in court a few days ago, when you said something about the incident when Mr. Offerman, Mr. Jaffin and Mr. Wershil came in to see you—you remember that?

A. Yes, sir. [601]

Q. Now, then, in the answers you gave to Mr.

(Testimony of Michael J. Curry.)

Clark about that when he was examining you last week, it is true, is it not, that you did not intend to say that you discussed with Messrs. Offerman, Jaffin and Wershil the idea of the tax saving for this tax loss?

A. Well, that is correct. May I continue? My recollection is that about all they said to me was that they felt the stockholders should get something for that stock that was turned over to the reorganization committee; no tax savings mentioned.

Q. That is your best recollection at this time, of the occasion when they saw you? A. Yes, sir.

Q. And that occasion was in December, 1943?

A. Early in December, as I recollect.

Q. Right. That is all I have about your deposition at the moment, Mr. Curry.

Now, do you recall learning, Mr. Curry, in the early part of January, 1944, that the amounts which had been accrued on the railroad company's books for Federal taxes had been reversed?

A. Yes, sir.

Q. And what was your understanding at that time? That is, in January, 1944—what was your understanding as to why those accruals had been reversed?

A. Well, it was my understanding that the matter of tax returns hadn't been decided by the Internal Revenue Bureau and [502] they set that amount up as a contingent tax liability.

Q. Well, you are speaking now of the reserve,

(Testimony of Michael J. Curry.)

are you not? A. The reserve, yes.

Q. What you and I were talking about was about the reversal of the tax accruals; the reversal came, did it not, before the reserve was set up?

A. Yes, it came in December, as I recall.

Q. It was the reversal in the December account?

A. That is as I recall it.

Q. And those December accounts were closed during the month of January and published in that month, of the following year? That is, 1944?

A. That is my recollection.

Q. And there had been before that time a large sum accrued on the railroad company's books for account of Federal taxes? A. That's right.

Q. And then in the December accounts, that accrual was reversed so that the year's statement showed nothing accrued for those taxes?

A. That's right.

Q. And you learned about that in January, 1944? A. I did.

Q. Now, then, what was your understanding at that time as to why the accruals had been reversed?

A. Well, as I stated a while ago, there was a question as to [603] whether or not the returns filed would be accepted by the Internal Revenue Bureau, and it was anticipated that losses would erase any possibility of tax payment.

Q. When you speak of losses erasing tax payment, you mean the major one was the corpora-

(Testimony of Michael J. Curry.)

tion's big stock loss? A. Yes, sir.

Q. That is the $75,000,000 item?

A. Yes, sir.

Q. And it is the fact, is it not, that that came to your attention in January of 1944?

A. That is my recollection.

Q. And was it your understanding that that loss would be employed as a deduction in a consolidated return to be filed by the parent company?

A. It is my recollection it was talked about at that time, yes.

Mr. Adams: May I ask that Plaintiff's 56 be handed to the witness?

(Document handed to the witness by the clerk.) [604]

The Witness: Plaintiff's 56 is before me.

Q. (By Mr. Adams): And that is Mr. Elsey's letter to Mr. Schumacher of January 24, 1944?

A. Mr. Elsey's letter to Mr. Ehrman with a copy to Mr. Schumacher.

Q. You are correct, and I had particular reference to the letter from Mr. Elsey to Mr. Schumacher, but looking at that one, Mr. Curry, isn't that letter which you have in your hand the original letter from Mr. Elsey to Mr. Schumacher?

A. No, this is a copy.

Q. May I look at it? I have reference, Mr. Curry, to the letter from Mr. Elsey to Mr. Schu-

(Testimony of Michael J. Curry.)

macher.

A. That is defendant's exhibit 319.

Q. Yes, that is a part of Plaintiff's 56, marked also Railroad Defendant's Exhibit 319, that is the original letter, isn't it?

A. Now, this is the original letter, yes, sir.

Q. Have you looked at that? Will you please do so? A. Yes, sir, I have read it.

Q. Does that serve to assist your recollection that in January of 1944 you did learn that it was proposed to set up a reserve fund and that the tax accruals had been reversed?

The Court: He has already testified that that was the case.

Mr. Adams: Yes, I am asking him a question to which I believe the answer is in the affirmative.

The Witness: I do not recollect seeing this letter. There [605] is nothing on it to indicate that I noted it.

Q. What about that line (indicating)?

A. Well, there is a green underscoring under the word "consolidated," indicating that I had read it.

Q. In connection with the reversal of the tax accruals and the proposition to set up a reserve fund, you knew, did you not, that it was contemplated that a consolidated return would be filed and that the corporation's stock loss would be a reduction in the consolidated return? A. I did.

Q. Was Mr. Schumacher also aware of those facts?

(Testimony of Michael J. Curry.)

A. It goes without saying he got the letter, marked it, and was aware of the facts, yes, sir.

Q. You discussed the matter with him?

A. I consulted Mr. Schumacher on everything like that, everything that came in, that I was seeking advice on, and so forth. I consulted with him or with Mr. Nicodemus.

Q. You do recall, do you not, later on you discussed the reserve with Mr. Schumacher?

A. I do.

Q. And you discussed the reversal of the tax accruals with him? A. Yes, sir.

Q. Do you recall whether or not you discussed these subjects with Mr. Nicodemus or Mr. Campbell? A. I do not recall that I did. [606]

Q. You have no recollection about it at this time? A. Not at this time, no, sir.

Q. When it did come to your attention that it was proposed to file consolidated returns, and that the corporation's stock loss would be a deduction on them for the year 1943, did it occur to you that there was anything inappropriate in filing such returns?

Mr. Phleger: I am going to object to that, counsel, if it please the Court, I do not think that is proper cross-examination, and I do not think his answer would be material or relevant, if it were.

Mr. Adams: I think it is appropriate, your Honor. It is a question of his state of mind.

The Court: If he answers "yes" to that ques-

(Testimony of Michael J. Curry.)

tion, I could make a finding in the case that there was an admission by the defendant that it was inappropriate. I do not think that that sort of question is factual in nature. If this witness were to say "yes" to that question, or, rather, to say "no," to that question, then he could be answering that question as an officer of the defendant and I could make a finding based upon that answer, if it were appropriate, in the decision of the case, and I could make it the other way, too.

Mr. Phleger: It is the other way, then.

Mr. Adams: We have no fear of the facts. We feel, your Honor, in a case of this sort that instead of drawing inferences [607] based upon some matters that are not in contest, some facts that are now established that we all agree upon, that your Honor should have the true setting. It is in pursuance of an effort to develop the true setting, what these people did and how they acted, that I am asking these questions.

The Court: That is quite correct, Mr. Adams, but it never adds anything, it does not aid the Judge for a man who is on the witness stand, identified with one of the companies that is involved in the litigation to say whether he thinks it was right or not. You would not need me to decide it then.

Mr. Adams: His bona fides is an issue in the case. It is drawn in issue by the interveners.

Mr. Phleger: There is no issue of this witness' bona fides at all.

(Testimony of Michael J. Curry.)

Mr. Adams: I said the interveners.

Mr. Clark: We are not concerned with what Mr. Curry did or what he knew. This man held two positions. We have shown that and demonstrated. That makes all this line of questioning utterly immaterial. [608]

* * *

The Court: I think it is immaterial. If you attach any great significance to it, I will overrule the objection and let him answer it.

Mr. Adams: Your Honor, I hear the interveners admit that it is immaterial. I would like to hear them say they consider that there is nothing in this case in the way of intentional misconduct. When I hear that, then I may concede it is immaterial. I have not heard it yet.

Mr. Clark: We are not willing to concede that at this point, your Honor, but we will make this statement to your Honor, that Mr. Adams will hear argument from us at the close of this case to the effect that the good or bad faith of these dual officers makes not one bit of difference on the basis of the plaintiff's theory, with which we concur, as to the effect of that duality. In my opening statement I said perhaps the evidence would develop some other second theory, may it please the Court, that we felt it our duty to develop before you. In our view that has developed to some extent on the prima facie case already in.

Mr. Adams: Your Honor has heard the statement.

(Testimony of Michael J. Curry.)

Mr. Clark: It simply amounts to the thing your Honor has heard of a conscious and deliberate use by certain actors in this transaction of the corporation for the benefit of the company, [610] and that has been developed by Mr. Phleger's examination of this witness.

The Court: That is all admitted. There is no question about that. The only question is whether there is any materiality to any claim that there was any conscious fraudulent motivation involved. The facts are what they are, that there was a consolidated return filed, these were the officers of both corporations, and the effect of filing the return was that the operating company, as a result of the loss of the parent company, was free from a certain income tax liability. Those facts are apparently not subject to any dispute in the case. We could have stipulated to that a long time ago. If that does not give rise to a cause of action——

Mr. Clark: There is one further fact, your Honor, and that is that the management of the tax matters was taken over by employees selected and paid for by the defendant company.

The Court: Whatever those facts are, I will overrule the objection. If you wish the witness to answer this question, irrespective of what you are asking your opponents to concede, if you think that that is germane to the case. Repeat the question.

Q. (By Mr. Adam): Mr. Curry, at this time in January, 1944, when it came to your attention

(Testimony of Michael J. Curry.)

that it was proposed to file consolidated returns for 1943 and that it was proposed that the corporation's stock loss should be a deduction in the returns [611] offsetting the income of the court's trustees, did it occur to you that there was anything inappropriate in filing such returns?

A. No, sir.

Q. Did it occur to you that it was in any way unfair to the parent corporation for such returns to be filed——

Mr. Clark: Same objection, your Honor. It is absolutely immaterial.

Mr. Adams: I think it is within your Honor's ruling.

Mr. Clark: Considering the positions this man held.

Mr. Phleger: It is also improper cross-examination.

The Court: He is a witness in the case. I will overrule the objection.

The Witness: It did not.

Q. (By Mr. Adams): Did anyone suggest to you at any time before you heard of the stockholders suit in the middle of 1946 that it was in any way unfair to the corporation for such returns to be filed? A. Not to my recollection.

Q. You knew in January, 1944, did you not, that the corporation on a separate return basis would have no taxable income? A. I did.

Q. Did that fact in any way suggest to you that

(Testimony of Michael J. Curry.)

the corporation should file separate returns?

A. No, it did not.

Q. You knew in January, 1944, did you not, of the November 22, [612] 1943, agreement which called for the transfer of the company's stock held by the corporation and the reorganization committee? A. I did.

Q. Did the fact that this transfer was contemplated suggest to you that the corporation should file a separate return for 1943?

A. It did not.

Q. Was that suggestion ever made to you by anyone before you heard about the stockholders' suit in the middle of 1946? A. No, sir.

Q. I would like to show you a document, being a letter addressed by you to Mr. Nicodemus on March 9, 1944, identified as Railroad Defendant's Exhibit 406. Mr. Curry, is that a file copy of a letter you wrote to Mr. Nicodemus on March 9, 1944? A. It is.

Mr. Adams: Your Honor, this letter refers to the matter of the Delaware franchise tax of the plaintiff corporation, and it winds up with the following end paragraph:

"In view of conditions confronting the corporation filing of consolidated federal income and excess profits tax, etc., I should like to have your advice as to whether payment of the 1941 tax should be made on or before April 1."

Q. Mr. Curry, referring to the portion I just

(Testimony of Michael J. Curry.)

read, does the reference to the 1941 tax refer to Delaware franchise tax? [613]

A. It does.

Q. Would you please read into the record your handwritten notation upon this letter?

A. It reads: "Mr. Campbell discussed this with me and agreed we should request extension to July 1, 1944."

Q. Do you recall that there was a discussion to that effect at that time? A. I do.

Mr. Adams: I offer the document as Defendant's No. 10.

Mr. Clark: Being formerly identified as what, Mr. Adams?

Mr. Adams: As Railroad Defendant's Exhibit 406.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 10.)

Q. (By Mr. Adams): Mr. Curry, referring to our exhibit 10, when you wrote "in view of conditions confronting the corporation filing of consolidated federal income and excess profits tax, etc.," did you assume that Mr. Nicodemus knew that consolidated returns would be filed for 1943?

Mr. Phleger: I object to that upon the ground it is not proper cross-examination. It is utterly immaterial.

The Court: I will sustain the objection. I do

(Testimony of Michael J. Curry.)

not see the relevancy of that, whether he assumed that somebody else knew something.

Mr. Adams: I will ask the next question, your Honor, to indicate what I think is the materiality.

Q. If this was your assumption, what basis did you have for making it? [615]

* * *

The Court: What is the difference between what you are offering and what has already been offered?

Mr. Phleger: That is my point.

The Court: I do not think there is anything that has developed on cross-examination. Is there any dispute about this matter?

Mr. Adams: Oh, yes.

The Court: What is the dispute? [615A]

Mr. Adams: The dispute is this, your Honor, and this is what we expect to hear when we get to argument, that certain gentlemen on our side of the case took this income tax matter in charge and handled it. I am not talking about Mr. Curry. I am talking about certain gentlemen on our side of the case. So they produced Mr. Curry and had him testify that taxes were Greek to him. He has volunteered it three times. All he did was to look at the returns that Miss Valouch presented to him, and when she said they were all right he sent them in blind reliance on what she said, and because she told him that Mr. Polk had looked at them. When this case is brought to your Honor, it is going to be contended, as stated here time and again, that

(Testimony of Michael J. Curry.)

the people on our side, on the defendant's side, handled this transaction and took that belonging to the plaintiff for their own. Now, your Honor, we propose to show that that is not so, and it is partly through this witness. He is not the only witness, but it is our purpose to establish to your Honor's satisfaction, as we think we can, that everybody on the corporation's side who was significant, Mr. Schumacher, Mr. Curry, and the other gentlemen, knew all about this. They were in a position to act for the corporation. They were free. They did not bring it to Judge St. Sure. Why? Because nobody thought of the idea.

The Court: Mr. Adams, I am following what you are saying, but what has that to do with the letters that this witness wrote to Nicodemus about the franchise taxes? How does what you are [616] proving here show anything differently from the letters already put in evidence on the same subject matter? Because he wrote two letters, does that make any difference?

Mr. Adams: No, your Honor. The interveners put before Mr. Curry certain matters about the Delaware franchise tax and he testified they were unrelated to the federal income tax, and I propose to show they were not.

Mr. Clark: Oh, no.

Mr. Phleger: That is not so.

Mr. Clark: The letter is in evidence.

The Court: I may be in error. My memory may

(Testimony of Michael J. Curry.)

not be good, but I think in one of those letters the interveners introduced Curry to Nicodemus, he referred to the fact that there might be some decision necessary with respect to the franchise taxes because of the filing of the consolidated returns.

Mr. Phleger: Exactly.

Mr. Clark: Exactly. [617]

* * *

Q. Referring to that letter of March 9, 1944——

The Court: Defendants' Exhibit 10.

Q. (By Mr. Adams) (Continuing): ——Defendants' Exhibit 10, Mr. Curry, you will notice your statement there in the last paragraph of that letter?

(Document handed to witness.)

A. Yes, sir.

Q. Now, when you wrote, "In view of conditions confronting the corporation, filing of consolidated Federal income and excess profits tax returns, etc.," was it your understanding that Mr. Nicodemus understood that consolidated returns were to be [628] filed for 1943? A. Yes.

Q. And what was the basis of your understanding of his understanding?

Mr. Phleger: Well, now, I am going to object to that. I didn't object to the previous question because I wanted to save time. But I think that is not proper cross-examination. I think it is wholly immaterial.

Mr. Adams: I shan't argue it, your Honor. If

(Testimony of Michael J. Curry.)

your Honor considers the question objectionable, I will accept the ruling.

The Court: Well, this is in March of 1944?

Mr. Adams: Yes, your Honor.

The Court: Well, the Coulson firm had already written a letter, hadn't they?

Mr. Adams: Oh, yes, yes, and given advice.

The Court: Concerning the matter?

Mr. Adams: That is right.

The Court: And there has also been evidence here as to this witness' knowledge of that letter.

Mr. Adams: Yes, your Honor.

Mr. Phleger: And that the letter was sent to Mr. Nicodemus.

The Court: And that the letter was sent to Mr. Nicodemus, yes.

Mr. Adams: That is correct.

The Court: That is already in. Now, what is the purpose of [629] this question?

Mr. Adams: We want to establish the relationship between the Delaware franchise tax problem of the plaintiff corporation and the fact that it was planned to file this return for the year 1943——.

The Court: Well, that was what he said in this letter.

Mr. Adams: Yes, that is correct. My last question addressed to Mr. Curry was what was the basis of his understanding that Mr. Nicodemus knew of the plan to file such consolidated returns.

The Court: Well, because he had already sent

(Testimony of Michael J. Curry.)

the letter, hadn't he, to him? That is, Coulson's letter to Nicodemus, which he had received? I think he has already testified to that.

Mr. Adams: Yes. That was May 20, 1943, some ten months before.

Well, I don't want to argue it further, your Honor.

The Court: Obviously this witness knew that Nicodemus knew that they were going to file these returns, because he had sent him all this data.

Mr. Adams: Well, if that would be stipulated by opposing counsel, we would have cleared that question immediately.

Mr. Phleger: After having said he doesn't want any stipulations, it is interesting, at least, that he asks for a stipulation. [630]

The evidence shows that this witness sent a copy of the paradoxical letter to Mr. Nicodemus shortly after it was received. There is no question about that. We put that in as direct testimony. What this man may have thought Mr. Nicodemus thought seems to me the height of immateriality and certainly not proper cross-examination.

The Court: Well, I think that that statement is correct, isn't it, counsel? What do you have to say as to that?

Mr. Adams: I didn't ask Mr. Curry what he thought Mr. Nicodemus thought.

The Court: You asked him what was the basis of his understanding as to what Mr. Nicodemus understood.

(Testimony of Michael J. Curry.)

Mr. Adams: What he knew about this. Now, that is quite a different matter from what people are thinking.

The Court: Well, what is it you want him to answer to that question?

Mr. Adams: What was the basis for his understanding that Mr. Nicodemus knew consolidated returns were to be filed for the year 1943 with the stock loss in them.

The Court: Can you answer that?

The Witness: Well, we had talked about consolidated returns beginning early in '43. Mr. Nicodemus was aware of it, and when I wrote the letter in March 9, 1944, my thought was that he knew that consolidated returns were to be filed.

Mr. Adams: For that year, for the year 1943?

The Witness: For the year 1943. [632]

* * *

February 9, 1949, 10:00 A.M.

Cross-Examination

(Resumed)

By Mr. Adams:

Q. Mr. Curry, did Mr. Polk ever direct you to sign any tax returns? A. No, sir.

Q. The same thing is true, is it not, with respect to the refund claim? A. That is correct.

Q. When you signed the 1943-1944 consolidated returns you knew, did you not, that the plaintiff corporation would not pay any tax on a separate return basis? A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. And when you signed the 1943 return—that was in July of 1944—you knew, did you not, of the reserve fund for contingent tax liability that had been set up by the trustees? A. Yes, sir.

Q. And when you signed the 1943-1944 returns, did you expect that if any taxes were to be assessed upon them, that the taxes would be paid by the companies having income in the group? [636]

* * *

Q. (By Mr. Adams): Do you undersatnd the question, Mr. Curry?

A. Let me have it again, please.

Q. When you signed the 1943-44 returns, who did you expect would pay the taxes if any should be assessed for those years?

A. Well, it was my thought that the company would pay it out of the reserve.

Q. Did you ever suggest to Mr. Polk that he had any duty to advise you or the plaintiff corporation of possible claims of the corporation against other members of the group?

A. Did I ever direct him to advise me?

Q. My question was: Did you ever suggest to him that he had any such duty?

A. No, no. I depended upon him to advise me of our rights, if any, so far as the corporation was concerned.

Q. Did you ever tell Mr. Polk that you depended upon him to advise you of any rights of the corporation against other [638] members of the group?

(Testimony of Michael J. Curry.)

A. I don't recollect that I did.

Q. That is the fact, is it not? You did not give him any such statement? A. I did not.

Q. Did you ever make any such suggestion to Mr. Coulson? A. I did not.

Q. Did Mr. Polk or Mr. Coulson or anyone else connected with the Whitman firm ever refuse to answer any question you asked with regard to taxes? A. No.

Mr. Adams: Now I will ask that Plaintiff's Exhibit 69, Mr. Curry's letter to Mr. Polk of May 5, 1947, be exhibited to the witness.

(Document handed to witness by clerk.)

The Witness: Yes, I have it.

Q. (By Mr. Adams): That is, of course, your letter to Mr. Polk, is it not, Mr. Curry?

A. Yes, sir.

Q. And you prepared that letter?

A. Our attorneys, Mr. Nicodemus, and my recollection is, Mr. Osborn assisted in it.

Q. Yes. That is all I have on that paper.

(Document returned to clerk by the witness.)

Q. Now, with regard to the closing of the New York office, what [639] we have in mind, Mr. Curry, is that the office was physically closed on May 1, 1945? A. As of April 30, 1945.

Q. As of April 30, 1945? A. Yes, sir.

Q. Now, you heard, did you not, that it was

(Testimony of Michael J. Curry.)

planned that the New York office should be closed along about the end of 1944?

Mr. Clark: I will object to that as being vague and indefinite, your Honor. Claimed by whom?

Mr. Adams: I didn't understand I used the word "claimed."

Mr. Clark: I misunderstood counsel, then.

Mr. Adams: Would you read it, please. It may be that I should correct my question.

(Previous question read by the reporter.)

The Court: You mean did he hear it before the end of 1944?

Mr. Adams: Yes.

The Witness: I don't recall that I did.

Q. (By Mr. Adams): When, according to your best recollection, did you first hear about the proposal to close the New York office?

A. Well, it was my recollection that it was definitely brought to me about the 1st of April or the latter part of March of that year.

Q. And from whom did you first hear about that? [640]

A. From some one of the officers of the railroad company who was in New York at the time?

Q. Was that Mr. Droit?

A. Well, I can't say. I remember Droit was here and Engelbright was here and Elsey were—I mean, in New York.

Q. Mr. Droit was the secretary of the railroad company? A. He was.

(Testimony of Michael J. Curry.)

Q. Mr. Engelbright was assistant to the president of the railroad company?

A. That is correct.

Q. And both of those gentlemen had their offices in San Francisco? A. That is correct.

Q. Mr. Elsey was the president of the railroad company? A. Yes, sir.

Q. He had his offices in San Francisco?

A. Yes, sir.

Q. And your recollection, then, is that at some time about April of 1945 you talked to one or more of those gentlemen about the closing of the New York office?

A. That is my recollection, yes.

Q. And is it your recollection that that was your first information that the New York office was to be closed?

A. Yes, it is my recollection that that is about the first time I heard definitely that it was to be closed. [641]

Q. You knew, did you not, that the trustees' operation of the railroad had ceased at the end of 1944?

A. I knew that, yes. And I knew that the trustees, under the court order, were to carry on until May, I believe it was.

Q. Yes, that is correct. That is to say, the trustees' purpose and intent was to continue until May 1, 1945? A. That's right.

Q. But you knew, did you not, that they were

(Testimony of Michael J. Curry.)

no longer operating the railroad after the end of 1944? A. Yes.

Q. Now, in the discussion that you had with Mr. Droit or Mr. Engelbright or Mr. Elsey, any of those gentlemen, did you have any discussion with regard to your personal situation and what might be done about it? A. I don't recall that I did.

Mr. Adams: May I ask that Mr. Curry's deposition, the volume containing page 2803, be handed to the witness.

(Handed to the witness by the clerk.)

The Witness: Yes, sir, I have it.

Q. (By Mr. Adams): Now, Mr. Curry, directing your attention to the question in the middle of the page, "Had that subject ever been discussed with you by Mr. Coulson?" I will read some questions and answers which you gave upon your examination by Mr. Clark at the time of taking of your deposition:

"Q. Had that subject ever been discussed with you [642] by Mr. Coulson? A. No.

Q. Or by anyone else?

A. I don't know that it would be a proper answer to say—it was intimated that something would be done for me after the closing of the office. But what was to be done, I had no knowledge.

Q. Who intimated that to you?

A. I think it was either Mr. Droit or Mr. Engelbright of the railroad company, who were in New York prior to this time."

(Testimony of Michael J. Curry.)

Do you recall that those questions were asked and that you gave those answers?

A. Yes, sir.

Q. And were they true? A. Yes, sir.

Q. And now that your recollection is refreshed, do you recall that either Mr. Droit or Mr. Engelbright intimated to you that something would be done for you after the closing of the New York office? A. Yes, I recollect it now.

Q. Now, did you also discuss that subject with Mr. Schumacher? A. Yes.

Q. And please state to the best of your recollection what discussion you had with Mr. Schumacher as to what might be done [643] in your personal connection after the New York office was closed.

A. Well, I don't recollect exactly what was said; it was just a subject that was talked about off and on. I explained to him my personal situation, that I had been advised that the office would close and that there was no place for me in the railroad organization. However, that I understood that Mr. Coulson possibly would have something to offer.

Q. And do you mean that when you discussed the matter with Mr. Schumacher, you had already heard that Mr. Coulson might have something to offer? A. Yes.

Q. And from whom had you learned that before you discussed the matter with Mr. Schumacher?

A. I can't recollect exactly whether it was Elsey, Engelbright or Droit. It was either one of those

(Testimony of Michael J. Curry.)

three that intimated to me that something might be done for me.

Q. And at the time of your discussion with them, then, it was your understanding that something might be done, emanating through Mr. Coulson?

A. Yes, sir.

Q. Now, may I direct your attention to page 3707 of your deposition.

Mr. Adams: It is in another volume, I believe.

(Handed to the witness by the clerk.)

The Witness: Might I say here that these questions, I [644] qualified it at a later testifying?

Q. (By Mr. Adams): You should, Mr. Curry, if you fail to state that; you are entirely correct in asking to do so. Go ahead and make any statement you wish.

A. The only thing I had in mind was I believe I stated the first intimation I had of what Colonel Coulson had in mind was the letter I received from him of June 6, I think it was. I later qualified that by stating I recall that he did call me over to the office and told me that he had something in mind for me, but he mentioned no figure.

Q. When you were speaking of that discussion with Mr. Coulson and of the later letter, they came, did they not, after you had had your discussions with Mr. Droit and Mr. Engelbright?

A. Yes.

Q. And after you had your discussions with Mr. Schumacher? A. That is right.

(Testimony of Michael J. Curry.)

Mr. Adams: I think this would be just cumulative, and therefore I won't go into it. I refer to page 3707, Mr. Curry, and if you desire to look at it, I suggest that you do that. If after looking at it you want to say anything further, you are privileged to do so. It is right there in front of you.

The Witness: 3707?

Mr. Adams: 3707.

The Witness: Yes, that is what I just testified to.

Q. (By Mr. Adams): It is the fact, is it not, Mr. Curry, that [645] you did not solicit the retainer arrangement? A. That is correct.

Q. It came to you unsolicited on your part?

A. Yes, sir.

Q. I would like to direct your attention to a letter from Mr. Coulson to you dated June 6, 1945, which is Plaintiff's Exhibit 33 in the case.

I desire, your Honor, to draw to Mr. Curry's attention Plaintiff's Exhibit 33. I had better read the whole letter. It is short.

"Enclosed is the check of this firm for $750, which represents a quarterly payment on your retainer by this firm for services in connection with the pending tax matters with which we are dealing in behalf of the Western Pacific Railroad Company. As agreed, this retainer is to be on an annual basis of $3000, and this quarterly installment covers the period from May 1 to July 31, 1945. You will note that there are no deductions from this check on account of taxes or social security premiums, since

(Testimony of Michael J. Curry.)

you are in no sense an employee of this office or the Western Pacific Railroad Company, but are merely retained as an independent contractor to make studies and reports and perhaps subsequently act as a witness [646] in connection with the pending tax problem."

Mr. Curry, does this letter state your understanding of the purpose of your retainer?

A. Yes, it was a standby arrangement in connection with—for use of me in connection with tax matters.

Q. Did you have any different understanding of the purpose of your retainer from what is stated in that letter? A. I did not.

Q. Did Mr. Coulson or any of his associates ever suggest to you that your retainer had any different purpose? A. No, sir.

Q. Did you understand that your retainer had obliged you in any respect to take any action adverse to the corporation's interests?

A. No, sir.

Q. During the period of your retainer, which ran from this time in 1945, when it began, until the end, 1948, did you ever take any action which you considered adverse to the interests of the corporation? A. No, sir.

Q. Did you consider that your action in signing the 1944 tax return, which you signed in your office over there at 40 Wall Street in the Whitman, Ransom suite, did you consider that that action was in any way disadvantageous to the corporation?

(Testimony of Michael J. Curry.)

A. I did not. [647]

Q. When you signed that return you signed it, did you not, in your capacity as president of the plaintiff corporation?

A. I believe it was signed in the capacity of treasurer—president and treasurer.

Q. President and treasurer?

A. That is right.

Q. During the time you were in receipt of the retainer and occupying an office in the Whitman, Ransom suite, you felt entirely free, did you not, to take any action in behalf of the corporation which you though was required in its interest?

A. Yes, sir.

Q. And you likewise felt entirely free, did you not, to decline to take any action which you thought was disadvantageous to the corporation?

A. Yes, sir.

Q. I have no further use of the document, Mr. Curry. Did you advise the board of directors of the plaintiff corporation of your retainer by the Whitman, Ransom firm and your occupancy of an office in their suite?

A. I do not recall that I did at a board meeting, but they were all advised as I saw them subsequently.

Q. When you say they were all advised, do you mean——

A. I informed them of the retainer arrangement.

Q. And that includes Mr. Nicodemus, does it not?

(Testimony of Michael J. Curry.)

A. I am not sure that I mentioned it to Mr. Nicodemus at the [648] time.

Q. Did you advise Mr. Campbell, Mr. Nicodemus' partner?

A. I have no definite recollection of it at this time.

Q. May I ask that you refer to your deposition, page 3702? A. Yes, sir.

Q. 3706, Mr. Curry. I misspoke as to the page number, beginning with the question in the middle of the page 3706, these questions being put by me at the time of the taking of your deposition:

"Q. Do you recall whether Mr. Nicodemus discussed with you the matter of the effect upon your personal financial situation of closing the New York office? A. I do not recall that he did.

Q. Did you discussion that subject with Mr. Schumacher? A. I did, yes, sir.

Q. What was that discussion, Mr. Curry?

A. Well, as I recall it, we went into the matter from the standpoint of the salary that I was getting at that time, and the fact, having become 65 or over, that I was to get a pension from the railroad company under the provisional retirement plan that was effective January 1, 1945, as I recall.

Q. And was it under that provisional retirement plan that you were to draw down an amount of some $88 a month? [649]

A. $89.54.

Q. Do you recall whether you had any discus-

(Testimony of Michael J. Curry.)

sion with Mr. Schumacher in regard to you receiving a retainer from Whitman, Ransom, Coulson & Goetz?"

I think I directed your attention to this. I will read the answer.

"A. I do not recall whether we discussed anything like that as a retainer. I understood at the time that some consideration was being given to taking care of me in some way because of the closing of the office and the cutting me off from the payroll, and so forth, but what it was I didn't know at that time."

Your Honor, I read something on my own examination that I am sure is not as close to this subject as it ought to be, so I do not think this is proper cross-examination. In fact, I will say so myself. I thought this came more closely to the knowledge of the directors about the occupancy of the office and the retainer.

Q. Mr. Curry, I want to ask you about that: Who among the members of the board of directors to your knowledge were acquainted with the fact that you were receiving a retainer from the firm of Whitman, Ransom, Coulson & Goetz?

Mr. Phleger: That calls for a conclusion. I have no objection to his asking him whether he told them.

Mr. Adams: I will submit the question, your Honor. It is [650] to his knowledge.

The Court: If it is within his knowledge I will allow it.

The Witness: The question, please?

(Testimony of Michael J. Curry.)

(Question read.)

The Witness: I do not remember.

Q. (By Mr. Adams): Mr. Curry, please state what you do remember about having discussed that matter with the directors from time to time after you came into the occupancy of that office.

A. I have no recollection of the discussion. All I recall is when the time was opportune, I mentioned it to the directors individually.

Q. It is your recollection that you mentioned it to each of them individually from time to time?

A. Yes, sir, that is my recollection.

Q. I do find the place in the record I was looking for, if I may have that last volume handed back to Mr. Curry. 3703. Mr. Curry, beginning six lines from the bottom of page 3703 of your deposition, I will read you the questions I put at the time of the taking of your deposition and your answers:

"Q. Did you after you moved into your office over at Whitman, Ransom, Coulson & Goetz office at 40 Wall Street, did you at some time thereafter inform the other directors that you had your office there?

A. It is my recollection that at a meeting of the [651] board I notified them of that, yes, sir.

Q. Do you recall when you notified the directors of that fact?

A. Well, it was at a meeting very shortly after I moved, the first meeting, as I understand it. It

(Testimony of Michael J. Curry.)

was just a matter of notifying them that I was coming over to 40 Wall Street."

You recall giving those answer to those questions? A. I do, yes.

Q. Are they correct according to your present recollection of the matter?

A. It was my recollection at that time when I gave this testimony that it was at a meeting of the board. Upon reflection, it might have been after the close of the meeting or later that I encountered the directors and informed them of the fact.

Q. Now, if you will turn to page 3705, six lines from the bottom:

"Q. Is it your recollection that it was at the meeting of July 31, 1945, that you told the directors that you had your office in the suite of Whitman, Ransom, Coulson & Goetz?

A. That is my recollection at the moment. I saw the directors in the meantime, and as I recall, informed them that my office was at 40 Wall Street."

Do you recall giving that answer to that question?

A. Yes, I do.

Q. Is that now correct according to your best recollection? A. Yes.

Q. Did any member of the board ever take any exception to the arrangement about the office and your retainer? A. None whatever.

Q. During the time your office was in the suite of Whitman, Ransom, Coulson & Goetz did you

(Testimony of Michael J. Curry.)

carry on your activities as president of the corporation from that office? A. I did.

Q. Did Mr. Coulson or any other person connected with the Whitman firm ever attempt to interfere with your activities as president of the corporation? A. No, sir.

Q. And did Mr. Coulson or anyone else connected with that firm ever attempt while you were in that office to influence your conduct as president of the corporation? A. No, sir. [653]

Q. Is it fair to say, Mr. Curry, that during the period you were retained by the Whitman, Ransom, Coulson and Goetz firm, you conducted the corporation's affairs to the best of your ability for the best interests of the corporation?

A. Yes, sir.

Mr. Adams: Now I will ask the witness to turn to page 2804 of his deposition.

(Handed to the witness by the Clerk.)

Q. (By Mr. Adams): Beginning at the bottom of page 2804, I will read a portion of some questions put to you by Mr. Clark and your answers: (reading)

"Q. What services, if any, have you rendered pursuant to the retainer arrangement which is outlined in Interveners' Exhibit 38?"

Which I identify as Plaintiff's Exhibit 33.

Q. (continuing):

"A. The only service that I performed since this

(Testimony of Michael J. Curry.)

arrangement was effective was in executing the tax returns as treasurer of the corporation.

"Q. What tax returns do you refer to?

"A. The consolidated tax returns of 1942, 1943, and 1944.

"Mr. Shaw: I would suggest, Mr. Clark, that you refresh the witness' recollection as to the time on this.

"Q (By Mr. Clark): You will observe, Mr. Curry, that according to Interveners' Exhibit 38, the retainer [654] arrangement which is outlined therein did not commence until as of May 1, 1945.

"A. That is right.

"Q. Bearing that in mind, do you want to change your last answer?

"A. I do. I was mistaken.

"Q. Would you please now answer the previous question, namely, as to what services, if any, you have rendered to date under this retainer?

"Mr. Shaw: Since May 1, 1945.

"Mr. Clark: I will accept that qualification.

"Q. (By Mr. Clark): Answer the question.

"Mr. Osborn: ——"

He was one of the plaintiff's counsel, your Honor, and is, of course, he is on the record.

"Mr. Osborn: I would like to point out to the witness, if I may, that your question calls for a conclusion by the witness; that he might not have performed any services under the retainer.

"Mr. Clark: If he did not, he can say so.

(Testimony of Michael J. Curry.)

"A. I cannot recall that I have performed any services under that retainer."

Now, Mr. Curry, do you recall giving those answers? A. I do.

Q. And referring to the last answer, "I cannot recall that I [655] performed any services under that retainer," is that correct?

A. Well, outside of the tax return that I signed while in that office, and the power of attorney, those are the only services I can recall that I performed.

Q. Well now, you had in mind at the time you gave your testimony, did you not, the tax returns? You will notice that the record I just read to you referred to the tax returns, and I am asking you if, at the time you gave that testimony, you did not have that in mind.

A. Well, as I recall, I was confused as to certain questions that were asked of me at that time, and inasmuch as it was June 1, 1945, that I went over to the 40 Wall Street office, the only services that I performed while there was the execution of the '44 federal tax return and the power of attorney.

Q. Now, Mr. Curry, is it your understanding that you were being paid by the retainer to sign that return?

A. The only thing I understood by that was that I was to stand by; it was a stand-by arrangement. There was no understanding as to just what I would be called upon to do, and I just continued along in that office waiting for anything I might do in connection with the object of that retainer.

(Testimony of Michael J. Curry.)

Q. You bear in mind, do you not, that the retainer was not paid to you so that you could sign a return; isn't that the fact?

A. Well—— [656]

* * *

A. Specifically, that is the fact, yes.

Q. (By Mr. Adams): And when you gave your last answer that I read to you, "I cannot recall that I have performed any services under the retainer," you believed at that time, did you not, that that answer was correct?

A. Yes, because it was a tax return; it was a tax matter and the letter of June 6 stated specifically I was to stand by on tax matters. And as that was one of the functions of the president and treasurer, to execute these tax returns—— [658]

* * *

Q. Mr. Curry, do you recall in your examination by Mr. Phleger two days ago, the following questions and answers? Page 323, Mr. Phleger, towards the bottom.

"Q. (By Mr. Phleger): I show you, Mr. Curry, Plaintiff's Exhibit No. 54, which is a letter on the Coulson letterhead dated January 11, 1944 addressed to Mr. Elsey advising with respect to the 1943 tax accruals, their reversal and other matters. That is the so-called opinion letter. Did you receive a copy of that letter?

"A. I did not.

"Q. Did you ever see a copy of that letter?

(Testimony of Michael J. Curry.)

"A. I did not."

Mr. Adams: I will ask that Plaintiff's Exhibit 56, and particularly that portion of Plaintiff's Exhibit marked Railroad Defendant's 319 be handed to the witness.

(The document referred to was handed to the witness.)

Q. (By Mr. Adams): Plaintiff's Exhibit 56, that portion marked Railroad Defendant's 319, is the original letter of January 24, 1944, addressed by Mr. Elsey to Mr. Schumacher, and that is [660] a letter which you saw at the time, is it not, Mr. Curry, and has your green pencil drawn under the word "consolidated" in the first sentence?

A. Yes, sir.

Q. You will notice the first paragraph of that letter reads:

"Mr. James K. Polk of Mr. Coulson's firm was recently in San Francisco and explained to us the reasons why the Western Pacific should not make any accrual for consolidated federal income and excess profits taxes for 1943. We have received a letter from Mr. Coulson dated January 11, copy of which is inclosed, which sets forth the reasons for such a conclusion in considerable detail."

Now, with that document before you, is your recollection refreshed in any respect as to whether or not at that time you saw the opinion letter of January 11, 1944?

A. I have no present recollection of it, but the

(Testimony of Michael J. Curry.)

mere fact that my green pencil underscores the word "consolidated" indicates to me that I did read it, did see it.

Mr. Phleger: Read what, your Honor?

The Witness: The memorandum, the letter referred to of January 24 from Mr. Elsey to Mr. Schumacher.

Q. (By Mr. Adams): You notice the reference in it to the inclosed copy of the opinion letter of January 11, 1944, that I just read to you and the second sentence of the first paragraph?

A. The second sentence of the first paragraph, yes. [661]

Q. And is your recollection refreshed by that in any way as to whether or not at that time you saw the opinion letter of January 11, 1944?

A. No.

Mr. Adams: Just one further question, your Honor, and for this purpose I would like to have handed to Mr. Curry his deposition, page 2904, beginning nine or ten lines from the bottom of the page, the questions being asked by Mr. Clark:

"Q. At that time what work, if any, were you carrying on in your office in the suite of Whitman, Ransom, Coulson and Goetz?

"A. I was performing whatever functions were necessary in connection with the corporation, such as answering letters to stockholders and looking after the records, that is, the file system and prepara-

(Testimony of Michael J. Curry.)

tion of the agenda for board meetings and preparation of the minutes, incidental things like that.

"Q. Did you consider the signing of these tax returns one of the necessary acts to be carried on by you for the corporation?

"A. Yes, I did."

Q. Did you give those answers to those questions at that time, Mr. Curry? A. I did.

Q. And did you then believe they were true? A. Yes, sir.

Q. And are they true, according to your recollection? A. Yes, sir.

* * *

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TRANSCRIPT OF RECORD

(Pages 911 to 1361)

Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DuP. BAYARD, RECEIVER, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN AND J. S. FARLEE & CO., INC., PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 150—PETITION FOR CERTIORARI FILED JUNE 23, 1952
No. 160—PETITION FOR CERTIORARI FILED JUNE 26, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAIROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Transcript of Record
In Five Volumes

Volume III
(Pages 911 to 1361)

**Appeals from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

ROBERT BUCHANAN

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court, please?

A. Robert Buchanan.

Direct Examination

By Mr. Phleger:

Q. Mr. Buchanan, where do you live?

A. I live at 2306 Leavenworth Street, San Francisco.

Q. What is your occupation? [663]

A. I am a certified public accountant.

Q. With what firm are you associated?

A. Lybrand, Ross Bros. & Montgomery.

Q. How long have you been associated with that firm? A. About 25 years.

Q. What has been your experience in the field of accountancy?

A. Well, I have been with that firm of certified public accountants, and for that period of time. In fact, a somewhat longer time than that. In that time I have been the manager of the tax department in San Francisco.

Q. For how long have you been manager of Lybrand's tax department in San Francisco?

A. Approximately 25 years.

Q. Are you licensed to practice before the Treasury Department? A. Yes, sir.

Q. Have you testified before as an expert in court on tax matters? A. I have.

(Testimony of Robert Buchanan.)

Mr. Phleger: Before proceeding further with the examination of this witness, your Honor, I would like to offer in evidence certain documents bearing upon this particular matter, before proceeding with the specific questions.

I would first offer in evidence the following sheets, which are identified by the following designations: Interveners' 128A, 128B, 128C, 128D, 128E, 128F, and Interveners' 85A. [664] Those, may it please the Court, are computations which I am sure counsel will stipulate were prepared by Mr. Reilly of the Coulson firm.

Mr. MacKinnon: Mr. Reilly is not in the Coulson firm; never has been.

Mr. Phleger: Will you stipulate that he was employed and paid for by the Coulson firm in connection with the preparation of these tax returns?

Mr. Adams: No, I think that that is an inaccurate statement of Mr. Reilly's position. His charges are taken up in the bill you have seen, and those charges were paid by the railroad company.

Mr. Phleger: Well then, we will make it more specific, since you won't help me; and that is that Mr. Reilly was employed in and about the preparation of these returns, under the direction of Mr. Polk, that his current salary was paid by the Coulson firm, but the Coulson firm has now billed the railroad company for the amounts paid by it to Mr. Reilly.

(Testimony of Robert Buchanan.)

Mr. Adams: Mr. Phleger, and your Honor, there is no purpose to have anything but an accurate statement here, and I am sure that is what we all want. Now Mr. Reilly was in the employ of Consolidated Edison. He did some special work as an accountant in connection with this matter. I am a little troubled by being asked for statements that frankly, just from my own recollection, I cannot be sure are accurate in detail. [665] Mr. Reilly's position in the matter has been developed here. He worked in the office of the plaintiff corporation as an accountant.

Mr. Phleger: On these tax matters?

Mr. Adams: These tax matters.

Mr. Phleger: Right. And these are sheets prepared by him.

Mr. Adams: That is my recollection.

Mr. Phleger: Without going into them more—in fact I won't go into them further, other than to state that these were computations made in the fall of 1946 at the request of Mr. Polk, as to what the taxes would have been in this matter had the returns not utilized the stock loss.

I will offer that as Plaintiff's Exhibit 73.

(Intervener's Exhibits 128A through F, inclusive, and Interveners' 85A, referred to above, were received in evidence and marked Plaintiff's Exhibit 73.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 74, three sheets otherwise identified as Inter-

(Testimony of Robert Buchanan.)

vener's 114A, 114B, and 114C, consisting of a letter on the letterhead of the Western Pacific Railroad Company, dated November 8, 1943, addressed to Mr. James K. Polk, New York, by Mr. D. C. DeGraff, general auditor of the Western Pacific Railroad Company, showing the amounts that were being accrued on the books of the defendant corporation for 1943 taxes and the estimate of the total amount for that year. [666]

Mr. Clark: On a consolidated basis, isn't that right?

Mr. Phleger: That is correct; on the way that they were actually accrued for the period up to that date, and estimated for the balance of the year.

Mr. Clark: And without reference to any use of the stock loss. [666A]

Mr. Phleger: Correct.

(Letter dated November 8, 1943, from DeGraff to Polk, was received in evidence and marked Plaintiff's Exhibit 74.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 75 two sheets otherwise identified as Railroad Company's Exhibits 898 and 898-A, consisting of a letter signed by Mr. Charles Elsey, directed to Mr. Robert E. Coulson, dated November 13, 1943, giving an estimate of the income of the railroad for the current year, 1943, and containing the following statement:

"Please note that these statements are on the basis of estimated Federal taxes in the amount of

(Testimony of Robert Buchanan.)

$8,274,000, which have been calculated as set forth in detail on a statement submitted by Mr. DeGraff to Mr. Polk by letter dated November 8, 1943."

(Letter dated November 13, 1943, from Elsey to Coulson, was received in evidence and marked Plaintiff's Exhibit 75.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 76 the following sheets, identified as follows: Interveners' 455-A, 455-B, 455-C and 455-D.

These, may it please the Court, are the journal entries on the books of the defendant corporation, showing on the top sheet, 455-A, the reversal of the accruals for the Federal income taxes for the year 1943, in the amount of $7,069,052. The second sheet, 455-B, shows the accrual in the month of [667] January, 1944, of railway tax accruals—no, strike that—of United States Government Federal income taxes in the amount of $893,000. It shows on the next sheet the accrual for March, 1944, of United States Government Federal income taxes, in the amount of $932,300. On 455-D the accrual of U. S. Government Federal income taxes shows in the sum of $1,282,700.

(Interveners' Exhibits 455-A through -D, inclusive, were received in evidence and marked Plaintiff's Exhibit 76.)

Mr. Phleger: Will it be stipulated, Mr. Adams, that the accruals just mentioned for the year 1944, January to March, were on a consolidated basis but

(Testimony of Robert Buchanan.)

not including the plaintiff corporation; namely, a consolidated basis with the railroad company as the top corporation?

Mr. Adams: That is my understanding.

Mr. Phleger: In other words, the returns for the first four months, as shown by the books, did not include the consolidation which later was used in the returns for the first four months of '44?

Mr. Adams: I think that is an inadvertent statement; if you were to hear it read, you would find you started it out, "In other words, the returns for the first four months"—what you had in mind was that the accruals during the first four months of the year 1944 as entered upon the accrual books did not include anything on account of the plaintiff corporation or its loss. [668]

Mr. Phleger: Yes. It was not on a consolidated basis, including the plaintiff corporation.

Mr. Adams: That is right.

Mr. Phleger: Contrary to the returns which were later filed, which did include a consolidation with the parent corporation.

Mr. Adams: Yes. And may it be stipulated that the books of accrual were adjusted before the end of the year in conformity with the returns as filed?

Mr. Phleger: I will so stipulate.

I will now offer as Plaintiff's Exhibit 77-A a copy of the corporation income and declared value excess profits tax return of the Western Pacific Railroad Corporation, and affiliated corporations,

(Testimony of Robert Buchanan.)

for the year 1940, and as 77-B the excess profits tax return of the Western Pacific Railroad Corporation for the same year, 1940.

Mr. Adams: Those are for the corporation, are they not?

Mr. Phleger: For the corporation and affiliated companies.

Mr. Adams: Yes.

(Corporation income declared value excess profits tax return for Western Pacific Railroad Corporation, 1940, and excess profits tax return of Western Pacific Railroad Corporation, 1940, referred to above, were received in evidence and marked Plaintiff's Exhibits 77-A and 77-B.)

Mr. Phleger: Those, may it please the Court, are required as a foundation for some estimates which we will shortly offer. [669]

I will now offer as Plaintiff's Exhibit 78-A the corporation income and declared value excess profits tax return of the Western Pacific Railroad Corporation and affiliated companies for the year 1941 as Plaintiff's Exhibit 78-B the corporation excess profits tax return of the Western Pacific Railroad Corporation and affiliated companies for the year 1941.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 78-A and 78-B.)

(Testimony of Robert Buchanan.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 79-A the corporation income and declared value excess profits tax return of the Western Pacific Railroad Company and affiliated companies for the period beginning May 1, 1944, and ending December 31, 1945. May it please the Court, that is the return of the defendant and its affiliated corporations for the last eight months of 1944. The return, as you will recall, for the first four months of that year, was a return of the plaintiff corporation and the defendant corporation and its subsidiaries, and for the plaintiff corporation for the entire year. In other words, the consolidation with the defendant was only for the first four months, these being the separate returns of the defendant corporation and its affiliated corporations for the last eight months.

Mr. Adams: Those last eight months, Mr. Phleger, being the last eight months of the operations of the court's trustees. That is correct, is it not?

Mr. Clark: That is true, 1944.

Mr. Phleger: Well, I think that is true. The dates speak [670] for themselves.

(Corporation income and declared value excess profits tax return of Western Pacific Railroad Company and affiliated companies, May 1, 1944, to December 31, 1945, was received in evidence and marked Plaintiff's Exhibit 79-A.)

(Testimony of Robert Buchanan.)

Mr. Phleger: The returns are signed by Mr. Elsey as president of the company.

I offer next as Plaintiff's Exhibit 79-B the excess profits tax return of the Western Pacific Railroad Company and affiliated companies, also for the last eight months of 1944.

(Excess profits tax return of Western Pacific Railroad Company and affiliated companies for last eight months of 1944 was received in evidence and marked Plaintiff's Exhibit 79-B.)

Mr. Phleger: I will now offer for identification Plaintiff's Exhibit 80, consisting of three sheets. Copies of this, may it please the Court, have already been given to counsel. I ask that this be marked for identification. You might desire to follow this. Will you give that to the Court?

(Copy of document handed to Court through clerk.)

Mr. Phleger: The exhibit consists of three sheets headed, respectively, "Basis 1," "Basis 2," and "Basis 3."

(The sheets referred to were marked Plaintiff's Exhibit 80 for Identification.)

Q. (By Mr. Phleger): Mr. Buchanan, I direct your attention to Plaintiff's Exhibit 80 for Identification (handing to witness), [671] and will ask you if you prepared this exhibit. A. I did.

Q. Did you prepare it at the request of attorneys for the plaintiff? A. I did.

(Testimony of Robert Buchanan.)

Q. And pursuant to their instructions?

A. I did.

Q. I direct your attention now to the first page of the exhibit, entitled "Basis 1," and to the heading reading, "The Western Pacific Railroad Corporation and its Affiliates, Federal Income Taxes and Excess Profits Taxes, on a Separate Return Basis, Using the Data as Actually Shown in Consolidated Returns Filed."

Will you please state to the Court how this basis 1 was prepared and what is shows.

A. May I have access to my working papers?

The Court: Yes.

Mr. Phleger: Yes, you may.

(Witness produces papers.)

The Court: This witness is testifying as to what the income taxes would have been had separate returns been filed?

Mr. Phleger: Exactly.

The Court: All right.

A. These exhibits were prepared, using as the basic material the returns or photostatic copies that were furnished to me by Mr. Phleger. The returns of the—— [672]

Mr. Phleger: Just a moment. It will be stipulated—or perhaps I had better have Plaintiff's Exhibit 3, 4 and 5, the tax returns.

(Documents handed to counsel by the clerk.)

Q. (By Mr. Phleger): I show you, Mr.

(Testimony of Robert Buchanan.)

Buchanan, Plaintiff's Exhibits 3-A, 3-B, 4-A, 4-B, 5-A and 5-B (handing to witness), and I ask you if those are the returns or copies of them which you used in the computation you have just referred to.

A. These returns, plus the returns for 1940 and '41.

Q. Those are the ones which were just introduced in evidence? A. That is correct.

Q. As Plaintiff's Exhibit 77, 78 and 79?

A. That is correct.

Mr. Adams: The witness has not mentioned 79. You may wish to ask him about 79.

Mr. Phleger: 79 is the last eight months.

Mr. Clark: Of '44.

Mr. Phleger: He did use that.

The Witness: Yes, '44.

Q. (By Mr. Phleger): Will you now proceed.

A. Now, the material found in those returns are the basic material on which these computations were made, and in which it was determined on Basis 1 that on a separate return basis there would have been a tax payable by these companies aggregating $21,622,358.71. [673]

The same material—that is, the material contained in the returns—was used in computing the tax shown on Basis 2. The difference between the two—that is, between Basis 1 and Basis 2—being primarily the carry-forward of certain net operating loss carry-overs and unused excess profit credit carry-overs.

(Testimony of Robert Buchanan.)

Q. Will you refer, Mr. Buchanan, to the title of Basis 2 and state from it or your recollection of the specific method in which this was prepared.

A. Well, the title is "The Federal Income and Excess Profits Taxes on a Separate Return Basis, Using the Data as Actually Shown in the Consolidated Returns Filed, and Giving Each Affiliate the Benefit of Any Operating Loss Carry-over or Unused Excess Profits Credit Carry-over Attributable to It, Though Contrary to Regulations 110, Section 33.31(e) and (f)."

Q. And will you state what those regulations were?

A. Well, the regulations provided that for that type of loss or carry-over which had accrued prior to January 1, 1942, it could not be carried over to the separate returns of the individual companies if they made separate returns.

Q. And you therefore in this computation did not follow that regulation, but gave the separate companies the benefit of their own carry-over?

A. That is correct.

Q. Which otherwise they would have been deprived of had they filed [674] separate returns, because of having earlier filed consolidated returns?

Mr. MacKinnon: Just a moment. I object to that; that is a question of law for your Honor to decide, whether or not the regulations so provided. That is a question of law.

(Testimony of Robert Buchanan.)

Mr. Phleger: Well, I am asking him what he did.

Mr. MacKinnon: No, you were asking him for his opinion. That is the basis of my objection to the question.

The Court: Well, you are trying to find out from this witness whether or not his calculations were based upon that conclusion, is that it?

Mr. Phleger: That is correct. In short, may it please the Court——

The Court: If that is the question, I will overrule the objection.

Mr. Phleger: Will you read the question.

(Previous question read by the reporter.)

A. That is correct.

Mr. Phleger: I don't know whether I made my point clear to your Honor, but this was prepared under our instructions to give the benefit to the individual companies of privileges they would not actually have had.

The Court: This witness is of the opinion that they couldn't take this deduction, but that the calculations are based on the assumption that they could have taken it, is [675] that what you mean?

Mr. Phleger: Correct.

The Witness: That is correct, sir.

Q. (By Mr. Phleger): Now, I direct your attention to Basis 3.

The Court: That doesn't mean I am accepting the conclusion of law.

(Testimony of Robert Buchanan.)

Mr. MacKinnon: I understand, your Honor. I will say it is a question of law for your Honor to determine. [675-A]

Q. I direct your attention now to basis 3. Will you state what that shows, the basis on which it was prepared?

A. As stated in the heading, basis 3 was computed on the basis of a consolidated return or returns which were filed but excluding the corporation's stock loss of some $73,000,000.

Mr. Phleger: I will offer this now as Plaintiff's Exhibit, having been marked for identification previously.

(Plaintiff's Exhibit 80 for identification previously was thereupon received in evidence.)

Mr. Phleger: That is all.

Mr. Clark: No questions from us, your Honor.

Cross-Examination

By Mr. Adams:

Q. Mr. Buchanan, do I understand correctly that the figures and all the figures which you used in making these computations are figures to be found upon the income and excess profits tax returns for 1940, 1941, 1942, 1943, and 1944 for the parent corporation and likewise return of the Western Pacific Railroad Company and its affiliates as a consolidated return for the last eight months of the year 1944?

A. That is correct.

(Testimony of Robert Buchanan.)

Q. You did not go to any other source material whatever? A. No.

Q. Now, referring to basis 1, do I understand that basis 1 is your computation made up from the use of those figures and those returns of what the federal income and excess profits tax [676] liabilities of those companies shown on your schedule would have been if each of the companies had filed separate returns for the years 1942, 1943 and 1944?

A. If you will look at basis 1, you will see that the period is January 1 to April 30, 1944, so that when you say 1944 you are speaking of that period. That is what this basis 1 says. The reason I answer in that fashion is there might be some confusion because for the calendar year 1944 the parent corporation, that is, the Western Pacific Railroad Corporation, filed a consolidated return in which it included its income for the entire year and included the income of these subsidiaries for the four months' period, and then subsequently a consolidated return was filed for the last eight months of the calendar year 1944 by the Western Pacific Railroad Company and its subsidaries, but in this computation in basis 1 we refer to this period as the January 1 to April 30, 1944, period.

Q. Just to get my understand of this year, we refer only to the year 1942, referring to the figures computed on your basis 1, are the figures shown for that year your computation of what the tax liabilities of these several companies would have been had

(Testimony of Robert Buchanan.)

each of them filed separate returns for that year?

A. For the calendar year 1942.

Q. Based upon those figures you have taken from a consolidated return?

A. Based upon those figures taken from the consolidated return [677] for the calendar year 1942.

Q. Is the same thing true with regard to the year 1943, as shown on your schedule basis 1?

A. That is correct.

Q. Would you please explain to me how you calculated the figures under the column, "Period January 1 to April 30, 1944"?

A. I would like to refer to the return itself, if I may.

Q. Yes, you are privileged to do that, surely.

Mr. Phleger: Might I suggest to your Honor that perhaps if those papers were laid over on this desk——

The Court: Yes, he has room to lay them out there. The witness might testify from down to that table, if you will.

The Witness: Basis 1, the period January 1 to April 30, 1944: that was based on the income shown in the consolidated return for the Western Pacific Railroad Company and Corporation. Its income was included therein, and that was for the four-month period as stated at the top of the schedule called basis 1, Period January 1 to April 30, 1944, and that is based on the net income of the Western Pacific Railroad Company for that four-month pe-

(Testimony of Robert Buchanan.)

riod, included in the consolidated return that was filed for the Western Pacific Railroad Corporation and its affiliated companies for the calendar year 1944, showing a net income of $2,975,142.13, and this tax shown in basis 1 is on the basis of the Western Pacific Railroad Company filing a separate return showing that net income for that period.

Q. (By Mr. Adams): Is the same thing true, Mr. Buchanan, with respect to the smaller amounts for Tidewater Southern and Western Realty and Standard Realty and Development Company which are listed under that period on your basis 1?

A. That is correct.

Q. So where you obtained the figures entered in that column was to go to the corporation's consolidated returns for the year 1944, which included these first four months of 1944, and you obtained your income figures out of that return for this period? A. That is correct.

Q. And you made calculations of those income figures that you derived from that return?

A. That is correct.

Q. With regard to the columns for the years 1942 and 1943 on your basis 1 calculation, do I understand that in each of those cases you simply took the figures shown in the consolidated returns filed for each of those years as the income figures?

A. That is correct.

Q. And then you made tax calculations on the income figures taken directly from those returns?

A. That is correct.

(Testimony of Robert Buchanan.)

Q. It is not necessary for you to stand, Mr. Buchanan.

A. It is easier for me to find the figures in here if I stand. May I be permitted to stand?

The Court: Yes. [679]

Q. (By Mr. Adams): In your computations of them on basis 1, did you change any of the income or deduction figures found in those returns as filed in making up your estimates of tax liability on basis 1?

A. No. For example, the Western Pacific Railroad Company in the return I am looking at, the consolidated return for year ended December 31, 1944, the statement of income in the Western Pacific Railroad column shows a net income of $2,975,-142.13, and that is the figure I used in making these calculations that are shown on basis 1 on a separate return basis.

Q. Isn't that last figure that you just read a figure about the four-month period of 1944?

A. That is correct.

Q. I was speaking of the full calendar year, calculations shown on basis 1. A. Yes.

Q. Is it likewise true in those cases that you did not change any income or deduction figures shown on those returns in the making up of your tax computation? A. That is correct.

Q. Did you give any attention in making up your tax calculations on a separate return basis to the inter-company accounts between members of this group of affiliated corporations?

(Testimony of Robert Buchanan.)

A. Yes, I did. First, may I refer to a schedule I have of those inter-company accounts set up?

Q. Yes.

A. I prepared a schedule showing the inter-company interests. For example, in 1942 I have a schedule here which shows that the Western Pacific Railroad Corporation—it appears in the returns that there was interest on advances to the Western Pacific Railroad Company, interest advances to the Western Pacific Railroad Company, due the Western Pacific Railroad Corporation, of $274,733.10. The debtor company there was the Western Pacific Railroad Company. The creditor company was the Western Pacific Railroad Corporation. In preparing these returns the debtor company eliminated this deduction through what is known as schedule M, which on the tax return is a schedule which reconciles net income as shown by the return with a net income for the books.

Q. May I interrupt, Mr. Buchanan? You stated just now the debtor company in preparing this return. It is not your intent, of course, to give any testimony as to who prepared these returns or anything of that sort? You did not have that in mind?

A. No.

Q. What you did have in mind was it appears on the face of the returns that those things are so?

A. That is correct.

On the face of the returns it appears that the debtor company had deducted the interest, but that

(Testimony of Robert Buchanan.)

the creditor company had not taken it up as income. So in order to check that out, [681] and just see why that was, and to see the disparity had been corrected in the returns, so I wouldn't have to give effect to it in these computations, I made up the schedules to reconcile the fact that the debtor corporation—for example, in this example the Western Pacific Railroad Company—why it deducted $274,000 of interest due the parent company and the parent company had not taken it up as income. It was necessary to work this reconciliation out to make sure that it had been eliminated in these consolidated returns, and therefore it did not need to be adjusted in these computations, and those schedules that I have prepared here in detail show the mechanics by which they made this elimination, so it was not necessary to make any adjustment in these computations. It was by means of this schedule M attached to the returns, and on the other side the creditor corporation made the adjustment in the eliminations on the balance sheet; in other words, the creditor corporation eliminated the payable of the debtor company through the consolidated balance sheet, on which the amount due the affiliated companies was eliminated, and it is shown as an amount greater than due from the affiliated companies. So by that mechanics these adjustments that otherwise would have to be made, that is, the difference between the debtor corporation deducting the interest and the creditor

(Testimony of Robert Buchanan.)

corporation failing to take it up, was not necessary to be made. So I would answer your question that since that was eliminated in the consolidated returns, I did not [682] in making these computations, make any change in the final figures found in the consolidated return.

Q. In other words, you concluded that in calculating the tax liability of the Western Pacific Railroad Company on a separate return basis, you did not consider it necessary to restore the interest accrued on the books as a deduction?

A. That is correct, because the company itself had eliminated it in these consolidated returns.

Q. Of course, it is unnecessarily a part of consolidated return accounting to eliminate inter-company transactions; that is correct, is it not?

A. That is correct.

Q. Mr. Buchanan, are you familiar with the rulings of the Treasury Department generally to the effect that while these railroads were in reorganization their tax returns would take into account the old debt structure until reorganization was completed?

A. I think that is a legal question, Mr. Adams, that I would not——

Q. I was asking you if you were familiar with it.

A. In what respect?

Q. Did you know about that?

A. Would you repeat that question?

(Question read.)

A. No, I am not familiar with that. [683]

(Testimony of Robert Buchanan.)

The Court: If separate returns had been filed in the first instance, would the net income have been shown differently than it was in this consolidated return?

A. No.

Q. You said a moment ago that these credits and debits between the companies you took just from the income as shown in the consolidated returns? A. Yes.

Q. Suppose they had filed separate returns; would your calculation of that income have been just the same?

A. I think it would because the omission of the income from the income of the parent corporation might well have been—that income might well have been omitted on the ground it was not collectible.

Q. (By Mr. Adams): What about the debtor corporation, the one that had the interest to pay?

A. That might have been affected by the fact that it was in reorganization.

Q. And so to a measure, Mr. Buchanan, it might be affected by the Treasury rulings that I have just referred to?

A. That is possible.

Q. You do not know about that?

A. I am not familiar with that phase. [684]

* * *

Q. (By Mr. Adams): Mr. Buchanan, referring to your Basis 1 computations, did you make any allowance for net operating loss carry-overs of any

(Testimony of Robert Buchanan.)

of these companies? A. Not in Basis 1.

Q. You made no such allowance for net operating loss carry-overs for the years prior to 1942?

A. That is correct; I did not on Basis 1.

Q. On Basis 1? A. But on Basis 2 I did.

Q. Yes. Now, speaking of Basis 1, I take it neither did you make any allowance for net operating loss carry-overs from year to year within the period covered by Basis 1?

A. That is correct.

Q. Now, still referring to Basis 1, did you make any allowance for carry-overs of unused excess profits credits? A. No.

Q. Neither for the years prior to 1942?

A. That is correct.

Q. And similarly, you did not make any such allowance for carry-overs of unused profits credits from year to year within the period covered by the Basis 1? [685] A. That is correct.

Q. Now, in your computations on Basis 1, did you give any effect to any deductions which might have been claimed by the Western Pacific Railroad Company on account of a partial write-down of advances and loans made to the Sacramento Northern Railway? A. No.

Q. Now, if a deduction of that sort—that is to say, a deduction on account of a partial write-down of the value of such advances to the Sacramento Northern Railway—had been claimed in 1943, and if it had been allowed by the Treasury Department,

(Testimony of Robert Buchanan.)

would that bring about a difference in the computations of tax liability from those which you have made in your Basis 1?

A. I would have to investigate what the basis was of the assets which you say might have been written down. Not having that information, I don't recall that that information appears in the returns.

Q. Let me put the question this way: If the Treasury Department had allowed in a separate return for the year 1943 a deduction for a partial bad debt loss on account of the Sacramento Northern Railway's indebtedness, in an amount, say, of $8,500,000, would that affect the computations which you have made in your Basis 1?

Mr. Phleger: Just a moment. I don't want to interfere with this cross-examination, but this question is simply, "If [686] deductions had been claimed which were not claimed, and had they been allowed, would it have reduced the taxes?" Well, obviously it would; and I don't see what is gained by asking this witness if it would. We will stipulate that if they had had these losses, which were in fact claimed, and that if they had been allowed, there would have been less taxes. But they weren't claimed, they weren't allowed, and these are the taxes which are shown by this computation to have been payable had separate returns been filed.

The Court: Mr. Adams, may I ask you something so that I may understand this question? Is it going

(Testimony of Robert Buchanan.)

to be your contention that had a separate return been filed for the company, there were other deductions which could have been made, but which were not made because this loss was so large that they didn't even make any other?

Mr. Adams: That is just about right, your Honor. I think I could say "Yes" to that without any qualification, but I would like to add one further item to that, referring to this particular deduction: that is, the deduction for a partial bad debt loss. Such a deduction was not available under the laws and regulations, if you filed consolidated returns. It was available, it will be part of our case to show when we get to our defenses, that it was available if you filed a separate return.

The Court: Well, of course, this witness has only testified to the fact that he had taken the data that he found on the [687] consolidated return, and using the information there as to income, he has calculated that, absent the deduction for the stock loss, what the tax would have been.

Mr. Adams: Yes, your Honor.

The Court: That is the extent of this witness' testimony.

Mr. Adams: And he has testified that the sole source, the sole basis, for his computations was the figures that were shown in the consolidated returns as filed.

Q. (By Mr. Adams): Is that correct?

A. That is correct. [688]

(Testimony of Robert Buchanan.)

Mr. Adams: Now, I have two or three other questions. Perhaps it will be self-evident, but if I may have your Honor's patience I will go through with that.

Q. Mr. Buchanan, if the income for the year 1943 of the Western Pacific Railroad Company were to be adjusted by deduction for cut-backs in refunds to the United States government of, say, a million and a half dollars in that year, I take it that such an adjustment would materially reduce the computations of tax liability that you have paid?

A. Yes.

Q. And you yourself——

Mr. Phleger: May I again point out the witness has stated what he did. Now, these are hypothetical questions that if they had done something which they did not do, would the tax be less. If their income was less, would the tax have been less. Of course it would have been. That is not what he testified to.

The Court: Mr. Adams has stated he has two or three questions he wants to ask along that line. It is obvious what the answer is, but you may ask the question.

Mr. Adams: I think so, but of course, the same thing would be true for the years 1942 and for the first four months of 1944?

The Witness: That is correct.

Q. (By Mr. Adams): And it is likewise he fact, is it not, Mr. Buchanan, that if in the years

(Testimony of Robert Buchanan.)

1942, 1943 and the first four months of 1944 a different treatment had been given to accelerate am amortization of the emergency facilities, then different results would flow from what are shown on your Basis 1 statement?

A. That is correct.

Q. And you have made no calculation of that sort?

A. I have made a computation to see about what that difference would be.

Q. You have? A. Yes.

Q. Will you please state what it is?

Mr. Phleger: I point out that this is not cross-examination. If he wants to ask this witness the questions as his witness, it is all right with us.

Mr. Adams: I think it is cross-examination upon the scope and limitations of his own work. That is the object of these questions.

The Court: I do not pay much attention to whether the facts are listed on the cross-examination or direct examination any more, anyhow. You mean the old rule that you are bound by the testimony of the witness?

Mr. Phleger: Right.

Q. (By Mr. Adams): Do you have the question in mind? A. Yes, I have.

Q. Go right ahead.

A. According to my computations—first let me say that these computations are based upon the principle of accelerating the [690] amortization,

(Testimony of Robert Buchanan.)

that is, shortening the amortization, which you are permitted to do under the law, due to the earlier termination of the war. You see, the amortization originally was figured on a six-year basis and then the war ended sooner than that time and we were permitted to shorten the amortization, and according to my computations, in 1942 that would have reduced the tax dollars $47,000; in 1943, $165,000; and in 1944, $482,000 in round figures.

Q. (By Mr. Phleger): You mean for the four months' period in 1942? A. Yes.

Mr. Adams: You have made the computations that you have just described on the assumption that the election was not taken to accelerate the amortization of the emergency facilities?

A. That is correct.

Q. Whereas under the consolidated returns as filed, is it the fact that, according to your understanding, the election was exercised to take advantage of the privilege of accelerating the mortization of those facilities? A. No, it would not.

Q. Oh, it was the other way around?

A. It was the other way around.

Q. In other words, this additional increase that you have just given us are predicated on the hypothesis that the election was exercised to accelerate?

A. No, it was not exercised.

Q. The election was exercised to allow it over the five-year period?

A. To allow it over the five-year period.

(Testimony of Robert Buchanan.)

Q. And that would have the tendency, as you compute it, to reduce the figures shown upon your Basis 1?

A. No, the other way around. In other words, if they had elected to shorten the amortization period, that would have increased their deduction and that, of course, would have reduced the tax shown here.

Q. The figures you have given me for these three years are deductions upon your figures shown on that basis 1? A. That is right.

Q. That would have been occasioned had they elected to accelerate? A. That's right.

Q. Mr. Buchanan, have you heard about the pending litigation between the government and the Class I carriers where the government seeks by way of reparations to recover portions of the war income of the railroads?

A. Have I heard anything about it?

Q. Yes.

A. Only what I read in the newspapers.

Q. And, I take it, your figures on Basis 1, Basis 2 and Basis 3 take no account of any possible recovery against the Western Pacific in such litigation? [692] A. That is correct.

Q. But may I direct your attention to the column for the year 1942 in your Basis 1, and referring to that, and particularly to the figures entered in that column, the Western Pacific Railroad, would you state what amount of taxable net income you used in computing the taxes entered there?

A. Yes. You are asking now for the year 1942?

(Testimony of Robert Buchanan.)

Q. Right.

A. Taxable net income as shown in the consolidated return for 1942 of $10,806,257.38, increased by the operating loss carry-over for 1940, which was shown in the return as $438,280.24, which increased the income by that amount to $11,244,537.62. You see, the Basis 1 is computed without any carry-over, so we added back carry-over that had been taken in the return itself.

Q. So the income figure that you used as Basis 1 in the year 1942 for the Western Pacific was made by adding to the income reported for the company in that return the carry-over of net operating loss for 1940 of $438,000?

A. That is right.

Q. Did you follow this same operation as far as the figures for 1943 and the first four months of 1944 are concerned? A. Yes, sir.

Q. Returning still to the year 1942 and the railroad company's figures, what was the amount of the excess profits net income which you used in your calculations? [693]

A. Going back to that figure that I gave you a little while ago as to the income of $11,244,537.662, that is the normal tax net income. I added to that 50% of the interest or borrowed capital in the amount of $1,361,259.44 and deducted a dividends received credit of $30, bringing the excess profits net income to $12,603,767.06. Does that answer your question?

Q. You understand that it does, do you not?

(Testimony of Robert Buchanan.)

The question was, What was the amount of the excess profits net income which you used in your computations?

A. Finally it comes down to $12,605,767.06.

Q. What was the amount of the excess profits credit which you used in computing the excess profits tax of the Western Pacific Railroad Company for the year 1942?

A. A specific exemption of $5,000 and an excess profits credit based on invested capital of $6,781,515.17.

Q. You state that last figure was based on invested capital? A. Invested capital.

Q. Where did you obtain the figure of invested capital upon which you based that amount?

A. From the return, that is shown in Schedule C, taxed to the excess profits tax return, consolidated return, for the calendar year 1942, and that is the schedule that shows the equity invested capital and the borrowed invested capital of all of the companies, and in the column for Western Pacific Railroad Company, starting out with an equity invested capital of [694] $75,800,000 and an average borrowed capital of $73,597,000, the schedule in line 36 finally arrives at $110,525,252.87. [694A]

And to that figure we apply the rates then in effect, of .8 per cent on the first 5,000,000, which is $400,000. 7 per cent on the next 5,000,000 is $350,000, and 6 per cent on the balance of $100,525,250.87—6 per cent of that is $6,031,515.17, or a total of $6,781,515.17.

(Testimony of Robert Buchanan.)

Q. Thank you. Now, in your figures for the year 1942 for the Western Pacific Railroad Company, did you include as a deduction in the computation of its tax on a separate return basis any interest on the bonds of that company then held by the parent corporation?

A. You mean the inter-company interest, I take it?

Q. Well, I think that is a fair description. These were bonds of the railroad company held by the plaintiff corporation.

A. Yes, these are bonds—that is the interest on bonds of the Western Pacific Company, held by the Western Pacific Railroad Corporation. It was an item of $525,784.44. No, that was eliminated in the schedule M before they got to the schedule which shows the income of the individual companies, and I did not take that as a deduction. As a matter of fact, I did make a computation taking that as a deduction.

Q. Would you please give us that.

A. Beg pardon?

Q. Please go ahead and give us that. I take it what you are speaking of now is the computation of the amount your own figures would be reduced by taking that into account? [695]

A. Yes, and also having the creditor corporation taking up a similar amount of income. And I did that for all of the companies for all of the years, 1942, 1943 and 1944, and calculated that the

(Testimony of Robert Buchanan.)

tax would have been, on that basis, $88,000 greater. So in consultation with counsel, they suggested that we eliminate the inter-company interest.

Q. What would have happened, Mr. Buchanan, to the tax computation as to the Western Pacific Railroad Company, if you had taken into its accounts in the year 1942 a deduction for some $525,000 of bond interest?

A. It would have decreased the excess profits tax, but would have increased the income tax, and the net difference would have been $31,995.24.

Q. Do you have a schedule which gives the details of those computations? A. Yes, I do.

Q. Might I ask that this particular schedule be produced, or that we be provided with a copy of that schedule?

A. Yes, I have all the details on those calculations.

Q. Now, is it invariably the rule of the Treasury Department that if a debtor company accruing interest takes the accrued interest as a deduction, that the creditor company, which doesn't receive interest in fact, is required to take the item in as income? A. Yes. [696]

Q. You understand it to be the invariable rule?

A. That is the general rule; now, whether it is the invariable rule, whether there might in some instances, isolated instances, be an exception to that rule, I don't know.

Q. You are not familiar with that?

(Testimony of Robert Buchanan.)

A. No.

Q. Now, I would like to ask you a question or so on the Sacramento Northern Railway computations, which you have made for the year 1942. Excuse me. Before I go to that, may I ask if you will give me a description of the particular schedule that we were just speaking of, under which you computed varying tax consequences resulting from various treatment in these inter-company interest accounts, so that we can have it marked for identification? You have some particular papers that contain those computations?

A. Yes. In fact, all of these computations start with the income shown in the return, and then it shows the adjustments for the inter-company interest, so all of these major schedules, income schedules, show these adjustments. To give you an example——

Q. You don't have any particular computation which brings about this eighty-odd thousand dollar figure we were speaking of a moment ago?

A. Yes, they are all in this set of working papers here (indicating). [697]

Q. Well, you say they are all in there; but do you have a particular paper that has that computation?

A. I would have to go through each one and show the adjustment by years. In other words, we made them separately for each year.

Q. Very well, then.

* * *

(Testimony of Robert Buchanan.)

Q. (By Mr. Adams): Now, then, Mr. Buchanan, directing your attention to the item as to the Sacramento Northern Railway for the year 1942, the income tax of $127,527.71 for that year, would you please state what was the amount of the taxable net income of the Sacramento Northern Railway for 1942 that you used in Basis 1 computations?

A. Yes, I have that right here.

The Court: Now, is there a substantial difference, Mr. Adams, between the amount that is covered by this witness' testimony and the amount you have in mind would be shown by testimony if other deductions were taken, other than the stock loss?

Mr. Adams: Yes, there is a very substantial variance, [698] your Honor, and those——

The Court: Well, what do you mean by that?

Mr. Adams: Let me see if I can call them off generally from memory.

The Court: No, I didn't want to know in detail concerning it. I mean, is it your contention if would be only half as great, a quarter as great, 75 per cent as great, or what?

Mr. Adams: I think if you take all of our figures at 100 per cent value, and of course when we present them and defend them, we do so from that standpoint, then it would appear that upon a separate return basis, consistently carried through—and I mean beginning back before the year 1942, because it makes a good deal of difference whether you did it before then or not—and taking into account this

(Testimony of Robert Buchanan.)

Sacramento Northern loss and cut-backs and reparations figures, that we would come out with a figure that was somewhere in the neighborhood of about, oh, four and three-quarters million dollars taxes for that period. When in fact, $4,200,000 was actually paid.

So that is perhaps a long-winded way of saying we come out with only about half a million dollars.

Now, I will be frank to say that that includes computations on account of one very large potential that cannot be satisfactorily reduced to figures, and that is this reparations suit. If the reparations suit, which is a very real potential, but is yet not susceptible of exact measurement, is left out [699] of our calculations, then our calculations would show something like $7,000,000 tax liability on a separate return basis during those years, leaving in comparison to the figures given here of fifteen and twenty-one.

Mr. Phleger: I take it your Honor understands that the Sacramento Northern loss is what would have happened had they sold the railroad that they still owned, and haven't sold; and the loss on which they didn't take in the last eight months of '44, when they in fact paid several millions in taxes; and it is also my understanding of the tax law that when you accrue as income amounts which are subsequently not paid and you were on an accrual basis, your remedy is to charge those off as losses when the loss is ascertained. So that the result of

(Testimony of Robert Buchanan.)

these reparation claims are that if, as and when—which we hope never will happen—the $3,000,000 lawsuit is determined adversely to the railroad companies, the railroad companies will then be in a position to charge off in that year the amounts which they have theretofore accrued as income and paid income tax on. That is the penalty of keeping your books on an accrual basis.

Mr. Adams: Your Honor, this is way ahead of us. We haven't even put that case in.

The Court: Yes. All I wanted——

Mr. Adams: I didn't want to let Mr. Phleger's statement go back with just a general caveat that we haven't presented [700] the Sacramento Northern loss; it is not as he defines it.

The Court: I just wanted to find out how important this stock loss was, whether or not the railroad company could escape without any taxes without filing the affiliated return. But it is obvious from what you say that they would have had to pay, even assuming you could establish all the deductions, the $7,000,000 anyhow. I just wanted to get the general picture of that.

Mr. Adams: Yes, your Honor.

Q. Now, I was taking up with Mr. Buchanan this figure for the Sacramento Northern Railway, and I asked what was the amount of the taxable net income that you used in computing the $127,000 income tax for '42.

A. It was the amount shown in the consolidated return for 1942.

(Testimony of Robert Buchanan.)

Q. And what was that?

A. Of $7,424.36, plus a net operating loss carried over from 1940 of $311,394.91, or a total of $318,819.27, which, at 40 per cent, gives $127,527.71, found in the column under the year 1942, in Basis 1.

Q. So that this computation, then, is arrived at by adding to the $7,000 income shown in consolidated returns an amount described as net operating loss carry-over? A. That's right.

Q. Now, is it the fact, Mr. Buchanan, also with reference to [701] this Sacramento Northern Railway tax computation, that you have not taken into account the interest accrued on any of the indebtedness in the Sacramento Northern?

A. That is correct. There is $801,000 of that inter-company interest that is eliminated in the consolidated return, which we didn't take up. Although we have a basis for showing its effect when it was taken up as a deduction previously, which computation I previously referred to. [701A]

Q. You are addressing yourself now to your general statement that you worked this thing out all across the board and disappeared, it balances out or almost substantially so?

A. That's right.

Q. But however, that is not to say that in this particular instance of which we are speaking, there was some eight hundred odd thousand dollars deductions of the Sacramento Northern that you haven't taken into account in making that?

A. Oh, on that computation, right.

(Testimony of Robert Buchanan.)

Q. Right. And now referring to the column for the year 1943, our Basis 1, would you say that the computation——

A. For which company?

Q. For the Western Pacific and the Sacramento Northern. Those are the ones we have been speaking of, I take it? A. Yes.

Q. Referring to that column, would you say that your computations for '43 were similar to those which you have just described in the case of '42 for those two companies? A. Yes.

Q. Now referring to the third column on the Basis 1, a period from January 1 to April 30, 1944, you note in the Western Pacific Railroad Company column you have a figure of $1,295,616.56 for excess profits tax of the railroad company for that four months' period? A. Yes. [702]

Q. Did you calculate that tax solely upon the income figure of $2,975,142.13, that you referred to in your testimony this morning?

A. Let me give you the detail of that.

Q. Perhaps you might say "no" if that question is not correct.

A. I would have to look up the computations to refresh my mind.

Q. Surely.

A. Now that computation, the net income for declared value excess profits taxes is $2,975,142.13. And then there is added to that 50% of the interest on borrowed capital, $454,447.27, making a total of

(Testimony of Robert Buchanan.)

$3,429,589.40 from which there is deducted a figure dividend received credit of $30, coming down to $3,429,559.40; and from that is deducted a specific exemption prorated of 4/12 of a year, $5,000 for 4/12 of a year, which figures to $1,666.67, and the excess profits credit is also prorated for 4/12 of a year, arriving at the amount of $1,912,551.73, giving a total excess profits credit of $1,914,218.40, which leaves as subject to excess profits tax, $1,515,341.00, and the tax is 95% of that amount, or $1,439,573.95. From that is deducted the post-war refund of 10% thereof, or $143,957.49, coming down to a tax, an excess profits tax, of $1,295,616.56, which is the figure about which you are asking.

Q. Yes. Now from what source did you derive the excess profits credit figure which you then prorated by taking a third of it? [703]

A. That is that same figure that I gave you a little while ago, taken from the return here, as the $110,000,000 figure. No, let's see. That is—let me make sure of this. This is the 1944?

Q. Yes.

A. That is taken from the return itself, showing an equity invested capital—do you want me to read all the details?

Q. I asked you the source of the excess profits credit figure that you used in the computation.

A. The source of the returns which show money paid in for stock of $800,000, property paid in for stock, $75,000,000, or a total of $75,800,000. This is

(Testimony of Robert Buchanan.)

the Western Pacific. And borroweed capital of $73,000,000, half of which is thirty-six million odd. That gives one hundred twelve. And then there is an adjustment of inadmissible assets of $2,000,000, bringing the invested capital to $110,753,104.08, which is apporximately the same as we have here for 1942, and to that invested capital figure is applied the percentage rates, coming to an excess profits credit of $5,737,655.20, and then the credit is prorated, 4/12 of that amount resulting in this prorated credit of $1,912,551.73. [704]

* * *

Q. Now, Mr. Buchanan, directing your attention to your schedule, Basis 2, I take it what you told me with reference to Basis 1, as far as the possible deductions I have mentioned are concerned, that is, the Sacramento Northern partial bad debt loss and the accelerated amortization and the cut-backs and refunds and the reparations claimed, I take it that no account of those matters is taken in your figures on Basis 27. A. That is correct.

Q. Now, in Basis 2, you say, among other things, in your title "Giving each affiliate the benefit of any operating loss carry-over or unused excess profits credit carry-over attributable to it," and I would like you to explain, if you will, just what process you followed in giving those benefits in your computations, Basis 2. [705]

A. Yes. You will notice that the difference between Basis 1 and Basis 2 is that in Basis 1 we

(Testimony of Robert Buchanan.)

have an excess profits tax of $4,713,594.03, whereas in Basis No. 2 we have no excess profits tax. Now, explain that difference where you start with the net income shown as a return; the same as used in Basis 1, $10,806,257.38, and we add back to that what was added back in the return, the operating loss of $438,280.24, and the 50% of interest on borrowed capital of $1,298,956.10. And I might say in passing that adding back the $438,280.24, that is the entire net operating loss, whereas that should have been the net operating loss deduction, which is really the operating loss less certain adjustments for non-taxable income, dividends, and capital gains. But we put that figure in because that is the figure used in the return, and it would not materially affect the results because of the very large credit that we come up with in 1942. But I just want to point out that fact. That gives us an excess profits net income of $12,543,493.72. The entire excess profits tax is wiped out because we have the current credit, that is, the excess profits credit for the year 1942 of $6,781,515.17, and then we have a carry-over from 1940, unused excess profits credit of $7,725,229.71 and an unused excess profits tax credit carry-over from 1941 of $7,633,732.80, or a total carry-over for those two years of $15,356,962.51. The unused excess profits carry-overs for the years 1940 and 1941, added to the current year's credit, gives a total credit of $22,138,477.68 applied to the excess profits net income of $12,542,463.72 and,

(Testimony of Robert Buchanan.)

of course, the excess profits tax is wiped out and is zero, as is shown in column 1 of Basis 2. So the principal difference between Basis 1 and Basis 2 is the result of these carry-overs.

Q. Let me ask you one or two questions about Basis 3. Is it correct to say that your computation on Basis 3 is made by using the data in the consolidated returns as filed without any change or adjustment except elimination of the corporation's stock loss? A. That is correct.

Q. So that in effect this computation is a computation of what the consolidated tax returns would have shown as taxable income if the loss had not been taken as a deduction in those returns?

A. That is correct.

Q. And I take it, as in the case of Bases 1 and 2, you have not taken into consideration the adjustments for accelerated amortization or for cut-backs, refunds or for the reparations claim in those computations? A. That is correct.

Q. Just one more question about the figure in the column Basis 3 for the period January 1 to April 30, 1944. I notice that there is a note there "Corporation's excess profits credit for 1944 prorated." A. That is right.

Q. Correct me if I am wrong about this, but I will try to state [707] what I understand the return shows in this regard. The return shows the parent corporation's excess profits for the last twelve months, does it not?

(Testimony of Robert Buchanan.)

A. That is correct.

Q. And that excess profits credit is a figure entering into the computation of tax liability?

A. That is right.

Q. And to reduce it to 1/3 of that figure would increase the resulting tax liability?

A. That is right.

Q. Is it not the fact that the return as filed by the parent corporation under the law covered the whole year for the parent corporation?

A. Yes, but all the subsidiaries were in there only for four months.

Q. The subsidiaries were in there only for four months? A. And if it were deemed——

Q. Did the law require that in the computation of tax liability under the return to parent's excess profits credit be cut 2/3, as you understood?

A. As far as I could find, the law is silent on that point, and under the consolidated income tax regulation, since the subsidiaries had all gone out of the picture, that was the reason for our prorating it. In other words, it might well be put that the treasury department would say that it had to be prorated for [708] that reason. That was our reasoning.

Q. Are you satisfied in your mind whether or not the Treasury Department would have made that requirement?

A. I don't know. It seemed to me that might well have been required for that reason. I looked up

(Testimony of Robert Buchanan.)

some regulations; I couldn't find any ruling on the subject.

Q. Have you made any computation covering that four months' period of what the figures entered in your Basis 3 item would have been if you had taken the full amount of the twelve months' excess profits credit?

A. No, I have not. [709]

* * *

Mr. Phleger: This morning, in connection with Plaintiff's Exhibit 73, which you recall were six sheets representing an income tax computation prepared by one Reilly, I asked counsel to stipulate who Reilly was, but I think I forgot to ask him to stipulate that those sheets were prepared by Reilly. Will you so stipulate?

Mr. Adams: I think that is what the record shows.

Mr. Clark: That is right.

Mr. Phleger: That is not my recollection. We identified Reilly but we did not have a stipulation that Reilly prepared them, which he in fact did, as shown by the deposition.

Mr. Clark: May we have the stipulation now?

Mr. Adams: Oh, yes. I think the record shows that. If it does not, I so stipulate.

Mr. Phleger: If it please the Court, this terminates the presentation of our case in chief. I will conclude by offering Plaintiff's Exhibit 1 for iden-

tification, the chart showing corporate relationships. [711]

* * *

Mr. Adams: I am just making an objection to a chart that I do not think is fairly representative of the evidence.

The Court: This has nothing to do with what your contentions are in the case. Your opponent is merely offering the chart as a summary of what he says his witnesses have already testified to and what the record he has already introduced shows. It is not offered for any more than a summary of the evidence he has presented. It does not prove anything in the case. The chart does not prove anything.

Mr. Adams: May I respond to his Honor, because I think his Honor's request was directed to me. I would have no objection to the production of this paper if all that were sought to be accomplished by it is the same thing that is accomplished by a brief. I do not understand how it can be that something that purports to be in effect a brief on the part of one party to the litigation can be admitted in evidence as evidence or proof of any fact.

The Court: We admit all sorts of things for limited purposes in evidence, and that takes care of that matter, and if this is admitted only as a summary of what has already been testified to, if there isn't any testimony to state it, the chart does not mean anything. It has that limitation to it when it is admitted. [713]

Mr. Adams: Well, in other words, as I understand your Honor, then, admisson of this chart in evidence does not tend to prove anything that is not otherwise proved for the record.

The Court: Of course. I have said that several times. I think that is all any chart is admissible for.

Mr. Adams: Then in that case, I confess that I don't have a very good ground for objection to its admission in evidence.

The Court: I think these charts may be admitted as charts, as summaries of the testimony already in evidence, and not in proof of any fact thereon stated—unless there is evidence to show the things that are set forth in the chart.

Mr. MacKinnon: May I inquire whether there is any evidence to support the stock holdings indicated on the chart of Sacramento Northern, Deep Creek, Standard Realty and Tidewater Southern, at the present time?

Mr. Phleger: Yes, in the income tax report of the Western Pacific for the last eight months of 1944; also in the annual reports of the Western Pacific Railroad for 1944, '45, '46 and '47.

The Court: Well, if there is any inaccuracy in these charts, why, you can treat them in effect as if they are brief presentations of the evidence.

Mr. Phleger: Now, I take it that covers——

The Court: How many charts have you got there?

Mr. Phleger: Plaintiff's 1, which is the corporate [714] relationship. Plaintiff's 2, being the positions held by the officers, and I will offer the chronology as 2-B.

The Court: Very well, they will be admitted for the purposes and on the basis of the Court's statement.

(Plaintiff's Exhibts 1 and 2 for Identification were received in evidence; chronology chart referred to was received in evidence and marked Plaintiff's Exhibit 2-B.) [715]

* * *

(The Plaintiff rested.)

Mr. Clark: May it please your Honor, on behalf of the interveners, I will ask all counsel in the case for a stipulation that the intervener, Henry Offerman, now owns 4080 shares of preferred stock of the plaintiff corporation, and has been a stockholder of the plaintiff since July 7, 1942; that the intervener J. S. Farlee & Co., Inc., is the owner of 10,000 shares of the plaintiff corporation and has been a stockholder since January 10, 1944; and that Meredfth H. Metzger, formerly [716] Meredith H. Van Kirk, who was substituted for her deceased husband by order of this Court on January 28, 1949, is the owner of 11,385 shares of the plaintiff corporation, 8200 shares of which were distributed to her from the estate of her deceased husband; and that he had been a stockholder of the plaintiff corporation since February 23, 1944.

Is it so stipulated, gentlemen?

Mr. Adams: I would like to respond to that very briefly, Mr. Clark. In the first place, I told Mr. Clark, and I will stipulate to the fact upon his assurance that it is so,—which he gives me—that whatever stock ownerships were developed at the time the depositions were taken, and those related to Mr. Offerman and Mr. VanKirk and the J. S. Farlee & Co., are still existent. This is probably just what Mr. Clark has said.

Now, with regard to Merodith H. Metzger, Mr. Van Kirk's widow, we agreed also that she might be substituted in the case subject to the same defenses and disabilities that her husband might have had. So when Mr. Clark refers to the fact that she also comes individually as a stockholder in her own right to some small number of shares, I wish it to be understood I haven't agreed she might come in the case late not subject to those disabilities and defenses. With that statement, I take it that what Mr. Clark has said is substantially what I have said. [717]

Mr. Clark: Well, may it please your Honor, of course the Metzger substitution is covered by a written stipulation, and a court order which was made pursuant to a stipulation signed by all the parties. Now, as to the amounts I read, they are slightly larger than the amounts developed on deposition, due to the fact that in the meantime, some treasury stock of this plaintiff corporation was offered to the stockholders, and these people have taken their pro rata shares of that offering.

The figures are substantially above those developed on deposition, in that Offerman was shown to have held some 3090 shares, and the figure I gave was 4080 shares.

With that one point, pointing that one thing out to the Court, my statement is substantially in accord with that made by Mr. Adams, which was agreed to on pre-trial, with the exception of the small additions.

Mr. Adams: As to the small additions, your Honor, I take it that Mr. Clark is not insisting that because of these additions, his clients have any better position.

Mr. Clark: No, I am simply trying to give the correct amounts.

Mr. Adams: And further, that the prices paid for those small additions may be stated as they have been, with respect to the other stock; if you have the prices, I would be grateful if you would state them, and we will accept your statement.

Mr. Clark: I don't know the price for that. [718]

* * *

(Letters previously identified as Interveners' 67-A, -B [721] and -C, dated February 11, 1947, referred to above, were received in evidence and marked Interveners' Exhibit 14.)

Mr. Clark: And the record, of course, shows that the plaintiff corporation received no notice of any such offer of settlement until the following April. [722]

* * *

Mr. Levy: I should like to read into evidence certain portions of the deposition of Mr. Robert E. Coulson taken in New York; first from page 5702:

"Q. Mr. Coulson, you are a member of the bar of the State of New York? A. Yes.

Q. And a member of the firm of Whitman, Ransom, Coulson & Goetz? A. Yes.

Q. Are you the Mr. Coulson of the firm name?

A. Yes."

Page 5704:

"Q. When did you first become affiliated with the firm of Whitman, Ransom, Coulson & Goetz, as it was then known? A. January 2, 1919.

Q. Have you continued with that firm since to date? A. Yes."

5709:

"Q. In the course of your activities for the firm of Whitman, Ransom, Coulson & Goetz did you engage in legal services for Arthur Curtis James during his lifetime? A. Yes.

Q. Can you give us a brief picture of the nature of the [723] services that you performed upon his behalf?

Mr. Levy: Generally.

Q. The answer can be general as well.

A. Generally I acted as counsel for him in many of the matters which arose in New York.

Q. Did those matters involve tax work?

A. Yes.

Q. Did they involve corporate work?

A. Some of them involved corporate work.

Q. Did they involve legal advice in connection with business dealings, that is, the acquisition of property or the sale of property? A. Yes.

Q. Would you say that a considerable part of your activities on behalf of Mr. James were in the tax field during his lifetime?

A. A substantial part was, especially in the early years, Mr. Levy.

Q. During your activities with the firm of Whitman, Ransom, Coulson & Goetz did you perform legal services for the various James companies?

A. Yes.

Q. Did those services cover the general field of law practice? A. Yes. [724]

Q. Did they include tax work?

A. Yes, again with a qualification, Mr. Levy. In the early years I dealt with the tax problems personally and in the later years, why, the office, the firm would deal with them and I would know about them.

Q. When did you become a partner in the firm?

A. January 2, 1919.

Q. Have you during any period of your work with the firm been the partner in charge of the legal services rendered by the firm for Mr. James and his companies? A. Yes.

Q. During what period would you say that was true? A. For almost 20 years.

Q. Has it continued to date?

A. Yes, subject to the qualification that Mr. James has no companies at the present time. They have all been dissolved.

Q. Since Mr. James' death have you represented the estate of Mr. Arthur Curtis James?

A. Yes, our firm has represented the estate since his death.

Q. Your firm has also represented the James Foundation during this period? A. Yes.

Q. And you are the partner who was in charge of the [725] work performed for the firm for both of those clients?

A. Yes, for the estate, that would be under the partner who is the head of the probate work, Mr. Chambers.

Q. In connection with handling the estate, are you kept generally familiar with the progress there?

A. Yes.

Q. During the reorganization of the Western Pacific Railroad Company the firm represented the A. C. James Company, did it not?

A. That is correct.

Q. Were you the partner in charge of your firm's activities in that connection? A. Yes.

Q. By the way, we have developed the practice in these proceedings of referring to the railroad company as the company and the railroad corporation as the corporation, so if I say the company I mean the railroad company, and if I say the corporation I mean the railroad corporation.

During the years 1943 and 1944 your firm was likewise tax counsel to the trustees in bankruptcy of the railroad company, were they not?

A. The firm was retained sometime in 1943 to

act for the trustees under Section 77 in the reorganization proceeding." [726]

The next page is 5819:

"Q. I believe you have already testified that from 1943 to date your firm has been counsel to the A. C. James estate, the Foundation, and the A. C. James Company up to the time of the dissolution?

A. Yes.

Q. As counsel for those various clients did your firm do tax work and corporate work?

A. Yes, we were general counsel.

Q. Did you draw the will of Arthur Curtis James?

A. Yes, in the sense that I was the responsible draftsman. Our probate department, of course, worked on it. It was a composite job, both the will and the codicils.

Q. Would it be correct to state that the securities of the railroad company held by the estate and the Foundation were an important asset of the estate and the Foundation?

A. They represented substantial value as well as a much larger investment.

Q. Had you from time to time held a position with any of the James companies other than that of counsel?

A. Yes, I had been for some years a director of the Curtis Southwestern Company and the Curtis Southwestern Corporation and the A. C. James Company. [727]

Q. Had Mr. James requested you to assume

those positions in those companies? A. Yes."

Page 5718:

"Q. Was the effect of taxes on earnings a vital factor to your clients, the A. C. James Company?

A. Yes, in that they expected to receive securities in the reorganization. The property, you understand, was in the hands of the trustees and in the process of reorganization." [728]

* * *

Mr. Adams: I have not hitherto understood the statements made on behalf of the plaintiff—they were made largely on behalf of the plaintiff—that the defendant took over this tax matter to relate to particular conduct of any particular gentleman who was involved in these transactions. I had understood the plaintiff's case to be a contention that these tax returns were filed by a variety of people—Mr. Curry was one of them, Mr. Schumacher was another, and so on—whom he has up there on his chart, and that the tax returns were advantageous to the defendant, and that all that was intended by a statement that the matter was taken over was that that was the way it was done, without any implication of any sinister or improper motive, but only that it was done, and the complaint was that the plaintiff had some rights in the matter about which the plaintiff [731] is now in court. Now, do I understand that it is interveners' view that there was any misconduct, improper motive or improper action on the part of any actor in these

proceedings? I would just like to be sure what these charges are that are being brought against us so we may know what it is we have to answer.

Mr. Levy: I think the facts speak for themselves, your Honor.

The Court: I am not too sure about it.

Mr. Levy: I will spell it out a little. I do not want to dodge the question.

The Court: You are suing the railroad company here, aren't you?

Mr. Levy: Yes, we are.

The Court: And it is your contention that the railroad company dominated this tax situation. Is it your contention that the railroad company in turn was dominated by this gentleman, Mr. Coulson?

Mr. Levy: No, we have not made that contention in the course of this trial, your Honor. What we have contended is this: We have contended that through the dual relationships of these officers and directors and through Mr. Coulson's domination of the corporation, the plaintiff in this case, and through his position as tax counsel, wherein he dominated the handling of these tax matters, and through having put Mr. Curry in his own office since May 1, 1945, he did in fact—— [732]

The Court: Mr. Coulson was not a director of the corporation, was he?

Mr. Levy: He was until 1942; but your Honor will recall that the James Foundation owns 40 per cent of the stock of this plaintiff.

The Court: In the period with which we are concerned he was not a director?

Mr. Levy: He was not.

The Court: Nor an officer?

Mr. Levy: He was not, but he was its tax counsel with all these conflicting pulls operating upon him.

The Court: What is it that he did that the defendant did not do that gives you any cause of action that you did not have before?

Mr. Levy: I will put it this way: What the defendant did, it did in part through—for instance, the failure to advise this corporation as these returns were going in of whether or not separate returns could be filed, of whether or not the corporation was assuming liabilities, of whether or not the corporation had another course of conduct which it could have pursued—he did that. He is a member of the firm and he did it, and the testimony will show he actively participated in the various events as they took place.

The Court: Of course, if he did it without the knowledge and consent or against the consent of the plaintiff, then maybe you [733] might have named him as a defendant and charged him with some form of conspiracy and the Court might properly find what he had to do with the matter.

Mr. Levy: He was working for the railroad.

The Court: Is there anything more than that under the circumstances that have been described that, as you have urged heretofore, the defendant

caused the preparation of the returns which the plaintiff signed?

Mr. Levy: Other than this?

The Court: I say, what does this add to it?

Mr. Levy: Well, I think this particular letter, your Honor, adds——

* * *

The Court: What difference does it make what he said to somebody else concerning the matter?

Mr. Levy: That is not the point, your Honor. I think the point is this: The point is to me, Did Mr. Coulson represent both companies and what were his conflicting tugs? That is one of the issues in this case.

The Court: What difference would it make unless the defendant is chargeable with it?

Mr. Levy: Now, I think the defendant is chargeable with it [734] in this sense: Everybody knew who Mr. Coulson represented. That was no secret, your Honor.

Mr. Adams: Certainly there was no secret about that.

Mr. Levy: I am not saying there was anything invidious about his representations, but it is a part of the duality, your Honor.

The Court: Is there any secret about the fact that Coulson had represented these other interests?

Mr. Levy: No.

Mr. MacKinnon: It was spread right out through the reorganization.

Mr. Levy: There was no secret about that. I am not contending there was.

Mr. MacKinnon: This is a little more color, that is all.

Mr. Levy: I do not agree with that. This piece of evidence gives you a piece of evidence that you do not now have in the record. There is nothing in the record that shows that as of that date, and during the period of the reorganization, during this critical period, the James interests had and viewed their standing as being that of a group representing 21 per cent of the stock of this railroad company when it was issued. Now, that is a strong tug for a man who is representing both the railroad company and the corporation in determining where his interests lay, as to who should get any savings that flow from taxes. [735]

The Court: You are not expecting to get me into an evaluation of the tugs that are involved in this case? If that is the case, it would open the door to all sorts of testimony concerning this gentleman, Mr. Coulson, what he thought about it, whom he spoke to, what his views were as to his respective loyalties, duties, and so forth and so on.

Mr. Levy: I am pointing to objective facts, not subjective facts. [736]

* * *

But we do feel that your Honor is absolutely right that on one leg of this case this stuff has very little to do with it. We do feel, though, that there is a second leg of the case, and although your Honor may not give any judgment based upon it, we feel there is a basis for the claim perhaps in an

appellate court, if we ever have to go that far, and they will agree with us on that leg of it. [738]

And along those lines the basis of our claim can be simply stated that over and above what dual relationships produced, which is enough to make the case, if there is unfairness, if there were a conscious using, you have got a different kind of a case with different legal incidents. Now, one of the elements of this conscious using is mode of use to benefit one against the other. [738-A]

The Court: Well, I can follow all that argument or I could if there were some concealment involved. But when everybody was, as they were in this case, acting completely in the open in the matter, nobody was concealing anything from anyone else, the element of fraud or deception, of the kind that you refer to, is absent. So you have to decide the matter then on the basis of whether or not, under those facts and circumstances, there was nothing that was either legally or equitably wrong or disadvantageous to one party or the other, done. You don't enter into these questions of fraudulent overreaching unless you have got some element of concealment involved in the case, and equity; your reading of equity will satisfy you on that, of the principles of equity, and you are not charging or claiming that there was any of that kind of deception in the case. Everybody knew that consolidated returns were being filed. Everybody knew who the directors were. Everyone knew that these attorneys were being employed to file this consolidated return. It was all done right out in the open. The

question that you have to present in this case is, now, can we go back and under principles of equity, redetermine the transaction on the basis that a legal or equitable wrong was done by what was done.

Mr. Levy: Your Honor, that is a very persuasive answer to our contention, and perhaps your Honor is ultimately right. But you say that there is no concealment here, and there is no secrecy. I just want to point out two things to you, without [739] going into the record to give you more. One is, why do tax attorneys who represent two participants in a consolidated return fully advise one and not advise the other at all? That is unnatural; let's at least call it that. Let's go to the settlement in February 11. Let me just pursue that one moment.

The Court: Well, all I have to say to you there, Mr. Levy, is that I don't think it is necessary to carry that argument forward now. Everybody knew, didn't they, that the consolidated return was being filed? So that the defendant railroad company wouldn't have to pay any income tax? That was why it was filed, wasn't it?

Mr. Levy: Yes, your Honor.

The Court: Nothing else is of any importance; that is why it was filed.

Mr. Levy: Yes.

The Court: With that in mind, nobody had to conceal anything from anybody else. That is why they did it. They filed a consolidated return and took this loss so the railroad company wouldn't

have to pay any income tax. They made use of the stock loss of the parent company to avoid paying the income tax. Now that is what they did.

Now under the particular circumstances that we have in this case, you have presented a very unusual, and I think at this point, a difficult question, which involves whether or not there was a cause of action now on the part of the plaintiff [740] because of those circumstances. Now isn't that the case here?

Mr. Levy: That is one leg of it. Undoubtedly——

The Court: Well, if it hasn't got that leg, it hasn't got any leg.

Mr. Levy: Absolutely. That is a very important leg of it, and that may be the only part of the case that your Honor feels he is going to have to decide. But rightly or wrongly, and certainly without any desire to prejudice the plaintiff's case, we think that there is an argument to be made on another leg. Now we may be proceeding mistakenly, and we certainly have tempered our presentation of it in an effort not to take too much time. We have spent an awful lot of time talking about one piece of paper here. [741]

* * *

Mr. Levy: Now I should like to read from Mr. Coulson's deposition, on page 5740: (reading):

"Q. In what capacity did you write the letter of June 26 to Mr. Curry, Interveners' Exhibit 64?

"A. For that, I would like to see the prior letters, Mr. Levy, because it is a continuation of cor-

respondence which apparently started with a letter of April 12, 1943, from me to Mr. Curry, and a letter from Mr. Curry to me of May 15, 1943."

Whereupon the requested documents were exhibited to the witness. (Continuing):

"Q. Will you answer the question, Mr. Coulson?

"A. That letter was written in the capacity of counsel to the James Foundation of New York, Inc.

"Q. I notice that the last paragraph of Interveners' Exhibit 64, your letter of June 26 to Mr. Curry, states: 'Before the Foundation gives a final and definitive answer to your proposal, I would wish to discuss with Mr. Polk the tax aspects of the problem and make that information available to the trustees of the Foundation.'

"Now I show you interveners' exhibit 60,——"

This is Plaintiff's 51 in this case.

"——your memorandum of June 26——" [744]

The same date, 1943,

"——to Mr. Polk, and ask you whether that is one of the tax problems taken up with Mr. Polk in connection with your letter of June 26, Interveners' Exhibit 64."

"The Witness: This memorandum speaks for itself, being on the same date. I have no recollection independent of the documents here, Mr. Levy. It was a memorandum written to Mr. Polk on the same date as the letter to Mr. Curry, and refers to tax problems which might arise, or tax aspects of the continuation of the corporate charter of the holding company."

Now, continuing on page 5743: (Reading):

"Q. Can you tell us in what capacity you directed the memorandum of June 26 to Mr. Polk?

"A. Was, to the best of my recollection, as counsel for the James Foundation of New York.

"Q. In your memorandum to Mr. Polk, Interveners' Exhibit 60,——"

Which is Plaintiff's 51.

"——you use the following language:

"'Will it embarrass you in the Western Pacific . . .'

"Was the Western Pacific situation referred to, Mr. Polk's activity as counsel to the trustees in tax matter? "A. Yes. [745]

"Q. What was the relationship between the Western Pacific tax situation and the Foundation on or about June 26, 1943?

"A. The James Foundation held, directly and indirectly, as creditor, a substantial tentative in the Western Pacific reorganization, and was interested in the ultimate outcome of this reorganization, and hence, interested in anything that benefited the earnings and assets held by the trustees in bankruptcy."

* * *

The Court: Well, you don't need the letter in for that; they will stipulate with you on that, won't they, as to what the percentage was?

Mr. Levy: If they will, I will accept the stipulation, based on Mr. Coulson's letter, yes.

The Court: If all you want to show is the percentage, subject to its materiality——

Mr. MacKinnon: The plan shows what they got.

There is no secret about that.

Mr. Adams: Yes, there is no secret about that.

Mr. MacKinnon: They got it under the plan of reorganization.

The Court: The figure was correct, was it?

Mr. Adams: Let us see how it is stated here; this may be an abbreviation.

Mr. Levy: 21½% of the voting stock of the reorganized company.

Mr. Adams: I think that is correct. I will stipulate to it.

The Court: You don't need to put the letter in.

Mr. Adams: That is a statement that the James Foundation and the A. C. James Company together came into 21½% of the voting stock of the reorganized company under the provisions of the [748] plan, and the securities they held.

Mr. Levy: I think that says it, your Honor.

The Court: All right. [749]

* * *

Mr. Levy: Will it be conceded that 100% of the stock of the Western Realty has been owned since April 30, 1944, by the James Foundation of New York, Inc.?

Mr. MacKinnon: Subject to correction, yes. The exact dates are the thing in question; if they would be shown to be [752] changed, I will reserve the right to make the change. [753]

* * *

Mr. Levy: I hope I won't take too much more time as a result of precipitating these debates.

On page 6144 (reading):

"Q. Has the retainer arrangement with Mr. Curry been terminated?

"A. No, it has been terminated, but is still in effect. It has been terminated as of the end of the year 1948.

"Q. Did you discuss the termination of that retainer with any representative of the railroad company?

"A. Not to my recollection." [755]

Mr. Levy: I think I have no more, your Honor. That concludes the reading.

Mr. Clark: The interveners rest, your Honor.

(The interveners rested.)

Mr. MacKinnon: Your Honor, I should like to make a motion at this time to dismiss the complaint in intervention purusant to Rule 43, I think it is, of the Federal Rules of Civil Practice on the ground that the complaint in intervention has not been established by any evidence adduced, and whatever will meet your Honor's wishes, whether it be done at length, I will comply with.

The Court: Of course, I allowed the intervention.

Mr. MacKinnon: What is that?

The Court: I say the intervention was allowed.

Mr. MacKinnon: I appreciate that. The complaint in intervention is a pretty drastic pleading, and I say on the basis of the proof—and that is what we are dealing with—their complaint, in

which they charge a conspiracy here, I say there is no evidence to sustain a conspiracy. If they want to withdraw and restrict it, we will meet whatever cause of action there is, but as I understand it, they are resting on their complaint, and under the circumstances I do not think they made their case, and since they have not made their case I am prepared to discuss it at length or briefly, whichever your Honor wishes. [756].

The Court: Doesn't the complaint in intervention also adopt the plaintiff's cause of action?

Mr. Clark: It not only adopts it, it injected it into this case for the first time, your Honor. There was not an issue of duality in this case until it was allowed, and that is why it was allowed.

The Court: There was an amended complaint.

Mr. Clark: Yes, months later, which adopted in part the theory of the stockholders' action in New York and also the theory of the complaint in intervention. To answer your Honor's question, yes, the duality is the substance of the complaint in intervention.

Mr. MacKinnon: I do not think it is. I think there is a plan and conspiracy charged in the complaint in intervention, and domination and control is alleged from the beginning to the end. Now, if you want me very briefly to refer to the allegations——

The Court: Of course, there is no conspiracy involved here.

Mr. MacKinnon: Then let us have it on the record. Let us know what we have to meet.

The Court: What you are really interested in is knowing how far the defendant has to go in its proof?

Mr. MacKinnon: That is right. We have to know what we have to meet. That is what we want. I think it is time for [757] interveners to fish or cut bait.

Mr. Clark: That issue, if it please the Court, was defined on pre-trial. I handed up a letter to your Honor. I read it to your Honor, and everyone was advised of the restriction of the allegations which were made at the time of the intervention for purposes of the trial. Mr. MacKinnon had notice of that long before even the pre-trial conference. This complaint in intervention, if it please your Honor, was drawn at a time when the corporation had come out here, a few weeks after a motion to dismiss in the New York action had been denied, which had been interposed by defendants there, at a time, may it please your Honor, when the directors of the plaintiff corporation were named as individual defendants in New York, in the action brought by interveners as plaintiffs, at a time when Mr. Curry was officing in Mr. Coulson's office, Miss Valouch was there, they being president and secretary, and the complaint which the corporation came out here with and then filed did nothing more than to allege the fact that these returns had been filed and the stock loss used. There was not the least suggestion of the capacities under which the people had acted or anything

of that kind, and we came here, may it please your Honor, and Mr. Levy associating my firm for the purpose of intervening in that action, and on the evidence as we then knew it, depositions having been taken in New York, we made the allegation that both the defendant company and the corporation were dominated by the James interests, and we did allege what amounted to a deliberate plan to use these stock losses for the advantage of the defendant company. Now, those allegations were in the complaint. But also in that complaint was injected for the first time in this California litigation the issue of duality, and we detail as much of it, may it please your Honor, as we then knew, such as Curry's conflicting positions and the conflicting positions of Mr. Nicodemus, who was still counsel at that time for the plaintiff corporation. That was the petition of these stockholders at that time when your Honor on that showing, may it please your Honor, allowed us to intervene, and I assume the order allowing the intervention has long ceased to be appealable. That complaint stood all through the following couple of years, a year and a half, while we, the interveners, pressed forward the discovery proceeding and developed all this evidence that has been produced before your Honor, every bit of it, and when we came up to the pre-trial conference counsel asked me informally how much of this domination thing we intended to rely upon, and in my letter to them, which I read to the Court, after my first having

asked them if they intended to insist upon an amended complaint pleading, we specifically say, may it please your Honor, that in addition to the duality, which is the foundation of the complaint in intervention, we intended to rely on the theory which Mr. Levy has described as one leg of the case—and we [759] restricted it to the period commencing January 1, 1943, and later on pre-trial said March 15, 1943—namely, on that leg we describe the domination by the James interests through the activities of Coulson of the plaintiff corporation for the advantage of the railroad company while he, Coulson, was counsel for the railroad company. May it please your Honor, prima facie that showing has been made so far as supporting the allegations in the complaint as abridged by my pre-trial stipulation. There just is no doubt of it, and in addition to that the complaint in intervention proceeds upon the theory of duality. Instead of that being a fit subject at this time, your Honor, for a motion of this kind, I suggest to your Honor that if the complaint in intervention is supported by any of the evidence here, it should be allowed to stand, and at the conclusion of the trial, then if it is necessary we can conform to the proofs, and I think in view of the discussions between the parties before the pre-trial on this very subject, that Mr. MacKinnon's motion at this time is out of order.

Mr. MacKinnon: I do not think it is, your Honor. I think it is right on the nose within Rule

43 of the Federal Rules. They make their case or they don't make it. They have charged a conspiracy here. They have charged domination and control, and their complaint in intervention bristles with it. Now they say, if I understand them correctly, "We want to rely on duality but we do not want to take that position on the record." [760] Let them take a position on the record so that we know exactly what we have to meet. That is all I am saying. But they can't both say, "We are relying on a complaint in intervention which charges such matters as those to which reference has been made, and they are going to ask you to draw every inference they can from what I say is a definitely limited record here—definitely limited—this record amplified will explain many of these transactions. They take an isolated document out of its setting. They introduce it. They are going to ask your Honor to draw inferences from it. Are we to be circumscribed? We cannot be circumscribed, unless we know what they are making as their record, if they are standing on domination and control. If they are standing on conspiracy, we will meet it. But on the present state of the record they have not sustained domination and control. They have not sustained conspiracy, and by reason of their failure of proof I do not see any other alternative except to dismiss. If they want to rest on duality, let them say so.

The Court: Isn't there some evidence that supports the argument that there was in a legal sense domination and control?

Mr. MacKinnon: I do not think there is.

The Court: Without having any sinister connotation attached to it or anything that savors of fraud or deception; that by virtue of the facts as they actually occurred, the [761] positions of the parties, their relationship to one another, there was in fact control?

Mr. Clark: That is precisely the point, your Honor.

The Court: It does not necessarily have to be for a sinister purpose. There is nothing wrong about having exercised control.

Mr. MacKinnon: Obviously not.

Mr. Clark: Plus the fact that the case the interveners have made out by the evidence adduced before your Honor—it is not made out by the pleading. It is the case made out by the interveners.

Mr. MacKinnon: Do you want to amend to conform to proof?

Mr. Clark: Just a minute, Mr. MacKinnon. The interveners and plaintiff have made out a case, for what it is worth. Your Honor will pass on that evidence one way or the other. That is the interveners' case. Mr. MacKinnon knows very well how much of that he has to meet, and he will meet it irrespective of the condition of this pleading. There is prima facie sufficient evidence in this record to support, by inference and otherwise, all allegations of the complaint in intervention.

The Court: I certainly could not dismiss the complaint in intervention as a whole.

Mr. MacKinnon: I think you could.

The Court: I do not see much point to that.

Mr. MacKinnon: I do not either, but I would like to know [762] what we will be called upon to meet.

The Court: There was before the Court a complaint here which set forth matters which constituted a cause of action before the plaintiff's complaint was amended.

Mr. MacKinnon: I did not get that.

The Court: I said there was a complaint in intervention here which set forth a cause of action before the plaintiff's complaint was amended.

Mr. MacKinnon: That is right, but the complaint in intervention before the Court has not been sustained one iota by the proof that has been adduced.

The Court: There is as much evidence to sustain it, on the same issues, the complaint in intervention, as there is the plaintiff's complaint.

Mr. MacKinnon: On the same issue, but the same issue is not presented. I disagree with Mr. Clark on that.

The Court: Then there is no basis for dismissing the complaint.

Mr. Clark: The point is Mr. MacKinnon's move is quite adroit.

Mr. MacKinnon: The Federal Rules are very clear.

Mr. Clark: He moves to dismiss the complaint in intervention, which brought duality into the case, and then—just a minute, your Honor—once he gets rid of that, he hopes he will then make a motion to strike most of the plaintiff's case [763] because plaintiff's supplemental complaint does not go as far as their case does.

The Court: I do not want to be abrupt about this matter, but I am not going to rule on a motion to dismiss a complaint in a case of this kind where unquestionably there is a novel issue which everyone has told me exists in the case.

Mr. Clark: There is. There is no question about its being a novel case.

The Court: I will invoke a rule which I sometimes do in this type of case, Rule 12(d). Maybe you have heard of that rule. That is 12(d) of the Rules of Civil Procedure. I wrote a few decisions on it, that when there is some unusual question presented to the Court, it is foolish for any judge to try to accomplish justice by ruling on a matter that has to be determined by just what words are on paper, and until he gets a vista that the evidence gives him of what the case is really about. Both sides having had an opportunity to contribute to that, you intelligently decide whether the plaintiff is entitled to remain in court or not, and in this case the interveners. I am not going to dismiss the complaint in intervention on any ground of a more or less technical nature at this stage of the proceeding. You have a perfect right to make it. [764]

Mr. MacKinnon: I want to know what we have to meet. That is what I am more interested in than anything else.

The Court: You have a lot of lawyers sitting with you. I can see they follow the evidence in great detail. Everybody has made notes on it. You know exactly what evidence has been presented, and I do not think I have to give any advice to you as to what evidence you have to put in to meet the evidence that has been presented. You are not going to accept that compliment, are you?

Mr. MacKinnon: I will accept any compliment, your Honor. But aside from the compliments I will say this: With respect to streamlining this case, as long as the allegations remain that are here, I know of no way of streamlining it.

Mr. Clark: The allegations have nothing to do with it, your Honor.

Mr. MacKinnon: Is that statement for the record?

Mr. Clark: I say the allegations have nothing to do; the proof is in and the proof is what you will have to meet.

The Court: I do not think you necessarily have to get yourself into the frame of mind that you have to spend the rest of the year putting in a defense just because you think the Court should have granted a motion to dismiss the interveners' complaint, because you can pick out the essential things and present your evidence. You will make a better showing if you do that than if you scatter your shot. [765]

Mr. MacKinnon: That is right, but the essentials are not clear. That is one of the things that is true in this case.

The Court: You haven't got, so far as the factual record is concerned, such an awful lot to elaborate on, I do not think.

Mr. MacKinnon: No, but the written record was contemporaneous. That is the point in a nutshell. It is a contemporaneous record.

The Court: I know, you have argued that before, so has Mr. Adams, and on the cross-examination of one witness all I saw was an elaboration of some of the things. Elaboration does not necessarily mean that that proves anything more than it is an elaboration. I only suggested that in the interest of your own case, you pick out your strongest shots and shoot them—not all the shot that you may have, because sometimes it so happens when you do that, you tend to bolster up the other fellow's case.

Mr. MacKinnon: I am not afraid of that in this case. I am not remotely concerned with that. The written record that was made here was made out in the open. There is no doubt in my mind. As I said to your Honor at the inception, there is a legal question.

The Court: I do not think there is anything concealed about the case. I agreed with you on that. It is out in the open. You just pick out the things that you think fully present the whole aspects of the factual case.

Mr. MacKinnon: That is right. [766]

The Court: You do not have to go back to Adam, you do not have to lug in everything to do that. It does not necessarily follow that that adds anything. Because a man wrote four letters on the same subject does not add anything to your case, after your opponents put in one letter and you put in the other three letters, unless there is something that adds to it in some way it is just accumulative. The record does not become any more persuasive by its size.

Mr. MacKinnon: That I am convinced of. As a matter of fact, I would be very happy to make a record as brief as possible in any case.

The Court: I think the interest of justice would be best served by my reserving my ruling on your motion under 12D and you can renew it again when all the evidence is in and then you really will be in a position to have all the ammunition with which to proceed with your argument. We will recess until tomorrow morning at 10:00 o'clock.

* * *

ALEXANDER PERRY OSBORN

called on behalf of the defendants; sworn.

The Clerk: Will you state your name to the Court.

The Witness: Alexander Perry Osborn.

Direct Examination

By Mr. Adams:

Q. Mr. Osborn, you are a resident of the city of New York? A. I am. [768]

Q. And you are one of the counsel in this case?

A. I am.

Q. You also have been for a number of years a director of the plaintiff corporation, the Western Pacific Railroad Corporation?

A. I have.

Q. When did you first become a director?

A. 1937.

Q. And you have been continuously a director since that time? A. Yes, sir.

Q. You are a graduate of Princeton, 1905?

A. Yes.

Q. And you were admitted to the bar in 1910?

A. Yes.

Q. You are also a graduate of the Harvard Law School, 1909? A. Yes.

Q. And you have been admitted to practice in the New York State and Federal courts?

A. Yes, sir.

Q. From 1910 until 1922 you were engaged in the practice of law in New York?

(Testimony of Alexander Perry Osborn.)

A. Yes, sir.

Q. And then from 1922 to 1934 you were a partner in a banking firm having its offices in New York? A. Yes, sir. [769]

Q. That was the firm of Redmond & Company?

A. Yes, sir.

Q. Thereafter, in 1934, you resumed the practice of the law? A. Yes, sir.

Q. Since that time you have been practicing law with offices in New York City? A. Yes.

Q. Will you state briefly the nature of your law practice.

A. I have been active in corporation reorganization work in connection particularly with the Chicago, Milwaukee and St. Paul Railroad Company. I have acted as a trustee for several estates, and I have done some work in connection with the qualification of securities before the Securities and Exchange Commission. I have done what we call surrogate practice work in New York, settlement of estates. Beyond that a general practice.

Q. From time to time you have been a director of various companies? A. Yes, sir.

Q. You do have a connection, do you not, with the American Museum of Natural History in New York? A. Yes, sir.

Q. Please state what that is.

A. For many years I acted as president of the corporation, and I am now First Vice President.

Q. At whose suggestion, Mr. Osborn, did you

(Testimony of Alexander Perry Osborn.)

become a director [770] of the plaintiff corporation?

A. Mr. Schumacher, who was a friend of mine, told me that Mr. Winthrop Aldrich, president of the Chase Bank, had suggested that I become a director of the corporation.

Q. At that time what interest did the Chase Bank have in the corporation?

A. The Chase Bank had loaned the corporation large sums of money and had taken bonds of the defendant railroad company as collateral for those loans, also some bonds of the Denver, Rio Grande and Western Railroad Company; so it was a large secured creditor of the corporation.

Q. And did you thereafter, while you were a director of the corporation, keep the representatives of the Chase Bank advised on the corporation's situation as the years went along?

A. Well, from 1937 to the middle of 1943, I kept them advised. By that time they had disposed of their collateral, and, as you recalled, in November, 1943, they released any deficiency judgment they might have had against this corporation.

Q. That final release took place when the agreement became effective May 1, 1944; that is the fact, is it not? A. Yes.

Q. Now, had you previously had any connection with any member of the Western Pacific group?

Mr. Clark: Previous to what date, may I ask, your Honor?

(Testimony of Alexander Perry Osborn.)

Mr. Adams: To his becoming a director. [771]

A. I was an assistant lawyer in a case involving the inheritance tax of Mr. Arthur Curtis James' father, but it seems that is rather a far cry from having a connection with any members of this group.

Q. That is Mr. D. Willis James?

A. D. Willis James.

Q. That was way back when? A. 1910

Q. Aside from that you haven't had any connection? A. I don't recall any.

Q. Aside from that connection have you ever had any connection, in a business or professional way, with A. C. James or any of his interests?

A. Well, I also had one matter involving negotiations by the Phelps Dodge Corporation, in which Mr. James had a large interest, but it was wholly collateral with this issue.

Q. It had no connection in any way with the Western Pacific?

A. No, none whatsoever.

Q. And about when did that take place?

A. Perhaps 1939; I can't place it exactly.

Q. Now, during the time you have been a director of the corporation have you at all times sought in your office as director to protect the interests of the corporation to the best of your ability?

A. Yes, sir. [772]

Q. You were for a time a director of and a member of the executive committee of the Western

(Testimony of Alexander Perry Osborn.)

Pacific Railroad Company; is that not the fact?

A. That is the fact.

Q. And in those capacities, is it the fact that your directorship and membership in the executive committee came to an end in November of 1944?

A. That is correct.

Q. That was prior to the time when the reorganization trustees returned the property to the reorganized railroad company, is it not?

A. Yes, sir.

Q. And at whose suggestion did you become a director and member of the executive committee of the railroad company? A. Mr. Schumacher's.

Q. Did you ever attend, as far as you can recall, any meeting of the directors of the railroad company?

A. I don't recall attending any meeting of the railroad company.

Q. Do you recall ever attending any meeting of the executive committee? A. No, I do not.

Q. It is true, is it not, Mr. Osborn, that this directorship in the railroad company—that is, yours—was simply an outgrowth or incident of your directorship in the corporation? [773]

A. I believed it to be.

Q. And that applied likewise to your membership in the executive committee? A. Yes, sir.

Q. And it is true, is it not, that your positions as director and member of the executive committee of the railroad company while you occupied those

(Testimony of Alexander Perry Osborn.)

positions did not affect in any way your loyalty to the corporation as a director of that corporation?

A. That is true.

Q. Have you ever had any position with the reorganized railroad company? And by that I mean the railroad company from and after January 1, 1945? A. No, sir.

Q. Now, Mr. Osborn, did you attend the meetings of the directors of the plaintiff corporation regularly? A. Yes.

Q. Did you see Mr. Schumacher on those occasions?

A. He usually attended the meetings.

Q. And did you also see him on other occasions?

A. I saw him at the time of the meetings, and occasionally outside, in between the meetings.

Q. Would you say that in the course of the years you were a director, you have been a director of the plaintiff corporation, you became well acquainted with Mr. Schumacher? [774]

A. Yes, I was well acquainted with him, and he was a very good friend of mine.

Q. Are you familiar with Mr. Schumacher's reputation as a businessman and a railroad executive? A. Yes, sir.

Q. Please state what his reputation was in those respects.

A. A man of great ability and great honesty of character.

Q. Now, according to your observation of Mr.

(Testimony of Alexander Perry Osborn.)

Schumacher's conduct as president and director of the plaintiff corporation, you recall he was president until 1942 and remained as a director, was he, according to your observation, at all times devoted to the corporation's interests?

Mr. Phleger: I am going to object to that as calling for this witness' conclusions, also irrelevant, incompetent and immaterial.

Mr. Adams: I will submit the question, your Honor. I asked the witness according to his observation. He was a fellow director and he said he knew Mr. Schumacher well.

Mr. Phleger: The fact is, the facts show that Mr. Schumacher during this period was a trustee of the company.

Mr. Adams: You knew that quite well, did you not?

A. I knew he was a trustee of the property, and also——

Q. Thank you. Yes. That is accurate.

The Court: Well, what is it that you were getting at? You mean was he devoted to the corporation? [775]

Mr. Adams: I am endeavoring, your Honor, to meet the contentions based upon duality, and the interveners' contentions with respect to domination and control. I believe under the cases and authorities that where a dual relationship is established, as a matter of fact, it is appropriate to inquire as to the conduct of the gentlemen who occupied such positions.

(Testimony of Alexander Perry Osborn.)

Mr. Clark: There is no contention in this case, your Honor, that the court's trustees were dominated or controlled in the least.

Mr. Adams: I am happy to have that concession.

Mr. Clark: Well, that concession was made on pre-trial.

Mr. Adams: The contention, as I understand it, is this, your Honor. The James interests dominated and controlled the plaintiff corporation.

Mr. Adams: Now, Mr. Schumacher was one of the officers of the plaintiff corporation.

The Court: Oh, that isn't what is concerning me; it is the form of your question. You asked him whether a man was devoted to the company. Suppose he says "Yes" to that. What is that going to mean to you?

Mr. Adams: I will reframe the question, your Honor.

Q. According to your observation of Mr. Schumacher's conduct during the times he was president and director of the corporation, Mr. Osborn, would you say that he had conducted himself at all times in that capacity diligently in looking after the [776] corporation's interests? A. Yes, sir.

Q. During the period you have been on the board of directors of the corporation has Mr. Willis D. Wood also been a member of that board?

A. Yes, sir.

Q. What was Mr. Wood's occupation?

A. Mr. Wood is a retired businessman. He was

(Testimony of Alexander Perry Osborn.)

active in a banking and securities firm in New York, a partner in that firm. The firm specialized in railroad securities. He is a member of the board, the board of directors, of the Missouri, Kansas and Texas Railroad Company, and member of the boards of several large insurance companies in New York. He is interested in a number of philanthropies in New York.

Q. And do you know Mr. Wood's reputation?

A. I do.

Q. Will you please state it.

Mr. Clark: We object to that, your Honor, upon the ground it is incompetent, irrelevant and immaterial and calls for the conclusion of this witness.

Mr. Adams: Your Honor, the suggestions about duality may be met, among other ways, by way of showing who the people were and of what substance they were. We have heard it pointed out with a great deal of repetition that one of these gentlemen was what the plaintiffs call a stenographer. Now I am [777] asking about Mr. Wood.

Mr. Clark: Well, we will withdraw the objection.

The Court: All right.

A. Mr. Wood was a man of very excellent reputation in every respect.

Q. (By Mr. Adams): Now, according to your observation, did Mr. Wood conduct himself in his actions as director of the corporation, as an independent director, looking after the corporation's best interests? A. Yes, sir.

(Testimony of Alexander Perry Osborn.)

Q. Do you know Mr. H. Brua Campbell?

A. I do.

Q. And he was during a portion of this time a director of the plaintiff corporation?

A. He was.

Q. Mr. Campbell was a partner in the law firm of Pierce & Greer during that time also, was he not? A. I understood that was the case.

Q. From your observation of Mr. Campbell's conduct as a director would you say that he was an independent director looking after the best interests of the corporation?

A. That was my observation.

The Court: Campbell was a director of the corporation?

Mr. Adams: Yes, your Honor.

Mr. Clark: As well as a partner in Pierce & Greer. [778]

Mr. Phleger: And general counsel for the defendant company.

Mr. Clark: In New York.

The Court: Was he a director of the company, too?

Mr. Adams: He was.

Mr. Phleger: Here he is right here (indicating on chart).

Mr. Clark: Yes, and he was also a director of the railroad company for a time, your Honor, and the exhibits show that.

Mr. Adams: I believe that is correct.

(Testimony of Alexander Perry Osborn.)

Mr. Phleger: He was also general counsel for the railroad company.

Mr. Clark: And the railroad corporation.

Mr. Adams: We will get those facts established.

The Court: You can make that point in your argument. The chart does not show him as a director of the corporation.

Mr. Phleger: Not during this period, no—yes, he was.

Mr. Clark: Yes, he was a director of the corporation. Yes, he was a director, and the annual reports show it. The chart in evidence shows all of that, your Honor.

The Court: Very well.

Q. (By Mr. Adams): You knew, of course, that Mr. Schumacher was a trustee in the reorganization? A. I did.

Q. Is it the fact that your fellow directors on the board of directors were also familiar with that?

A. I believe they were.

Q. During the period that you have been a director, has the firm of Pierce & Greer and Mr. Frank C. Nicodemus, Jr., a member of that firm, been the counsel of the plaintiff corporation?

A. They have.

Q. And you are, of course, well acquainted with Mr. Nicodemus? A. Yes.

Q. And I take it that it is within your knowledge to state that Mr. Nicodemus and Mr. Schumacher were very close associates?

(Testimony of Alexander Perry Osborn.)

A. Well, Mr. Nicodemus acted as counsel for Mr. Schumacher.

Q. Perhaps I did not put that just the right way. What I have in mind is you and your fellow directors were aware, of course, that Mr. Nicodemus and Mr. Schumacher were very well acquainted?

A. Oh, yes.

Q. You knew, did you not, that during the period of trusteeship Mr. Nicodemus represented the debtor in this reorganization proceeding?

A. Yes.

Q. And by "the debtor" we mean the Western Pacific Railroad Company which went into bankruptcy? A. Yes.

Q. And you also knew, did you not, that Mr. Nicodemus was from time to time advising Mr. Schumacher on trustees' problems? A. I did.

Q. It was your understanding, I take it, that he was not [780] officially an attorney to the trustees, that position being occupied by their counsel, but that he was advising Mr. Schumacher personally from time to time upon trustees' problems?

A. I though he was.

Q. That was your understanding?

A. That was my understanding. [781]

* * *

Q. Mr. Osborn, you are aware, of course, of the claim the corporation had against the Railroad Credit Corporation arising out of the reorganization? A. Yes.

(Testimony of Alexander Perry Osborn.)

Q. Was Mr. Nicodemus active in asserting those claims? A. He was.

Q. Is that likewise the case with regard to the claims of the corporation against the Reconstruction Finance Corporation [785] arising out of the reorganization? A. Yes.

Q. It is likewise the fact with regard to the claims that the corporation is now pressing against the Sacramento Northern? A. Yes, sir.

Mr. Adams: One aspect of which was before your Honor recently and your Honor made a ruling upon an order that Judge St. Sure had previously made.

The Court: Yes.

Q. (By Mr. Adams): To your knowledge, Mr. Osborn, has Mr. Nicodemus ever failed to assert a claim of the corporation?

Mr. Clark: Just a minute. I will object to that upon the ground it calls for the opinion of the witness. It is incompetent, irrevelant and immaterial.

Mr. Adams: It is a question as to the knowledge of the witness.

The Court: Read the question.

(Question read.)

Mr. Clark: It is vague and indefinite, too.

Mr. Phleger: Beyond that, this is based upon Mr. Nicodemus having knowledge of claims. What claims?

Mr. Adams: I think Mr. Phleger's suggestion is good.

(Testimony of Alexander Perry Osborn.)

The Court: Ask him if there was any action the corporation requested him to take which he refused or failed to take.

Mr. Adams: Thank you, your Honor. May I ask if Mr. Osborn [786] would answer that question?

The Witness: I know of no instance in which he failed to perform his duty or respond to a request of the corporation.

Q. (By Mr. Adams): Do you know of anything, Mr. Osborn, that existed to prevent Mr. Nicodemus from asserting the present claim now being heard in this court during the reorganization if he had known about it?

Mr. Phleger: I object to that.

The Court: That is pretty hypothetical.

Mr. Phleger: It calls certainly for the opinion of this witness.

The Court: Would you read the question.

(Question read.)

Mr. Clark: Hypothetical, argumentative.

The Court: I think that is irrelevant. I will sustain the objection.

Q. (By Mr. Adams): It is the fact, is it not, Mr. Osborn, that as a director of the corporation you know that the New York office was a joint office of the plaintiff corporation and the railroad company? A. Yes, sir.

Q. Did you see anything inappropriate or unusual in that arrangement? A. I did not.

(Testimony of Alexander Perry Osborn.)

Q. You knew, did you not, that during the period prior to June [787] 1943 the expenses of that office were paid in part by the plaintiff corporation and in part by the reorganization trustees?

A. I knew that.

Q. And did you consider that that arrangement was in any way inappropriate or disadvantageous to the plaintiff corporation? A. No.

Q. Now, the record here shows that in June of 1943, the beginning of that time and continuing until the New York office was closed—strike that.

I had better state the record more accurately. The record here shows that beginning June 1, 1943, and until the end of 1944, which was the end of the trustees' operations, the entire expense of the New York office was paid by the reorganization trustees; that then that office remained opened for a period of four months, and during that period of four months those expenses were paid by the reorganized railroad company.

Now, when, if you recall, Mr. Osborn, did you learn about the arrangement for the reorganization trustees to take over the whole expense of the New York office?

A. Contemporaneously with the facts.

Q. Did you then see anything inappropriate about that arrangement? A. No.

Q. Did you see anything in that arrangement at that time that you considered disadvantageous to the plaintiff corporation? [788] A. No.

(Testimony of Alexander Perry Osborn.)

Q. The New York office was the head office of the Western Pacific group, was it not?

A. Yes, sir.

Q. And did the board of directors of the corporation determine policy in regard to Western Pacific matters?

Mr. Phleger: Now, just a moment. What do you mean by "Western Pacific"? Do you mean railroad matters?

Mr. Adams: I mean with regard to all Western Pacific interests that the plaintiff corporation had. Does that characterize it?

Mr. Phleger: Do you mean did the directors of the plaintiff corporation determine its policies?

Mr. Adams: I think that is what it comes down to, so I am persuaded to withdraw the question; I think it is self-evident.

The Court: Yes, I think so.

Q. (By Mr. Adams): Now, Mr. Osborn, do you recall that on March 15, 1943, the Supreme Court approved the Interstate Commerce Commission's plan of reorganization? A. Yes, sir.

Q. And what was your judgment as a director at that time of the effect of the decision on the plaintiff corporation?

A. I thought it ended the interests of the corporation in the railroad company. [789]

Q. You thought it was substantially a final decision against the plaintiff's equity?

A. It seemed so to me.

(Testimony of Alexander Perry Osborn.)

Q. That was your understanding?

A. It seemed so to me.

Q. And do you know whether or not the board of directors had the same view?

Mr. Phleger: The minutes are in evidence, I think, on that question.

A. Yes, they had the same view.

Q. (By Mr. Adams): Now, Mr. Osborn, prior to October of 1946, which is the time when this lawsuit here was instituted, did you ever suggest to Mr. Polk or Mr. Coulson that either of them had any obligation to advise the plaintiff corporation of possible claims against other group members on account of the tax transactions?

A. Would you mind reading that to me?

(Question read.)

A. No.

Q. And prior to that time, October of 1946, did Mr. Polk or Mr. Coulson ever refuse to provide you with any information which you asked of them in connection with the tax transactions?

Mr. Phleger: Well, now, that assumes that he asked them.

The Court: Yes, it is a little double-barreled, Mr. Adams.

Q. (By Mr. Adams): Is it the fact that you did make inquiry, [790] Mr. Osborn, about the tax transactions?

A. I made no inquiry of Mr. Polk and Mr. Coulson.

(Testimony of Alexander Perry Osborn.)

Q. I see. So that no occasion ever arose of the possibility of their either furnishing or declining to furnish any information?

Mr. Phleger: Now, I object to that because it assumes a very important fact that your Honor will have to pass on, as to what the obligations of attorneys are about advising their clients. He is asking this man whether or not he asked the attorneys to advise them. How about the attorneys being under an obligation themselves to advise?

The Court: Well, I think that the answer that he didn't make any inquiries disposes of that.

Q. (By Mr. Adams): Now, do you recall the corporation receiving advice in April, 1947, that a settlement proposal had been made to the Bureau of Internal Revenue with regard to these tax matters? A. Yes, sir.

Q. And were you advised at that time of the terms of the settlement proposal?

A. Well, I was advised in the sense that we received a letter, which Mr. Curry presented to the board—a letter, I think, from Mr. Polk—that outlined the terms of the proposed settlement. [791]

* * *

Q. (By Mr. Adams): Now, Mr. Osborn, you have before you Plaintiff's Exhibit 68?

A. Yes, sir.

Q. Consisting of a letter addressed by Mr. Curry to Pierce & Geer of April 4, 1947, and enclosures, and you note that the letter itself shows, "Copy,

(Testimony of Alexander Perry Osborn.)

Mr. A. Perry Osborne, 20 Exchange Place, New York 5, New York"? A. Yes, sir.

Q. And does that refresh your recollection that you received a copy at that time?

A. I remember seeing the copy of the letter of Mr. Polk to Mr. Curry at that time, yes—receiving that.

Q. And that is a portion of Plaintiff's Exhibit 68, being a copy of the letter of April 4, 1947, and marked also 41-B to -D? [792]

A. That is correct.

Q. Now, then, you notice also that Plaintiff's Exhibit 68 includes, as an enclosure, the pages marked 41-E to -F? A. That is correct.

Q. Being a copy of a letter signed, "Western Pacific Railroad Corporation, James K. Polk, Attorney in Fact," and dated February 11, 1947, addressed to the Hon. Joseph D. Nunan, Jr., Commissioner of Internal Revenue? A. Yes, sir.

Q. And when I asked you the question that I did a moment ago, and you answered the question regarding your receiving advice that a settlement proposal had bee. made to the Bureau of Internal Revenue, were you referring to the advice shown upon Plaintiff's Exhibit 68? A. Yes, sir.

Q. Thank you. You may look at that further if you wish to do so. A. Yes.

Q. You knew, did you not, Mr. Osborn, at that time that the plaintiff corporation was free to accept or to reject the settlement proposal as it might see fit? A. Yes, sir.

(Testimony of Alexander Perry Osborn.)

Q. Now, strictly from the standpoint of the settling of the matter with the Government for taxes for the period in question, did you consider that the settlement was a good one—and I [793] am leaving out of my question anything about the intercorporate claims? A. Yes, sir.

Q. Was that the judgment of your fellow directors?

A. It was the judgment of the committee that was appointed to consider the matter.

Q. And the committee consisted of yourself, Mr. Wood and Mr. Nicodemus?

A. That is correct, and Mr. Curry as ex officio.

Q. And Mr. Curry, ex officio. Now, is it the fact that nevertheless, notwithstanding your view about the advisability of a settlement as regards the Government, that the directors seriously considered withdrawing Mr. Polk's power of attorney and refusing to go along with the settlement?

A. They certainly considered that.

Q. And what was their reason for considering that?

A. The reason, I believe, was the desire of the corporation to have the matter submitted, the question of the claim of the corporation, as a legal and equitable matter before some competent court, and because of the inability to have that done, because of the answers which the defendant made, which raised technical objections to that course—and our position was that those technical defenses should

(Testimony of Alexander Perry Osborn.)

be withdrawn and the claim should be submitted as a matter for legal and equitable determination.

Q. And by "technical defenses" you have reference particularly, do you not, to the defense that the reorganization proceeding is a bar?

A. That is correct, sir. And the other technical defenses, the statute.

Q. Statute of limitations?

A. And delay of the corporation in asserting the claim.

Q. Now, the board finally took the position, did it not, that the settlement with the Government should be approved? A. It did, yes.

Q. But in connection with doing that, the board had, prior to that time, obtained an agreement for a stipulation which is the stipulation that was afterwards filed with the court; is that the fact?

A. That is correct.

Q. Yes.

The Court: Well, that is the stipulation that was made which made it possible to make a settlement without anybody waiving any claims in regard to subsequent litigation?

Mr. Adams: That is correct.

Mr. Clark: That is the time we came in with an application for injunction.

Q. (By Mr. Adams): Now, so far as you can see, Mr. Osborn, was the corporation in any way prejudiced by reason of the fact that it obtained notice of the settlement in April, 1947, [795] in-

(Testimony of Alexander Perry Osborn.)

stead of February, 1947, when the settlement was proposed?

Mr. Phleger: Well, I object to that as calling for the conclusion of the witness, a legal matter.

Mr. Adams: This is a director of the plaintiff corporation.

Mr. Phleger: It doesn't make any difference. That may be one of the questions.

The Court: That may be true, but what is the materiality of asking his opinion concerning that?

Mr. Adams: I understand that contentions are to be made here that in some fashion or other, which I am frank to say I do not understand at all, there was some prejudice to the corporation derived from the fact that the settlement proposal was first made in February, 1947, but the corporation wasn't advised about it until April, 1947. Now I am asking one of the directors of the corporation, who participated in the transactions, if there was any prejudice to the corporation resulting from that delay.

The Court: Well, that would be a legal question, if it were material.

Mr. Phleger: But perhaps I can help counsel. We introduced evidence of that not for the purpose at all of showing prejudice to the plaintiff corporation; we introduced it for this purpose: and it is absolutely and conclusively proof of it—that the matter was taken over and handled by the [796] defendant, namely, the defendant made all of the decisions with respect to this offer of settlement

(Testimony of Alexander Perry Osborn.)

and the negotiations of settlement, without even advising the plaintiff corporation. That is our point. They passed these letters in April 2; they communicated with San Francisco, the directors of the defendant in San Francisco met, authorized them. And it wasn't until April, three months later, that this corporation was advised for the first time.

Mr. Clark: You mean the letters passed on February 11, Mr. Phleger, not April 2.

Mr. Phleger: Yes; well, I mean the letter to the plaintiff corporation was in April.

* * *

Q. Mr. Osborn, when and where did you first meet Colonel Coulson?

A. I met him at my first attendance at the board meeting of the corporation; I think it was in early 1937.

Q. And he was then a director of the plaintiff corporation? A. Yes, he was. [797]

Q. Now, you know, of course, that throughout the reorganization proceedings Mr. Coulson was the attorney for the A. C. James Company, and in those proceedings? A. Yes, sir.

Q. And you knew, of course, that throughout the period he was a director and thereafter that Mr. Coulson and his firm have been attorneys for the James interests? A. Yes, sir.

Q. And for Mr. Arthur Curtis James personally while he was living? A. Yes, sir.

(Testimony of Alexander Perry Osborn.)

Q. Did you ever do any legal work for Colonel Coulson or for his firm? A. No, sir.

Q. Did you ever do any legal work for Mr. James or his companies? I will list them very quickly: the A. C. James Company, the Curtis Southwestern Corporation, the Curtis Southwestern Company, the James Foundation of New York, Inc. Did you ever do any legal work for any of those interests, other than the two incidents you have spoken of, one of them relating to D. Willis James and the other relating to the Phelps Dodge matter?

A. No, sir.

Q. Now, when you were asked to become a director of the plaintiff, were you told that you were to represent any interest other [798] than the general interest of its stockholders? A. No, sir.

Q. During the period of your service as a director of the plaintiff corporation, have you ever been told how you should vote on matters coming before the board of directors? A. No.

Q. Did any representative of the James interests ever request you to vote for or refrain from voting on any matter coming before the board?

A. No, sir.

Q. Were you yourself dominated or controlled in the discharge of your duties as a director by any representative of the James interests?

A. No, sir.

Q. And is the same answer to be given with respect to the Colonel Coulson?

(Testimony of Alexander Perry Osborn.)

A. You mean as to whether he——

Q. Dominated or controlled you in your conduct as a director. A. Not whatsoever.

Q. During the period of your directorship, did you keep yourself informed with regard to the affairs of the plaintiff corporation?

A. Yes, sir.

Q. And did you exercise your best judgment on matters coming before the board during that period? [799] A. Yes, sir.

Q. Were you afforded as a director full opportunity to discuss matters coming before the board?

A. Yes, sir.

Q. And that is likewise true as to all other members, is it not, of the board? A. I thought so.

Q. And did the directors freely discuss matters that came before them? A. Yes, sir.

Q. Did any representative of the James interests ever ask you to refrain from bringing up any matter for consideration before the board?

A. No.

Q. Now, I have asked you a number of questions about the James interests. Is the same thing true as regards the defendant railroad company? That is, to put it generally, did any representative of the defendant railroad company at any time——

Mr. Adams: Now, just a moment, your Honor. May I think out loud about this? I think I am asking something not in issue. I think the interveners' contentions of domination and control as be-

(Testimony of Alexander Perry Osborn.)

tween the trustees and the plaintiff corporation, as between the defendant railroad company and the plaintiff corporation, assuming the subsidiary could control a parent—I think all such contentions have been withdrawn. I understand there [800] is still a contention——

* * *

Mr. Adams: ——on the part of the interveners that the James interests dominated and controlled the parent corporation. That completes my statement.

Mr. Clark: That is correct.

Mr. Phleger: I might, for the purpose of clarification, say that our contention very definitely is that the trustees when in office and the corporation after it succeeded to these properties, took over and handled and managed these tax matters.

Mr. Adams: Well, may I ask Mr. Phleger——

Mr. Phleger: I mean the company; excuse me.

Mr. Adams: May I ask Mr. Phleger just to clear that up?

Mr. Phleger: I don't suggest by that that there is anything invidious about domination, but they just did. They ran it, made the decisions.

Mr. Adams: Well, I am just seeking to find out what the contention is, because I have to ask the witness some questions.

Mr. Phleger: Yes.

Mr. Adams: Now, it has been my understanding that there is no contention that the reorganization

(Testimony of Alexander Perry Osborn.)

trustees dominated or [801] controlled the plaintiff corporation. Is that a fact?

Mr. Phleger: I think my position is absolutely clear. Mr. Schumacher was a trustee and Mr. Curry was Mr. Schumacher's man. Now, I don't predictae anything upon that at all, but that is a fact that is in this record. The evidence we produced was directed to the proposition that these tax matters were handled by the defendant corporation; and the decisions made by it. Now, I don't characterize that as anything except just that.

* * *

Q. Mr. Osborn, did the trustees in reorganization or either of them to your knowledge at any time instruct you as to how you should act?

A. No, sir.

Q. As a director? A. No, sir.

Q. And they never at any time told you how to vote or what to say or in any way interfered with free exercise of your judgment as a director, is that correct? [802] A. That is correct.

Q. Did the trustees or either of them at any time to your knowledge give any instructions or directions to any member of the board of directors of the corporation as to how to conduct himself or the corporation's affairs?

A. I never heard of any instructions being given.

Q. And it is the fact, is it not, that you were, as a director, not in any wise dominated or controlled in the discharge of your duties by the court's

(Testimony of Alexander Perry Osborn.)

trustees, either of them or any representative of those trustees?

* * *

A. I was not.

Q. (By Mr. Adams) During the period of your services as a director of the plaintiff corporation did any representative of the James interests at any time ask you to pursue a course of conduct in the special interest of Mr. James or his companies? A. No, sir.

Q. During the period of your service at any time as a director of the plaintiff did Colonel Coulson at any time ask you to pursue any course of conduct in the special interest of the [803] James interests?

A. No, sir.

Q. I have been speaking of the James interests generally, and would the answers that you have given me with regard to the questions I have asked as to anyone offering to give you any advice or instructions as to how you should act or in any way interfering with your term as a director; would those answers to those questions be the same if I were to ask you whether any officer or trustee of the James Foundation sought to interfere with your conduct as a director?

A. I can't exactly answer that question. I think advice was given, but the question was whether the advice was solid.

Q. Let me ask these questions: Did any officer or trustee of the James Foundation ever tell you

(Testimony of Alexander Perry Osborn.)

how you should vote on matters coming before the board? A. No, sir.

Q. Or tell you to refrain from voting on any matters coming before the board? A. No, sir.

Q. Or tell you who should be selected as officers of the plaintiff corporations? A. No, sir.

Q. Or tell you who should be selected as directors of the plaintiff corporation?

A. No, sir.

Q. Or tell you how in any respect you should conduct yourself as a director of the plaintiff corporation? A. No, sir.

Q. Did you as a director of the plaintiff ever consciously act in the interest of the James Foundation to the detriment of the plaintiff corporation of which you were a director? A. No, sir.

Q. Did you vote for the election of Mr. Curry as president of the plaintiff corporation in January, 1942? A. I did.

Q. And in casting your vote did you exercise your best judgment as you saw it in the interests of the plaintiff corporation? A. I did.

Q. And after his election as president, I take it Mr. Curry was the presiding officer at the meeting of the board of directors? A. Yes, sir.

Q. During the period of your directorship you were aware, were you not, that Mr. Curry received compensation from the reorganization trustees?

A. I was not aware that his compensation came from the reorganization trustees. I knew that at

(Testimony of Alexander Perry Osborn.)

one time he was receiving compensation from the corporation, from the company, and after June, '43, wasn't it, he received his compensation from the company exclusively, and that lasted until the New York office was closed, and thereafter I knew that he was receiving some [805] pension from the company and also some compensation from Colonel Coulson's firm.

Q. When you speak of receiving compensation from the company in 1943 and 1944, I take it you had no purpose to insist that the company was not then in reorganization? A. Oh, no.

Q. Did you as a director of the plaintiff corporation disapprove of Mr. Curry's receiving a retainer from the firm of Whitman, Ransom, Coulson & Goetz? A. No, sir.

Q. The fact is, is it not, Mr. Osborn, that at or about the time of closing the New York office you discussed with Mr. Schumacher and Mr. Coulson the idea of doing something for Mr. Curry in view of his pending retirement?

A. Yes, sir, without indicating who should do it or what should be done; I just said I thought he ought to be taken care of.

Q. Precisely.

The Court: During the time that you were director of the corporation in 1943 and 1944 did the directors ever discuss the filing of these consolidated tax returns at or about the time they were filed?

The Witness: No, sir. [806]

* * *

(Testimony of Alexander Perry Osborn.)

Q. (By Mr. Adams): Mr. Osborn, you said you have been a director of a number of corporations?

A. Yes, sir.

Q. Would you say that was ten or more?

A. You asked me to prepare a list.

Q. I am just asking you for an approximate number. I do not want to go into detail unless that is necessary.

A. According to the list prepared by my secretary it is seventeen in all.

Q. Was the matter of the income tax returns ever taken up at any board meeting of any corporation of which you were a director?

* * *

Q. (By Mr. Adams): Mr. Osborn, during all the time you were a director of the Western Pacific Railroad Corporation, were the income tax returns ever taken up with the Board of Directors?

* * *

The Witness: As the question is put, it is very hard to answer. May I answer the question in my own way?

Q. (By Mr. Adams): Answer it according to your best recollection.

A. My best recollection is that the income tax returns were not taken up with the Board of Directors at any time prior to June, 1946, when the suit, the VanKirk action, was filed, nor was there any discussion of income tax returns in the Board of Directors.

(Testimony of Alexander Perry Osborn.)

Q. Mr. Osborn, until you learned of the institution of the stockholders' action in New York in the middle of 1946 and of the claims stated in that action, had the thought ever occurred to you of the plaintiff having any claim on account of the benefits to the court's trustees or the railroad company in these consolidated returns? A. No, sir.

* * *

Q. (By Mr. Adams): Prior to that time when you learned of the claims advanced in the stockholders' action in New York, had any officer or director of the plaintiff stated to you that he [808] thought or considered that the plaintiff corporation had any rights rising out of the benefit to the court's trustees of the railroad company in these consolidated returns? A. No, sir.

Q. You had heard no such suggestion from anyone prior to that time? A. No, sir.

Q. You knew, did you not, during the years 1943, 1944 and 1945 that the holding company was filing consolidated income tax returns?

A. Yes, sir.

Q. And you know, did you not, that the consolidated returns included the operations of the railroad in the hands of the court's trustees?

A. Yes, sir.

Q. And you know, did you not, that there were substantial, large advantages in respect of the taxes upon the income of the railroad incident to these consolidated returns?

(Testimony of Alexander Perry Osborn.)

A. I knew there were benefits in filing consolidated returns which the railroad company would secure and I have testified that I knew they were substantial benefits, I think, but I had no knowledge of what the benefits were.

Q. It is the fact, is it not, Mr. Osborn, that you knew that there were large and substantial benefits to the taxes upon the railroad's income derived from these consolidated returns filed [809] by the holding company?

A. I had no knowledge of what the benefits were. I thought there were benefits and I testified that they were substantial benefits.

Q. Let me ask you this to refresh your recollection: Turn to page 4239 of the record of your deposition taken in this action. In fact, being at the bottom of page 4238, if you will, two lines from the bottom. Will you follow as I read, it Mr. Osborn?

A. Yes, sir, 4238?

Q. 4238, at the bottom. A. Yes.

Q. "Q. At the time of the filing of the consolidated returns for 1943 and 1944 did you know that there were large tax benefits to the railway company in the filing of the consolidated return?

"A. I knew there were benefits to the railroad company from the filing of consolidated returns.

"Q. In connection with the last question and the last answer I read the following question and answer from the transcript of your testimony upon the taking of your deposition in February, 1947, in the New York stockholders' suit."

(Testimony of Alexander Perry Osborn.)

A. Mr. Adams, excuse me. What page are you reading from?

Mr. Clark: There was a mistake in the page. It was 4239, [810] Mr. Osborn. I think counsel mentioned 4238. It is 4239.

Q. (By Mr. Adams): I began at the bottom of page 4238, two lines from the bottom and I am continuing on page 4239. My copy shows that that is what I am doing.

A. I am now looking at page 4239.

Q. Have you had any trouble about that?

A. No, I was looking at 4238 before.

Q. I said I was beginning at the bottom of that page.

A. Yes, but I was not following you. Now I am following you.

Q. Then beginning with a question, "in connection with the last question—" do you have that?

A. I have that, yes.

Q. "Q. In connection with the last question and the last answer, I read the following question and answer from the transcript of your testimony on the taking of your deposition in February, 1947, in the New York stockholders' suit, upon examination by counsel for the plaintiff stockholders page 343, bottom:

"Q. Did you know that contemporaneously with the filing of the 1943 and 1944 consolidated return?

"A. (At the top of page 344.) Only as a matter of general knowledge that there were large tax

(Testimony of Alexander Perry Osborn.)

benefits to the railroad company in the filing of this consolidated return.' [811]

"Q. Did you give that testimony at that time?

"A. I believe I did.

"Q. Was it true?

"A. I can only say this, that I cannot specify what I had in mind as to what the large benefits were.

"Q. May I have an answer to my question?

"Mr. Dickerson: I do not think that his testimony is inconsistent, Mr. Adams.

"Mr. Adams: I did not ask anything about inconsistency. I asked if the testimony was true. I would like to have an answer to my question.

"The Witness: I am sure I thought it was true at that time."

Do you recall that I asked those questions and you gave those answers at that time?

A. Yes, sir.

Q. Were the answers which you gave then upon the taking of your deposition true?

A. Yes, sir.

Mr. Adams: No further questions, your Honor.

Cross-Examination

By Mr. Phleger:

Q. Mr. Osborn, when did you first learn of the fact that the plaintiff's stock loss had been utilized in a consolidated return? A. June, '46. [812]

Q. In June of '46. That is long after the period of the filing of these tax returns?

(Testimony of Alexander Perry Osborn.)

A. Yes, sir.

Q. When did you first learn that a claim for the refund of the 1942 taxes had been filed? That was filed on March of 1945.

A. April of 1947.

Q. April of 1947, two years later. When did you first learn that a power of attorney had been given by the plaintiff corporation to Mr. Coulson's firm to represent him in this matter, the power having been given on June 26, 1946?

A. April, 1947.

Q. About a year later?

A. About a year later.

Q. In your practice do you deal with income tax matters, that is, are you an income tax man?

A. No, sir.

Q. Have you any general knowledge about consolidated returns or the tax incident to that? [813]

* * *

The Witness: What is the question?

The Court: He wants to know how much you know about affiliated corporation returns, if any. That is what the lawyers always say, "if any."

A. I have no real knowledge as a lawyer of the filing of corporate consolidated tax returns. I have never acted for any corporation in that respect.

Q. (By Mr. MacKinnon): I beg your pardon?

A. I have never acted for any corporation in that respect. [814]

* * *

(Testimony of Alexander Perry Osborn.)

Mr. MacKinnon: Will you read the question? Is it a question before the witness?

The Court: I said I took it your question was whether or not the witness had any knowledge of income tax matters having to do with consolidated corporate returns.

Q. (By Mr. Phleger): Will you answer that?

A. I had no such knowledge.

The Court: I suppose that is what you mean—I am not intending to interrupt either examination—what you are inquiring about is whether the witness has any professional knowledge concerning the matter?

Mr. Phleger: That is correct.

The Court: Trained himself or has special qualifications. [815]

Mr. MacKinnon: I see no objection to that.

Q. (By Mr. Phleger): Will you answer that?

A. What was the question now? I have had no professional experience in corporate taxation.

Q. (By Mr. Phleger): You have testified that you did not hear of the use of the loss of the plaintiff corporation in the consolidated return until June of 1946? A. That is correct.

Q. Will you state what the occasion was?

A. The occasion was the bringing of the two VanKirk actions, one in the States Supreme Court and one in the District Court in New York, in June of 1946. And I either heard of these actions and the claim therein stated from Mr. Nicodemus in

(Testimony of Alexander Perry Osborn.)

connection with the action, he being counsel for the corporation at that time, or I got the knowledge independently by receipt of the complaints in that action at or about that time. But I am unable to state whether I heard it from Mr. Nicodemus in connection with the actions or from the actions themselves.

Mr. Phleger: That is all.

Cross-Examination

(For Interveners)

By Mr. Clark:

Q. Mr. Osborn, was the matter of the corporation giving Mr. Polk and his associates a power of attorney on June 26, 1946, over presented to the directors of the plaintiff corporation?

Mr. MacKinnon: I object to that—— [816]

Mr. Phleger: He has stated that he didn't hear about it.

Mr. Clark: He said if he didn't hear about it; and it is a preliminary question anyway.

Q. (By Mr. Clark): Now, Mr. Osborn——

A. I just answered that question. But if you want me to answer it——

Q. I thought it was answered.

A. Will you read the question? How did you put that question?

Mr. Clark: May I have it read?

The Court: There was a question and answer and then an objection.

(Testimony of Alexander Perry Osborn.)

Mr. MacKinnon: My objection to it is that it is not the best evidence. Defendants will show what was what.

Mr. Clark: You will concede, won't you, that the minutes show no such thing?

Mr. MacKinnon: You have them.

Mr. Clark: We are trying not to encumber this matter. I thought the same sort of question was asked by Mr. Adams.

Mr. Adams: No, your Honor, I asked the director——

The Court: Well, then, it was an argumentative statement of counsel.

Mr. Clark: No, may it please your Honor, Mr. Adams asked whether the matter of consolidated returns had ever been discussed, or presented to the Board of Directors, and the answer was "No." Now I am directing this specifically to the power of attorney [817] which was given by the plaintiff corporation to Polk on June 26, 1946.

The Court: He may answer it, or if he hasn't——

Q. (By Mr. Clark): Was the matter presented to the Board of Directors? A. It was not.

Q. Do you remember any prior occasion, in prior years, Mr. Osborn, when the matter of the corporation, the plaintiff corporation, getting Mr. Polk and his associates at the time at the Coulson firm a power of attorney with regard to federal income tax matters was presented to the Board of Directors?

* * *

(Testimony of Alexander Perry Osborn.)

Q. (By Mr. Clark): If it was presented to the Board of Directors, with respect to which I will direct the witness' attention to page 2928 of Mr. Curry's deposition wherein appears, read into the record, a portion of the minutes of the meeting of the Board of Directors of the corporation held on June 17, 1938 (handing to witness): If you will start right there at the bottom of the page (indicating)?

The Court: Well, what is your question, as to whether or not he recalls this meeting?

Mr. Clark: Yes, indeed, your Honor.

A. Well, I don't know whether I was present at that meeting or not.

The Court: Have you any recollection on that?

The Witness: I have no recollection of it.

Q. (By Mr. Clark): Have you any recollection of having been on any occasion the matter of Polk's receiving a power of attorney from the plaintiff corporation presented to the plaintiff's Board of Directors? A. Well, I remembered——

Mr. MacKinnon: I object to it on the grounds it is irrelevant and incompetent to any matter in issue, as to the period in question.

The Court: The witness has already said that he has no recollection.

Mr. Clark: The witness has no recollection.

Q. Now, Mr. Osborn, I show you a copy of the letter which has been called in this case the "second Krigbaum letter" dated May 19, 1947, and which

(Testimony of Alexander Perry Osborn.)

is in evidence as Plaintiff's trial exhibit 71 (handing to witness), and after you have examined that, I will ask you whether or not that letter was taken up with the Board of Directors of the plaintiff corporation by Mr. Polk prior to the time it was sent; namely, May 19, 1947.

A. No, it was not.

Q. And when was the first time, Mr. Osborn, that you learned that such a letter had been sent? That is, the letter which is Plaintiff's trial exhibit 71?

A. I first heard of the letter at the time of the actual settlement, which took place in August, 1947.

Mr. Clark: That is all, your Honor.

The Court: Anything else on redirect?

Mr. MacKinnon: I didn't hear the answer, your Honor.

The Court: Would you read the answer?

(Previous answer read by the reporter.)

The Court: Any redirect?

Mr. Adams: Just one or two questions, your Honor.

Redirect Examination

By Mr. Adams:

Q. During the period while these consolidated returns were being filed, Mr. Osborn—that is the returns for '43, '43, and '44—did you know that the firm of Whitman, Ransom, Coulson and Goetz had been engaged to advise as tax counsel in respect of these returns? A. Yes, I did.

Q. And did you ever make any inquiry from

them with regard to the returns prior to the time when you learned of the stockholders' suit?

A. No, sir. [822]

* * *

FRANK C. NICODEMUS, JR.

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court, please?

A. Frank C. Nicodemus, Jr.

Direct Examination

By Mr. Adams:

Q. Mr. Nicodemus, do you have you residence in the State of New York?

A. State of New York.

Q. And your profession is that of an attorney, having your office——

A. In the City of New York.

Q. In the City of New York. Just what is the address of your office? A. 44 Wall Street.

Q. You were admitted to practice in Maryland in 1901? A. 1901.

Q. Of what bars are you a member?

A. Maryland Bar, New York Bar, and various Federal Courts, including, I think, this court.

Q. When did you first become associated with the firm of Pierce & Greer?

A. Definitely along about 1905. Prior to that time I had an association dating back to 1903.

(Testimony of Frank C. Nicodemus, Jr.)

Q. And when did you become a partner in the firm? A. 1920. [823]

Q. And you are now the senior partner in the firm? A. I am now the senior partner.

Q. Have you and the firm specialized in railroad practice? A. We have.

Q. Would you please state briefly some of the railroads that have been your clients?

A. When I came into the office, my then later senior partner, Mr. Wendell S. Pierce, was general counsel of the Union Pacific Railroad Company. The junior partner, Morris Greer, was assistant general counsel of the Union Pacific. The firm also held counselships for certain of various Gould roads including the Missouri Pacific, the Denver & Rio Grande, and I believe the Western Pacific. There were others, but I have named the principal ones, except perhaps I should mention the Wabash, which ultimately became my most important client.

Q. And you are now general counsel for the Wabash? A. I am senior counsel.

Q. Senior counsel. Were you well acquainted with Mr. Thomas M. Schumacher, who was one of the trustees in reorganization? A. I was.

Q. And you first become acquainted with him when?

A. I think in 1929 or '30. I first met him at the time he became a director of the Denver & Rio Grande Western Railroad Company, which was shortly after the James interests acquired their

(Testimony of Frank C. Nicodemus, Jr.)

stock position in the Western Pacific Railroad Corporation. [824]

Q. That was in 1926, was it not, to be sure about our times—if they are important?

A. I thought it was '27, but——

Q. About that time?

A. About that date.

Q. Now beginning some time in 1934, was your firm engaged as general counsel for the Western Pacific Railroad Corporation?

A. We were.

Q. And from that time forward, and so long as Mr. Schumacher was active in railroad business, did he look to you for day to day advice?

A. I think he did. In railroad matters.

Q. And did he, to your knowledge, ever consult any other counsel in respect of such matters?

A. Railroad matters?

Q. Yes.

A. I can recall no occasion when he did.

Q. Was it at his suggestion that you became general counsel to the corporation?

A. I think that it was.

Q. Now at the same time—that is, in 1934—Mr. Nicodemus, did your firm receive an appointment as general counsel to the Western Pacific Railroad Company, the subsidiary of the Western Pacific Railroad Corporation? A. Concurrently.

* * *

Q. (By Mr. Adams): Now, Mr. Nicodemus,

(Testimony of Frank C. Nicodemus, Jr.)

ever since 1934, have you made it a practice to attend the meetings of the board of directors of the plaintiff corporation?

A. Very regularly.

Q. Have you ever represented the Western Pacific Railroad Company in any matter in which its interest was opposed to that of the plaintiff corporation?

Mr. Phleger: Well, now, I think that is an improper question.

Mr. Clark: We will object to it on the ground it is——

Mr. Phleger: The attorney has just proved that he is attorney for both companies. I think it is irrelevant, incompetent and immaterial. [827]

Mr. Clark: And also it calls for the conclusion of this witness on a matter of law. Both these companies are now in this courtroom.

The Court: You want to know if at any time, while he was attorney for both of them, that he took a position—you don't expect him to answer that, do you?

Mr. Adams: Well, your Honor, he knows the answer to the question; I am just asking the question. I don't want to argue about it. If your Honor wants to make a ruling on it, I will proceed with the next one. Shall I ask another question, your Honor?

The Court: Well, if you think that it is of any great importance to ask the question, ask it. We know what his answer is going to be, but——

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Adams: I am, of course, making a record. It is conceivable that the answer may be another way.

The Court: I will overrule the objection.

The Witness: I would like to have the question read.

Mr. Adams: Would you read the question, please.

(Question read.)

Mr. Clark: Well, may it please your Honor, may the time be specified and limited so far as the objection goes, to the date March 15, 1943, or at last October 11, 1943, when the District Court confirmed the plan which divorced these two companies? [828]

The Court: Well, you may have lurking in the question an opinion of the witness as to the precise transaction before the Court, if you asked it too generally.

Mr. Adams: Well, I will accept the limitation put upon it by Mr. Clark and ask that the witness answer that question.

Mr. Clark: Well, let us have the question, please. I don't know what the witness understood from my objection.

Mr. Adams: I will state it.

Q. Have you ever represented the company since March 15, 1943, in any matter in which its interest was opposed to that of the plaintiff corporation?

Mr. Clark: Object to that, your Honor, upon the ground it calls for the conclusion of the wit-

(Testimony of Frank C. Nicodemus, Jr.)

ness with respect to an representations during the so-called critical time in this case.

Mr. Phleger: Also it includes this lawsuit.

Mr. Clark: Right.

The Court: It calls for his opinion. You can ask him what he did.

Mr. Adams: I asked him if he represented the company.

The Court: Well, you would have to ask him what the representation was. When you asked him if he ever represented the company in any matter where there was conflict, if the matter in conflict is one of the issues before the Court, that is an answer to that, I think, without asking what he did or what [829] were the matters. I will sustain the objection.

Q. (By Mr. Adams): Now, were you the chairman of a special tax committee of reorganized railroads that was organized in 1943 or 1944?

A. I was.

Q. And what was the general purpose of that committee?

A. Well, the general purpose of that committee was to secure by the passage by Congress of a bill that would give preferred stock that, prior to a reorganization or readjustment, had represented debt, the right to deduct dividends; just as theretofore the interest could have been deducted in income tax returns. There was a similar law in effect at that time limited to utilities.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Were you thereafter a member of a second tax committee of the railroads, of which Mr. Atkinson was chairman? A. I was.

Q. And that committee operated during the years 1944 to 1947, or thereabouts?

A. I think it was organized, to the best of my recollection, about October, 1943.

Q. I see. And——

A. And ran on until the legislation was secured from the 80th Congress.

Q. And that was tax legislation relating to the tax positions of certain of the reorganized railroads? [830]

A. That was the legislation that gave a reorganized company that was reorganized under a new charter the same status under the tax law that was enjoyed by corporations such as the Western Pacific Railroad Company, which were able to preserve their charters throughout the reorganizing process.

Q. And do I understand you correctly, Mr. Nicodemus, that the legislation, the need for it, arose because of the decision of the United States Supreme Court in Helvering v. New Colonial Ice Company? A. That is correct.

Q. And that decision had to do with whether or not a deduction was a transferable thing?

A. No, the New Colonial Ice Company v. Helvering decision was in substance that the reorganized company was a different taxpayer from the

(Testimony of Frank C. Nicodemus, Jr.)

predecessor company, and that these carry-overs and carry-backs only applied to the same taxpayer.

Q. So that it couldn't take the carry-over or carry-back deduction? A. That is correct.

Q. Now, after the railroad company went into reorganization in August, 1935, you continued, did you not, with your general representation of the plaintiff corporation? A. I did.

Q. And you have continued as such up to this date? A. I have. [831]

Q. Did you from time to time give Mr. Schumacher advice as to the problems of the court's trustees in the reorganization?

A. I did from time to time.

Q. And it was the fact, was it not, that your firm was in receipt of a monthly salary from the railroad company while the trustees were operating it? A. That is correct.

Q. That was a continuation of the compensation arrangement pre-reorganization?

A. Yes.

Q. And that was authorized specifically in an early order made in the Bankruptcy Court, according to your recollection; that is true, is it not?

A. My recollection is this: That that was provided for in Order No. 1, signed by Judge St. Sure.

Q. Now, you also became, did you not, at that time the attorney to the debtor in reorganization?

A. I did.

(Testimony of Frank C. Nicodemus, Jr.)

Q. And in speaking of the debtor in reorganization, you have reference to the Western Pacific Railroad Company as the company that filed a petition in reorganization in August, 1935?

A. I was already the counsel for the Western Pacific Railroad Company, and I, with your former partner, Mr. Olney, filed the petition on behalf of that corporation for reorganization under Section 77. Then I continued to be the counsel for the debtor [832] throughout the reorganization proceeding.

Q. Mr. Olney and you jointly signed the petition that was filed for reorganization under Section 77 as counsel to the debtor company?

A. We did.

Q. Yes. And then shortly thereafter, when Mr. Olney was appointed as the attorney to the trustees, he withdrew as counsel to the debtor from that time forward; that is correct, isn't it?

A. Well, at the time of filing of the petition there was no requirement for the appointment of trustees under the Bankruptcy Law, and Judge St. Sure, although it was optional with the court, decided that to appoint a trustee was unnecessary, and that the business would go forward in a corporate form as it had theretofore.

The Court: The debtor remained in possession for a year?

The Witness: No, not as much as that.

The Court: Oh, not that much?

Mr. Adams: The statute was enacted very

(Testimony of Frank C. Nicodemus, Jr.)

shortly thereafter, requiring the appointment of trustees.

The Witness: I think about three months.

Q. (By Mr. Adams): My point is this, and this is the fact, is it not, Mr. Nicodemus: That at the time the trustees were appointed, in November, 1935, and the court authorized the appointment of Mr. Olney as their attorney, he then withdrew [833] as your associate as counsel to the debtor?

A. That is correct.

Q. And from that time forward you alone were the counsel to the debtor in reorganization?

A. That is correct; except that Mr. C. V. Dooling, who was an attorney in the San Francisco office of the Western Pacific Railroad Company, acted as co-counsel for the purpose of signing papers.

Q. Well, Mr. Dooling was an attorney in the law department of the railroad company, is that not the fact? A. That is correct.

Q. And he was like other employees of the railroad company, receiving a salary from the railroad company? A. That is correct.

Q. And his salary was paid by the court trustees after theey took over the operation of the railroad? A. That is correct.

Q. The same as your firm salary was paid?

A. That is also correct.

Q. But his name was not on the papers, was it?

A. Not on the original papers.

Q. Nor at any time as counsel for the debtor?

(Testimony of Frank C. Nicodemus, Jr.)

A. Oh, I think so. I think all papers that were filed on behalf of the debtor were filed with his signature, and his address as a local counsel in San Francisco. [834]

Q. To the debtor? A. Yes.

Q. I see. Now, in 1939 the Commission, of course, promulgated its modified plan of reorganization. You recall that?

A. The promulgated plan came out about that time, which was afterwards slightly modified.

Q. Then it was taken to the court here under the procedures prescribed, and it came to the court then?

A. It came to the court automatically under the Bankruptcy Act.

Q. Yes. And thereafter Judge Sloss was designated by the corporation to be the corporation's attorney in the proceedings in reorganization in the court?

A. He was authorized, I think, to intervene in the proceedings and to represent it.

Q. You, however, continued throughout your general representation as general counsel for the plaintiff corporation?

A. In cooperation with Judge Sloss.

Q. And you say "in cooperation with Judge Sloss." Do you mean in respect to the matters in reorganization, you cooperated with him?

A. That is right, that is correct.

Q. And you continued throughout also to act in the capacity of attorney to the debtor?

(Testimony of Frank C. Nicodemus, Jr.)

A. Up through the decision of the Supreme Court. [835]

Q. And continuing throughout the reorganization?

A. And continuing throughout the reorganization proceeding, up to December 31, 1944.

Q. Now, did Mr. Schumacher ever suggest to you that the interests of the corporation in the reorganization should not be fully protected?

A. He did not.

Q. Did you, to the best of your ability, protect the interests of the corporation in reorganization?

The Court: Well, what is the materiality of this phase of the case? There is no point being made, is there, that generally there was any adversity between the interests of the corporation and the debtor during reorganization?

Mr. Adams: There is a contention, your Honor, that the James interests dominated and controlled the plaintiff corporation, its agents and representatives.

The Court: Only with respect to this particular matter.

Mr. Adams: Well, not as I understand it; I understand the interveners' position to be that they propose to show that the James interests dominated and controlled the plaintiff corporation.

The Court: Well, they have presented the facts, the various positions occupied by the various persons, to show that in effect there was a control.

(Testimony of Frank C. Nicodemus, Jr.)

But there is no claim made that there was any dominance in any respect, except that the facts with respect to what was done in the tax transactions—as to what they show.

Mr. Clark: Now, how this transactions was accomplished, your Honor—that is all we attempted to show.

Mr. Adams: Now, just one moment.

The Court: I don't see any point in going back over all the years and finding out what Mr. Schumacher said to everybody connected with the company as to what their duties were as between the corporation and the defendant—unless you feel that some background material is necessary to your case.

Mr. Adams: Well, your Honor, the contention is advanced here and expressed by interveners that the James interests dominated and controlled the plaintiff corporation. It is perhaps that the James interests dominated and controlled the particular transaction only; that, to me, is almost incomprehensible. The question would be domination and control—did it exist or didn't it? The arguments made that the James interests, up until March, 1943, had their financial stake on the corporation's side and after that had their stake on the reorganized company's side—and I have heard these arguments, your Honor——

The Court: Maybe I hadn't thoroughly grasped it, but I didn't think that that word was used in any sinister light, but that it was merely the fact

(Testimony of Frank C. Nicodemus, Jr.)

of ownership that brought about a situation whereby they could have, had there arisen any [837] necessity, secured the accomplishment of such matters as they wished. From a legal point of view, not from any point of view that there was any actual dominance for any improper purpose.

Mr. Adams: But dominance, your Honor, is quite a different thing from the possession of a substantial or even a controlling stock interest. Domination is a fact, whether or not the Jaines interests did dominate these officers and directors.

The Court: But not with respect—not generally speaking.

Mr. Clark: We didn't care about——

The Court: Nobody has raised any such question as that, as I understand it.

Mr. Adams: Well, I don't understand how it can be that you dominate directors of a corporation if you are a stockholder. How could it be that you dominate parties, limiting your dominance to a particular transaction? Isn't it material to show that the directors were independent people, always independent people in all respects?

The Court: That is no more than what we have discussed many times before, that we show a man has always been a good man, so now why should you charge him with doing something wrong at a particular time. Not that that is a particularly happy illustration, but I don't get any contention here in this case made by anybody on behalf of

(Testimony of Frank C. Nicodemus, Jr.)

the plaintiff or the interveners that there was any general domination of anyone [838] in the affairs of these companies, except in connection with this tax matter.

Mr. MacKinnon: Let them put that on the record. Let the interveners put that on the record and get it nailed to one spot for all time.

Mr. Clark: That is the answer to it, your Honor; I put it on the record as many times as we have discussed this particular problem, and no later than last evening, I called attention to the limitation with respect to the allegations of domination in the complaint in intervention which we submitted to your Honor at the pre-trial. Now, the allegations are now, so far as the pleadings are concerned and irrespective of proof, that we contend that in these tax matters the James interests, through Coulson, dominated the plaintiff corporation to advantage the railroad company, of which Coulson was an agent. That is the allegation. Now, the proof adduced in support of that, your Honor, applies only to this transaction and it is the same thing which Mr. Phleger describes as the "taking over by the railroad company." The idea of venality doesn't enter into it at all. The facts are as shown on the prima facie case, that in a situation where Mr. Coulson, who was the tax counsel for the railroad company as well as the corporation, representing both of them, it being to the advantage of another of his clients whom he

(Testimony of Frank C. Nicodemus, Jr.)

represented, the James interests, whose stake was in the railroad company, to [839] advantage the railroad company, does what? His partner, Polk goes not to the directors here, but to Mr. Curry.

The Court: Well, I just don't recall any testimony that has been offered in this case that indicates in any way, or from which any inference could be drawn, that there was any dominance exercised in any way at any time, except in connection with the tax matters.

Mr. Phleger: That is our position and that is all the proof shows.

Mr. MacKinnon: I understand now the record is clear that if the interveners have taken a contrary position, that they are now on record that that is all they are charging.

The Court: Well, irrespective of what, they contend, that is all the evidence that is here shows. There is no evidence that at any time any director of the corporation was ever asked to do anything or perform any function in accordance with the directions of the James interests or anyone else who controlled the railroad company at any time, except in connection with these tax matters. I don't know of any such evidence otherwise. I notice that Mr. Adams very meticulously this morning, in connection with the testimony of Mr. Osborn, went over all these matters to point out that at no time was he asked to do anything by anyone. But no one made any claim that anybody was asked to do anything of that nature at any time during

(Testimony of Frank C. Nicodemus, Jr.)

the time during the time that such a person was acting as a director [840] of one or both of these companies. I don't recall any such evidence.

I don't want to be in a position of cutting off anything that you think is necessary to the defense, but I just don't see that there is anything involved in that.

Mr. MacKinnon: Well, that is all we are interested in, getting the record clearly shaped as to what we have to meet.

The Court: If there is any doubt about it, why, I merely asked this question as to whether or not there is any need for this kind of testimony.

Mr. MacKinnon: I understand your Honor's position, but this is the first time I have heard the interveners take the clear-cut position on the record, and I tried to force them yesterday to do it.

Mr. Clark: Why, we have, from the pre-trial, your Honor. The evidence speaks for itself, and the allegations are very clear in the case. [841]

* * *

Q. (By Mr. Adams): Mr. Nicodemus, when did you first meet Mr. A. C. James?

A. I knew Mr. James slightly for many, many years, but I first got to know him in 1934.

Q. When did you first meet Col. Coulson?

A. 1932.

Q. Were either you or your firm, Pierce & Greer, ever retained to do any legal work for A. C. James individually or any of the James companies or James Foundation of New York?

(Testimony of Frank C. Nicodemus, Jr.)

A. Never.

Q. Were you or your firm ever retained to do any legal work for the firm of Whitman, Ransom, Coulson and Goetz or for Col. Coulson?

A. Never.

Q. As counsel for the plaintiff did you ever receive any directions or instructions from Mr. James? A. Never.

Q. Or from any representative of the James interest? A. Never.

Q. Did you take the directions or instructions of anyone as to what legal advice you should or should not give to the plaintiff corporation?

A. Never.

Q. Were you dominated or controlled in any way in any of your activites as counsel for the plaintiff or as counsel for the [842] debtor?

A. No.

Q. At the beginning of 1943, Mr. Nicodemus, you knew, did you not, the difference between consolidated and separate returns?

A. I did vaguely.

Q. What do you mean when you say "vaguely"?

A. I mean that I was not familiar with the tax law as a tax expert.

Q. What did you understand was the difference between consolidated and separate returns?

A. In consolidated returns the return was filed by the parent, which must be a 95% owner of the subsidiaries that constituted the affiliated group. I think I was aware of that.

(Testimony of Frank C. Nicodemus, Jr.)

Q. You were aware, were you not, in a consolidated return the income, the debits and credits of the members of the group were taken into the return?

A. In a general way I was.

Q. So that losses of one company would offset gains of another in the computation of the tax liability? A. Correct.

Q. You understood that, did you not?

A. I understood that.

Q. You understood also the separate returns were the separate returns of the individual concerns? A. I thought I understood that. [843]

Q. Taking into account only their own incomes, debits and so on. It is a fact, is it not, that your employment as counsel for the railroad company terminated as at the end of 1944?

A. December 31, 1944, except as to minor matters.

Q. You did continue to handle a few minor matters which were then in your hands?

A. A few minor matters which were in my hands and one or two still pending, I think.

Mr. Clark: Just one moment, your Honor. I think the evidence shows the employment was by the reorganization trustees, among others, up until December 31, 1944.

Mr. Phleger: The evidence also shows, and the receipted bill is in the record, that the defendant company paid the witness' firm for legal services rendered throughout 1945.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Clark: As well, yes.

Mr. Phleger: That is in the record, a receipted bill.

Q. (By Mr. Adams): Mr. Nicodemus, the fact is, is it not, that you received a letter from Mr. Elsey, the president of the reorganized company to be, late in December, 1944, which informed you that the reorganized company did not expect to continue with the services of the firm of Pierce & Greer?

A. My answer is my relationship as corporate counsel was terminated as of December 31, 1944, with the reservation that we would continue to handle certain matters that were pending.

Q. That were then pending with you, and you did continue to [844] handle such matters?

A. We have.

Q. And it was as to such matters that you sent special bills to the railroad company which were paid? A. That is correct.

Q. Aside from that you never had any legal representation of the reorganized company?

A. No.

Q. And I take it you have not had any other official office or professional relation to the reorganized company? A. No.

Q. In behalf of the plaintiff corporation you have had in charge, have you not, certain claims against the Railroad Credit Corporation that arose out of the reorganization? A. I have had.

(Testimony of Frank C. Nicodemus, Jr.)

Q. And did your work in the matter begin early in 1944?

A. I think it did. I think it began in November, 1944.

Q. And you have carried that through since to a successful conclusion?

A. Yes, we did, in Maryland courts.

Q. Will you state briefly the nature of that claim.

A. The Western Pacific Railroad Company had borrowed from the Railroad Credit Corporation certain monies aggregated 7,000,000 and it gave as collateral certain securities belonging to it. In addition, the Railroad Credit Corporation demanded that the [845] Western Pacific Railroad Corporation, the parent company, contribute additional collateral to that loan, which is sometimes referred to, and is referred to in the decision of the Supreme Court as accommodation collateral. In the case of the Railroad Credit Corporation that accommodation collateral consisted of advances made by the Western Pacific Railroad Company to a solvent subsidiary of the railroad company, that amounted to $110,000, I believe, and our conception was the the Railroad Credit Corporation has been made whole out of the collateral provided by the principal debtor, and the accommodation collateral is thereby released, and we prevailed in that contention.

(Testimony of Frank C. Nicodemus, Jr.)

Q. That solvent subsidiary was the Standard Realty and Development Company?

A. Standard Realty and Investment Company.

Q. You have also had in your charge, have you not, a claim by the parent corporation against the Reconstruction Finance Corporation arising out of the reorganization?

Mr. Phleger: May it please the Court, I think this is all utterly immaterial, incompetent and irrelevant. I do not want to be interrupting interposing objections, but it is utterly immaterial. [846]

* * *

The Court: This litigation that you are now questioning the witness about, this employment, took place when?

Q. (By Mr. Adams): The R. F. C. claim—you started investigating that when, Mr. Nicodemus?

A. It was part of my continuous employment as counsel for the Western Pacific Railroad Corporation.

The Court: I mean, when were the activities that Mr. Adam referred to? When did they take place?

A. They started those activities in November, 1944, just before the end of the reorganization.

The Court: And that was litigation in which

(Testimony of Frank C. Nicodemus, Jr.)

the corporation was involved?

Mr. Adams: Yes, your Honor.

Mr. Phleger: And the defendant was not involved. [852]

The Court: And the defendant was not involved?

Mr. Adams: That is correct.

Mr. Clark: Nor any of the substance of this litigation.

The Court: Is there much of this kind of testimony?

Mr. Adams: No, your Honor.

The Court: I will overrule the objection.

(The last question was read by the reporter as follows: "Q. You have also had in your charge, have you not, a claim by the parent corporation against the Reconstruction Finance Corporation arising out of the reorganization?") [853]

A. We have.

Q. And are you proceeding now with that claim, Mr. Nicodemus? A. We are.

Q. Now, you have also had, have you not, with Mr. Osborn, a claim arising out of the reorganization in behalf of the plaintiff corporation, against the Sacramento Northern Railway and against the reorganized railroad company?

A. I would not characterize that as a suit arising out of the reorganization.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Will you please tell the Court what it was.

A. It was a suit on an open account between the Western Pacific Railroad Corporation, the plaintiff in this case, and the Sacramento Northern Railway, a subsidiary of the Western Pacific Railroad Company.

Q. And did you——

Mr. Clark: May we have this particular matter fixed as to time, your Honor?

The Court: Yes.

Q. (By Mr. Adams): You began work on that, did you not, in the middle of 1945?

A. I think so.

Q. And that is litigation in which you, in behalf of the plaintiff corporation, are a participant as its counsel, and in which the reorganized railroad company is an adverse party?

A. That is a correct statement. [854]

Q. And are you still pressing this claim in behalf of the plaintiff corporation? A. We are.

Q. Now, Mr. Nicodemus, have you felt free at all times to assert against the reorganization trustees or against the reorganized company any claim in behalf of the corporation which occurred to you?

A. That is certainly true as against the reorganized company; whether I was ever prepared to present a claim against the trustees in another matter. I was counsel for Mr. Schumacher in his capacity as trustee—I don't think I would have sued him.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Well, you bear in mind, do you not, that the presentation of a claim during the bankruptcy would not have been a suit against the trustees? You had that in mind, didn't you?

Mr. Clark: We object to that on the ground it is a conclusion, and argumentative.

Mr. Adams: I will submit it.

The Court: Well, that would have been an adverse interest, wouldn't it? The man couldn't act as attorney for the corporation and—that is, the reorganized corporation—he couldn't act as attorney of the railroad company, the holding company, the holding company here and also for the trustees in a dispute between them, could he?

Mr. Adams: Oh, but, your Honor, I think that is exactly [855] what he could do, because the trustees were the court's agents and any claim would have been a claim presented to the court.

The Court: I would never let a lawyer appointed in my court in a bankruptcy matter pursue that sort of thing. It is true that the trustees are officers of the court, but they are charged with preserving the res for the benefit of all parties involved, and if somebody asserts some claims that would involve, or have its impact, upon that res, certainly the man that asserts the claim couldn't be represented by the same man who represents the trustee as an officer of the court.

Q. (By Mr. Adams): Well, now, of course, it is a fact, is it not, Mr. Nicodemus, that you never

(Testimony of Frank C. Nicodemus, Jr.)

were an officer of the court as an attorney to the trustees?

Mr. Clark: Well, just a moment. That again calls for a conclusion. The evidence, may it please your Honor——

Mr. Adams: May we have this as an objection, your Honor?

The Court: Yes.

Mr. Clark: Very well, it calls for the conclusion of the witness.

The Court: Ask the question, Mr. Adams, and then I will rule.

Mr. Adams: Yes, your Honor. Would you read the question, please.

(Question read.)

The Court: Well, I think what you want to find out is, [856] was he an attorney for any of the trustees. Is that what you want?

Mr. Adams: Your Honor, what I have in mind to establish is that the attorney to the trustees was another gentleman. He was the lawyer appointed by the court for that purpose.

The Court: Who was that?

Mr. Adams: Formerly Mr. Olney and subsequently Mr. Matthew, occupying those positions.

Q. Now, it is a fact, is it not, Mr. Nicodemus, that you never occupied an official position as attorney to the trustee?

A. I was never the statutory counsel for the

(Testimony of Frank C. Nicodemus, Jr.)

trustee under Section 77 of the Bankruptcy Act.

Q. But it is further the fact that you from time to time, in an informal way, gave advice to Mr. Schumacher about his trustee affairs in New York?

A. Correct.

Mr. Adams: Now, that is precisely the situation.

Mr. Phleger: Well, it was paid for by orders allowed by the Bankruptcy Court.

Mr. Adams: Now, if your Honor please, this is argument and interjection, and if we are going to have objections to my questions, it should be in an orderly form.

Mr. Phleger: He is not stating the evidence correctly, your Honor.

Mr. Adams: May I be heard without interruption for a [857] moment? I perceive that counsel, very appropriately, have in mind that their argument may be presented while I am asking the witness.

The Court: Yes, I think you are right about that. There is a little too much argument, and we are getting away from the evidence here.

Mr. Adams: I thing that there is no question before the Court at the moment.

The Court: I have forgotten now what gave rise to the original objection.

Mr. Adams: The question that your Honor suggested was whether or not the attorney to the trustee would be in a position to present a claim to the Bankruptcy Court against the trustees. Your Honor suggested the question itself.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: Attorneys for the corporation.

Mr. Adams: Well, your Honor suggested, as I understand it,—the question in your mind was—as to whether the attorneys for the court's trustees would be in a position to present a claim in the Bankruptcy Court in behalf of the plaintiff corporation running against the trustees.

The Court: You seem to think that he wouldn't because he hadn't an official position as attorney.

Mr. Adams: And I point out through these questions and answers that he did not occupy that official position.

The Court: Well, nevertheless I don't think that he would [858] urge a claim against a trustee if he were unofficially or in any other way advising the trustee. How could he do that?

Mr. Adams: Well, this is a bankruptcy proceeding, your Honor, and this is a court in bankruptcy, and this gentleman is the general counsel for the plaintiff corporation, whose function it is to look after the corporation's affairs, and who brought into the Bankruptcy Court—take for example, that RCC matter.

Q. You appeared, did you not, Mr. Nicodemus, in the Bankruptcy Court in behalf of the plaintiff corporation, upon the hearing in the RCC matter?

A. I think I did.

The Court: That wasn't against the trustees, was it?

Mr. Adams: That was against the Railroad Credit Corporation.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: Yes, it was against the RCC.

Mr. Adams: That is right, in the Bankruptcy Court.

The Court: But I don't see how the witness could be attorney for, and present a claim on behalf of, the Western Pacific Railroad Company, an adverse claim against the estate, the trust estate, and at the same time be an advisor to one of the trustees. I don't think there would be much argument about that. I don't know whether we are talking about some academic question or whether there is something of this sort involved here.

Mr. Adams: Well, it will develop, your Honor.

The Court: Let us go ahead, then.

Q. (By Mr. Adams): Now, Mr. Nicodemus, do you recall that on or about May 24, 1944, you had a conversation with Mr. Thomas Tarleau and with a Mr. Rapp?

A. I do; but research and examination of my diary and files has developed the fact that this particular conversation occurred November 29, 1924.

Q. You mean 1944? A. Yes, '44.

Q. November 29, 1944?

A. November 29, 1944.

Q. Now, you recall that at the time your deposition was taken you gave some testimony in regard to that conversation? A. I do.

Q. And at that time you fixed the time by relation to your diary and other events, as May 24, 1944? A. That is correct.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Now, will you please state, then, what it is that has brought about a reconsideration in your mind as to the time of that occasion?

A. Why, the diary entry—what date did you give, the first date?

Q. May 24, 1944.

A. Oh, that date, I did go down to Washington with Mr. Tarleau on that date, but not with Mr. Rapp, as I remember it. I found [860] out afterwards that I met Mr. Rapp in Washington, so that demonstrated that I was mistaken as to the time when that talk took place, and I was able to communicate with my secretary, my former secretary, who had left me and gone up to Providence, and he came in and went over the files and confirmed that it was November—I think it was November 29—instead of May 29.

Q. Of the year 1944?

A. The year 1944.

Q. Now, you recall when you gave your testimoney upon your deposition that you first fixed that time as sometime over a period of a year, but no later than the middle of 1944?

A. I think I did, yes.

Q. And you are clear now that you were mistaken in that regard?

A. I am clear I was mistaken in that date.

Q. And the reason you now fix this date particularly is that this is the only diary entry date that fits an occasion when you talked with these two gentlemen?

(Testimony of Frank C. Nicodemus, Jr.)

A. Oh, no, no. We went further than that. We got a record of the reservations made from New York to Washington and the occupants of the drawing room, and so forth, which establishes in my mind that that took place in November, and that was confirmed by my secretary, who was along with us. I don't think I mentioned that in prior testimony; I had forgotten that he had been there. [861]

Q. Well, now, then, is it your best recollection at this time that the discussion you had with Mr. Tarleau and Mr. Rapp took place November 29, 1944? A. That is correct.

Q. And who were Mr. Tarleau and Mr. Rapp?

A. Mr. Tarleau, Thomas Tarleau, was the legislative counsel to Secretary Morgenthau until a short time before this conference took place. He had retired from that office and become a partner in a New York law firm, of which the late Wendell Willkie was a senior partner. The name has changed a number of times, and I cannot remember it. He was also a member of this tax committee on reorganized railroads that was working on legislation such as I referred to this morning, that eventuated in the passage of a bill by the 80th Congress.

Q. Now, on the occasion that you and I are talking about, that is the time you went down to Washington on the train with these gentlemen?

A. Yes; Mr. Rapp I haven't told you about.

Q. Oh, please do.

A. Mr. Rapp was formerly the minority clerk

(Testimony of Frank C. Nicodemus, Jr.)

of the House Ways and Means Committee and became a member of the office staff of Simpson, Thatcher & Bartlett, a very eminent law firm in New York.

Q. At a later time?

A. No, at that time, at the time of this conference. [862]

Q. Well, I mean at the time of the conference was he with the law firm?

A. He was with the law firm. And that law firm was counsel for this committee.

Q. So that these two gentlemen, to put it shortly, were tax lawyers who were specialists in tax law?

A. Tax legislation, I think, and tax law, too.

Q. Yes. And you had a discussion with them on the train on the way down to Washington?

A. I did.

Q. And you were on your way down there in connection with work for the tax legislation committee of which you were a member?

A. That is correct.

Q. Now, was it on that occasion, during that trip, that you brought up and discussed with Mr. Tarleau and Mr. Rapp the question whether a loss concern in a consolidated return might have a claim on account of the tax benefits that its loss produced? A. It was.

Q. And you had never discussed that idea prior to that time with anyone, had you?

(Testimony of Frank C. Nicodemus, Jr.)

A. Not that I recall.

Q. You had never discussed it with your partner, Mr. Campbell? A. No.

Q. Or with Mr. Schumacher? [863]

A. No.

Q. Or with Mr. Coulson? A. No.

Q. Or Mr. Polk? A. No.

Q. And so far as you can recall, this was the first time on which you ever discussed the idea with anyone? A. That is correct.

Q. It had occurred to you some time previous to this discussion?

A. Well, it had occurred to me—how far previous, I cannot tell. It grew out of a letter that was written by Mr. Schumacher to Mr. Ehrman back in April, 1943. There was a mention in that letter of a tax saving inuring to the benefit of the Tidewater Southern, and apparently that made no particular impression on my mind at the time. But some time later, and I think quite close to the date at which this talk occurred with Messrs. Tarleau and Rapp, I reread that letter, and it seemed to me that it might have some application to the Western Pacific Railroad Corporation, because it had gone into these consolidated returns, and then had contributed its operating loss, which was a loss growing out of the interest accrued on collateral loans to the Chase Bank and Hanover Bank and Trust Company and the James Foundation. And I raised the question with them as to whether the fact that that

(Testimony of Frank C. Nicodemus, Jr.)

loss was contributed [854] didn't create an equity in favor of the contributing parent.

Q. You are now speaking of this discussion on the train going down with Mr. Tarleau and Mr. Rapp?

A. That is what I understood you to inquire about.

Q. Yes, that's right. Go right ahead. I would like to hear all you recall about that conversation.

A. Mr. Rapp spoke up promptly and said, "No," he didn't think that it would create an equity, that "whoever heard of a tax law that was equitable"; and in his judgment, that the loss would not create an equity. Mr. Tarleau was not as specific or as dogmatic as Mr. Rapp. He said he would probably agree with him. And that is the substance of that conversation.

Q. Well, now, did you express any view yourself with regard to the idea?

A. Well, I was not convinced by their doubts. It still remained in my mind that that might create an equity that would be cognizable in a court.

Q. Did you have any subsequent discussion of that subject with either Mr. Tarleau or Mr. Rapp; that is, prior to the time that the stockholders' suit was instituted in the middle of 1946?

A. No, not that I remember.

The story of that talk with Messrs. Rapp and Tarleau is incomplete unless I tell you that the next day we also had a conference with another lawyer in Washington. [865]

(Testimony of Frank C. Nicodemus, Jr.)

Q. Yes. Please proceed with that. You say "we." But did Mr. Tarleau and Mr. Rapp participate in the conversation you had with Mr. Dudley?

A. I think they were present.

Q. Oh, you do?

A. At least they were present—we were all together, and my best recollection is that Mr. Tarleau left and Mr. Rapp left, to go to their respective appointments. I discussed it further with Mr. Dudley. Mr. Dudley was a Washington lawyer who was on this tax committee, and he said it was a question he hadn't thought of but might have some merit. And I said, "Well, maybe some day it will become a practical question."

Now, that was the substance of my talk with Mr. Dudley.

Q. Now, at the time did you tell these gentlemen that you were discussing this from the point of view of the Western Pacific or any of its subsidiaries? A. I did not.

Q. You just approached the subject as an academic question?

A. As an academic question, yes, sir.

Q. Now, have you told me the substance of the conversation you had with those gentlemen at that time on that subject?

A. As well as I can remember it.

Q. Now, subsequent to that time, and until the stockholders' suit was commenced in the middle of 1946, did you have any further conversation with

(Testimony of Frank C. Nicodemus, Jr.)

anyone? [866] A. Not that I can recall.

Q. With regard to this question of the possibility of a claim by the loss company on acount of the benefits of its loss in a consolidated tax return?

A. What date did you put?

Q. Any time up to the time when, in the middle of 1946, the stockholders' litigation was started.

A. Not prior to the institution of the stockholders' suit.

Q. And now, subsequent to your discussion with Mr. Tarleau and Mr. Rapp and your discussion with Mr. Dudley, did you advise Mr. Schumacher in regard to that discussion?

A. No, I did not.

Q. Did you advise Mr. Coulson or Mr. Polk in regard to it? A. No, I did not.

Q. Or Mr. Curry? A. No.

Q. Or anyone else in the plaintiff corporation?

A. No.

Q. Or did you advise, in fact, anybody about it?

A. No.

Q. Did you talk with your partner, Mr. Campbell, about it? A. Not that I recall.

Q. Now, was that for the reason that it appeared to you at that time that these gentlemen had not indicated that there was such a claim? [867]

A. It didn't occur to me that it was a practical claim at that time.

Q. Now, if you had considered at that time—strike that.

(Testimony of Frank C. Nicodemus, Jr.)

You bear in mind, Mr. Nicodemus, that as at the end of 1944, the trustees' operation of the railroad company came to an end? A. That is correct.

Q. You bear in mind also that the reorganization court remained open for certain purposes until March 1946; you have that in mind, do you?

A. I think that is correct.

Q. Do you bear in mind also that your representation of the railroad company, your official representation of that company, came to an end at the end of 1944? A. That is correct.

Q. Now, was there anything to prevent you from presenting this possible claim of the corporation to the reorganization court if you had desired to do so?

Mr. Clark: Well, now, just a moment, may it please your Honor. I will object to that upon the ground that it is vague and indefinite and assumes something not in evidence or not sufficiently explained—namely, as to what loss is referred to in the question. There is a distinction, as counsel well knows, between the loss which was discussed in these conversations with the witness and the preent stock loss. [868]

Mr. Adams: I will submit it, your Honor.

Mr. Phleger: Well, I will object to it as calling for the conclusion of the witness.

The Court: Well, I think that objection is good.

Mr. Adams: This witness knows, your Honor; he is an adverse witness, I am cross-examining him.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: You can, of course, have a field of inquiry there; you can ask him what he did do, what he did not do, with reference to the loss. But what his relationship was, his company—I think that the question you are asking him is one that calls for the opinion and conclusion on his part.

Mr. Adams: Well, I take it that the objection is sustained to the particular question?

The Court: I think I will sustain the particular objection. I believe you can approach the problem you have in mind in a different way.

Q. (By Mr. Adams): Now, Mr. Nicodemus, it is the fact, is it not, that between the time you had these discussion with Mr. Tarleau, Mr. Rapp and Mr. Dudley, and the time when the stockholders' action was instituted in New York in the middle of 1946, you did not take any further action of any sort in reference to the suggestions that you discussed at that meeting with those gentlemen?

A. No, the whole tax matter was in the hands of Whitman, Ransom, Coulson & Goetz; that was purely an academic discussion. [869]

Q. You took no action yourself of any sort in regard to that matter? A. No.

Q. And you didn't mention it to Whitman, Ransom, Coulson and Goetz or any of its members?

A. No, I did not.

Q. Nor to Mr. Schumacher? A. No.

Q. Nor to Mr. Curry? A. That is correct.

Q. Or Mr. Osborn? A. That is correct.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Or Mr. Wood? A. That is correct.

Q. Nor anyone else? A. That is correct.

Q. Mr. Nicodemus, do you recall that you were asked some questions and gave some answers on this matter on the taking of your deposition?

A. Yes.

Q. May I ask that Mr. Nicodemus' deposition, page 255, be handed to him?

(Handed to the witness by the Clerk.)

Mr. Clark: What page is it, please?

Mr. Adams: 255. [870]

The Witness: I have it. Where do you want me to read?

Q. Beginning five lines from the bottom of page 255, referring to Mr. Dudley. This is a part of your answer (reading):

"Mr. Dudley said that he wouldn't say there was no equity, that he never considered the subject. It was new to him, but it was something worth thinking about."

Now is it your present recollection that that is what Mr. Dudley said to you at that time?

A. That is my recollection, and it is what I have just testified to in substance, isn't it?

Q. Thank you. Now, Mr. Nicodemus, in an answer to a previous question—you referred to a letter written by Mr. Schumacher to Mr. Ehrman, and I will ask that Interveners' Exhibit 30—I am sorry, your Honor. It will take a moment to produce this document.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Clark: If you have some of these ahead, may I suggest to the court that it might save time if we could have a few of them and be digging them out of the deposition file here?

Mr. Adams: I had best get along with my own cross-examination, and I can proceed better in this way. I don't think we will have this repeated. If it is satisfactory to counsel, I can proceed better this way. I can hand this to the witness—no, I had better not hand my photostat to the witness.

Q. Mr. Nicodemus, I hand to you a document now marked Interveners' Exhibit No. 30, being a copy of a letter dated April 1, [871] 1943, addressed by Mr. Schumacher to Mr. Ehrman, and I will read it to the witness and his Honor (reading):

"Dear Mr. Ehrman:

"Referring to our telephone conversation last evening, this morning I have looked up our records to see just what the expense of making up the consolidated tax returns in our office and the tax savings effected has been since the Western Pacific Railroad Company went into trusteeship.

"First of all, the certified public accountants, Lybrand, Ross Bros. and Montgomery, were employed by the corporation from year to year to audit the accounts pursuant to the provision of the Securities and Exchange Act. Their charge for this audit has averaged approximately a thousand dollars a year. For the past two years we have consulted them on excess profits tax on a consolidated

(Testimony of Frank C. Nicodemus, Jr.)

basis, and their charge for this was $150 in 1940 and $400 in 1941, which was paid by the corporation.

"This work has all been done in this office and consolidated tax returns have been prepared and filed under Mr. Curry's supervision.

"I might add that during the years the company has been in trusteeship, payment of income taxes for the consolidated group was nil, because of the large consolidated deficits. In fact, the Tidewater Southern, which made a [872] profit every year and was included in the returns, benefited by these deficits, which effected a tax saving to it of approximately $116,000 for the six-year period.

"During that period expert advice from counsel was not necessary. However, commencing with 1942, the situation was changed considerably because the affiliated companies' earnings have greatly increased. For that reason, and in view of the new complicated tax law, we now require the advice of competent tax attorneys.

"For your further information, I find that the last payment of consolidated income tax was made in 1929. At that time there was a net consolidated taxable income of $365,000 on which the income tax amounted to $40,230."

(Document handed to the witness by the Clerk.)

Q. (By Mr. Adams): Now, Mr. Nicodemus, is that the letter to which you referred in your testi-

(Testimony of Frank C. Nicodemus, Jr.)

mony about the conversations that you had with Mr. Tarleau, Mr. Rapp, and Mr. Dudley?

A. This is the letter.

Mr. Adams: The record shows, your Honor, that a copy of this letter from Mr. Schumacher to Mr. Ehrman went to Mr. Nicodemus.

Q. And the tax savings, according to your recollection, that [873] you had in mind in November, 1944, when you discussed that matter with those gentlemen, were those Tidewater Southern tax savings that are mentioned in this letter of April 1, 1943?

A. Well, tax savings that I had in mind at that time were the tax savings that grew out of the income accruals of the Western Pacific Railroad Corporation during that tax period.

Q. During what tax period?

A. The tax period in which this letter relates. This is a prior tax period. This is a historical reference to a prior tax year.

Q. Is it your recollection, then, that at the time you had this conversation with Messrs. Tarleau, Rapp and Dudley in November, 1944, that you only had in mind this letter written a year and a half before that date with regard to the Tidewater Southern? A. That is correct.

Q. I will ask that you turn to page 1091 of your deposition. A. I haven't got it.

Q. Oh, it is in another volume from the one you have before you. Do you have that before you now, Mr. Nicodemus? A. 1091?

(Testimony of Frank C. Nicodemus, Jr.)

Q. Yes. A. I do.

Q. May I read certain questions and answers?

A. Yes. [874]

"Q. Do you recall that you testified in your discussion with Messrs. Tarleau, Rapp and Dudley the tax savings that you had in mind was a tax saving arising out of the 1942 return?

"A. Yes, the operating loss.

"Q. That is to say, those were the tax savings?

"A. That is what I had in mind.

"Q. Those were the tax savings for that year to which Mr. Polk referred in his letter of May 20, 1943, were they not?

"A. Yes, they were, that is correct.

"Q. So that then you had in mind that portion of Mr. Polk's letter of May 20, 1943, in which he referred to the 1942 returns?

"A. That is correct.

"Q. Did you at that time have in mind that portion of the same letter in which he referred to the possibility of a loss being taken on account of the corporation's loss on the stock of the company?

"A. No, I did not.

"Q. Is it clear in your own mind at this time that you had in mind one specific part of that letter and did not have in mind another specific part of it?

"A. It is clear in my mind that I had in mind only savings that he specifically referred to in that letter and which were also referred to in the letter of April 1." [875]

(Testimony of Frank C. Nicodemus, Jr.)

Q. Now, you recall that I asked you these questions and you gave those answers at that time?

A. Probably I did, and I readopt them.

Q. Are they correct now, according to your best recollection?

A. According to my best recollection.

Q. Is it not a fact, Mr. Nicodemus, that the tax savings for the year 1942 that are mentioned in Mr. Polk's letter with relation to the returns for that year are stated in his letter in an amount somewhat in excess of a million five hundred thousand dollars? A. Yes, they are.

Mr. Adams: That is the letter of May 20, 1943, your Honor. Plaintiff's Exhibit 50 in the case.

The Witness: Only a very small part of that was applicable to this loss of the operating company—I mean the parent company.

Q. (By Mr. Adams): Well, is it a fact that at the time you had your discussion with Messrs. Tarleau, Rapp and Dudley you did at that time have in mind Mr. Polk's advice, his letter of May 20, 1943?

A. I think this correspondence back in the spring of 1943 was perhaps in my mind, but I do remember specifically that letter of April 1.

Q. Now, Mr. Nicodemus, at the time your deposition was taken you were asked when it was that you, according to your recollection, first heard about the use of the corporation's stock loss [876] in consolidated income tax returns filed with the parent corporation?

(Testimony of Frank C. Nicodemus, Jr.)

A. I believe I was asked about that.

Q. I will ask you the same question again. What is your best recollection as to the time when you first heard about that matter?

A. About the stock loss?

Q. About the use of the stock loss. Let me put it this way: You know now, of course, do you not, that the stock loss was a deduction in the consolidated return for 1943? A. I do.

Q. And that it operated there so that no taxable income was reported for that year?

A. I understand that.

Q. And you know now that the stock loss was a very large sum, something like $75,000,000?

A. I do.

Q. And that the taxes that have been accrued until they were reversed for the trustees amounted to something over $7,000,000? You know all those facts presently? A. Oh, yes.

Q. When was it, Mr. Nicodemus, according to your best recollection, that you first heard about those matters?

A. The first time I ever heard of the stock loss, to my best recollection, was in the last month of 1945, or the first or the [877] second months of 1946, when I was told so by Robert E. Coulson.

Q. Now, Mr. Nicodemus, I would like to review with you a number of things.

Your Honor, Mr. Nicodemus is aware of this because we did this on his deposition before, your

(Testimony of Frank C. Nicodemus, Jr.)

Honor, and it will take a little time because I have various documents and records to put before him, with two things only in view: one to show notice, regardless of knowledge, and the other to present to Mr. Nicodemus documents, some of which he did not see upon the taking of his deposition, that may possibly result in some recollection he does not now have, and I say that because I know it is going to take a little time and I will go right ahead with it.

Mr. Phleger: May I interrupt at this moment? I have not made an objection to this line of testimony. It is our view that the notice, knowledge, action, inaction of this witness can have no possible effect to destroy any claim which the plaintiff might have, and as a result this entire line of questioning is incompetent, irrelevant and immaterial. I would like to have our objection noted to this whole line. I have not made it before, but that is our conception of this case.

Mr. Clark: The intervener enters the same objection, your Honor.

Mr. Adams: I take it, your Honor, this must be cross-examination and I would submit that it is a material question, namely, according to his best recollection when did he hear [878] about these returns? Your Honor said everything was open and aboveboard in this transaction.

Mr. Clark: No, I think he testified when he first heard about the stock loss.

Mr. Phleger: I would like to bring this out:

(Testimony of Frank C. Nicodemus, Jr.)

This is no part of our case. We did not open the subject of notice or knowledge to Mr. Nicodemus. This is the defendant's affirmative case, and our position is if is utterly and absolutely immaterial what this witness knew or did not know, what he did or did not do.

Mr. Adams: Shall I proceed, your Honor? There is no question before you.

The Court: No, there isn't any question.

Mr. Phleger: There is an objection to this whole line of testimony.

The Court: You stated you wanted to show some documents to the witness that may cause him to make some change in his testimony as to when he did or did not have notice of the use of this stock loss as a part of the return. You say that is going to take a long time to do that?

Mr. Adams: It will take some time. There are a number of documents. I do not think it is going to take what might be termed an extensive time, and a day or anything like it.

The Court: Some of the trial judges seem to be getting—I guess we are all affected by it—getting overcautious in [879] permitting evidence to go in, in view of some of the decisions of the higher courts. I have been leaning that way in this case because obviously you have spent a lot of time and know so much more about this case than it is possible for a judge to learn about it in the short time of the trial. I do not see that when this witness

(Testimony of Frank C. Nicodemus, Jr.)

learned about any of these things has any relationship to the question that you are presenting here. I gather you have something more than what was stated in the opening arguments that is a very much more vital question which bears on this matter, and that any such matter as whether this witness learned about it six months ahead of time or what he learned about it I think is incompetent, irrelevant, and immaterial, Mr. Adams. What I am saying about the matter does not indicate that I am in favor of the plaintiff's side of the case at all, but you know your own case best now. If you think this is some vital matter that you have to pile up a big record on matters that really do not bear on the issues of the case, that is all right. There are a lot of big lawyers involved in this case. You have spent a lot of time studying it. You want to throw it all in before the judge. I do not see that it helps me to decide this case. I would much rather hear your arguments and all the arguments on the important and vital issues of this case than all this stuff about what conversations this witness had with some lawyer on a train going to Washington. That is not going to make any difference in my decision of the case. I am more [880] anxious to hear what your arguments are on the vital questions. If you think it is important to put all this stuff in the record, I will allow it.

Mr. Adams: Your Honor, I will state briefly why we think it is important. We think this evi-

(Testimony of Frank C. Nicodemus, Jr.)

dence goes to matters of defense and the effectiveness of the bar of reorganization for the reason that we apprehend that some contention may be addressed to your Honor that the gentlemen who could have spoken for the plaintiff corporation while Judge St. Sure's court was open for hearing claims, that those gentlemen were uninformed about this matter, and this testimony just given is testimony along that line. Now, we do not think we have to disprove what the witness says, but we do think we have to show he had adequate notice. He was one of the representatives of the corporation. We believe this is material and relevant to the defense we present of the bar of the reorganization proceeding. I am sure it has nothing to do with the merits of the claim on the side of the merits. I think it has a material bearing upon the defense of the bar.

Mr. Levy: I would like to say one word in connection with that. Your Honor will remember that we are dealing with split personality and Mr. Adams is seeking to impute to this man considerable knowledge. If your Honor will recall, if there was such knowledge it was equally imputable to his two other clients, namely, the trustees, under whom he had a retainer—call it a [881] salary if you wish, but it was a retainer for legal services—and secondly, the debtor company for whom he was the attorney, and thirdly, the reorganized company, for whom he acted as attorney during the year 1945. However

(Testimony of Frank C. Nicodemus, Jr.)

much Mr. Adams may seek to minimize the nature of services which were rendered, the fact does remain that this man was the attorney for whatever services he rendered for this reorganized company through the year 1945 and was paid for it.

Mr. Adams: I think that is quite immaterial. Your Honor, it is now a little past three o'clock. I will prepare to go right ahead with this. If your Honor considers I should make an offer of proof, I can do that. I do think it is a necessary part of my record and I am prepared to make the offer of proof or to take it up with the witness as your Honor may decide.

The Court: Let me ask you this question, Mr. Adams: How many witnesses do you have in mind at this time that you are going to call in this case? How long do you think the presentation of evidence will approximately take? [882]

* * *

Mr. Adams: Your Honor, at this time I will offer as Defendant's Exhibit 11 the document that I read into the record, being the letter from Mr. Schumacher to Mr. Ehrman of April 1, 1943.

Mr. Clark: Previously marked as what, Mr. Adams?

Mr. Adams: As Interveners' 30. [883]

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 11.)

(Testimony of Frank C. Nicodemus, Jr.)

Q. (By Mr. Adams): Mr. Nicodemus, there is in the record here an exhibit representing certain payments you received as compensation as attorney to the debtor. Is it the fact that all compensation you received as attorney to the debtor was allowed upon orders of the Interstate Commerce Commission and the bankruptcy court?

A. That is correct.

Q. Did you recommend to Mr. Schumacher that the Whitman, Ranson firm be employed as tax counsel for the reorganization trustees?

A. I did.

Q. And did you have in mind at that time the large earnings that were then being earned upon the railroad properties in the hands of the trustees?

A. I did.

Q. Do you recall that there was a conference in your office with Mr. Polk and others on May 18, 1943, with regard to income taxes for 1942?

A. I remember a series of conferences. I think one of them was May 18.

Q. Do you recall that that conference took place shortly after the returns for 1942 had been filed?

A. That is correct.

Q. Do you recall what took place at that conference? [884]

Mr. Phleger: Excuse me. You mean the tentative return?

Mr. Clark: No, the final return was filed on May 15, 1943.

(Testimony of Frank C. Nicodemus, Jr.)

The Witness: My recollection of what took place at that conference was that Mr. Polk explained to me, and which he had previously explained to me briefly, why he thought it was desirable to file consolidated returns, and there was some memorandum which he produced at that conference that was the subject of discussion, more with Miss Valouch and Mr. Curry than with me.

Q. Miss Valouch and Mr. Curry were also present at this conference?

A. They were also present, and I believe that Mr. Reilly was.

Q. At that conference was there a discussion about the possibility of using the stock loss in the following year's return?

A. All I think that was adverted to at that conference——

Q. Do you have a recollection of discussing that matter at that time?

A. It is pretty hard for me to say at this late date. There was a document shown to us in that conference that did refer to it.

Q. Is it your best recollection at this time that at that conference on May 18, 1943, you did hear that there was a possibility of using the stock loss in the following year's return?

A. I think there may have been some reference to it, but I did not charge my memory with the details of that conference. [885]

Q. Did you thereafter receive a copy of Mr.

(Testimony of Frank C. Nicodemus, Jr.)

Polk's letter of May 20, 1943, Plaintiff's Exhibit 50, if you please, Mr. Clerk?

A. In due course I received a copy of that letter from Mr. Curry.

Mr. Adams: The Clerk may hand the document to you.

Q. Now, did you read the letter, Plaintiff's Exhibit 50, at or about the time you received it, May 20 or 21, 1943?

A. Did I read the letter addressed to Mr. Curry?

Q. The letter of May 20, 1943, Plaintiff's Exhibit 50. There is also in the record a letter of May 21, 1943, addressed to you by Mr. Curry transmitting a copy of Plaintiff's Exhibit 50. Do you recall that you read that at or about its date?

A. I recall receiving that and I undoubtedly read it. How carefully I read it I am not able to say at this late date.

Q. Then did you thereafter discuss it with Mr. Schumacher, according to your best recollection?

A. I don't remember having discussed it with Mr. Schumacher.

Q. Now, you met with Mr. Schumacher very frequently, did you not, Mr. Nicodemus?

A. Very frequently.

Q. You were in his office almost as a matter of daily meetings during the time he was one of the trustees of the Western Pacific?

A. I was in his office very frequently.

Q. And did you discuss tax matters with him from time to time?

(Testimony of Frank C. Nicodemus, Jr.)

A. I never recall discussing tax matters with him. [886]

Q. You have no recollection of any such discussions? A. No.

Q. The record shows, Mr. Nicodemus, that early in January, 1944, the tax accruals of the railroad's properties are reversed, and you know about that now; we have mentioned it?

A. I know about that now.

Q. Did you receive regularly during that period the forms 174 revised issued by the Western Pacific Railroad Company, their monthly operating statements? A. Will you produce one?

Q. Yes, I hand to you 174 revised for December, 1943, marked Interveners' Exhibit 424A and ask that it be stipulated that this document was produced from the files of Mr. Nicodemus.

Mr. Clark: I am not sure of that. I think probably it was produced from the railroad company's files, Mr. Adams.

Mr. Adams: That is not my recollection. However, I do not think I will need the stipulation.

Q. It is a fact, is it not, Mr. Nicodemus, that you regularly received form 174 revised during that period?

A. I received from time to time financial statements sent to me by Mr. Curry, usually with my name on it in pencil. I do not remember whether it was green or blue. But such statements that came into my office currently and were filed for such future reference as might be necessary.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Adams: May I read, if your Honor please, from page [887] 1157 of Mr. Nicodemus' deposition?

Q. Do you have the deposition before you?

A. Some part of it. No, I have not.

Q. Page 1157, Mr. Nicodemus. A. 1157?

Q. Yes. Do you have the page? A. I do.

Q. Mr. Nicodemus, this question is by me, about ten lines from the top of the page.

A. I see it.

"Q. Referring to this file, Mr. Nicodemus, do you recall these printed forms on form 174A revised were received regularly by your office?

"A. They were produced from my files and I will adopt them as documents that were sent to me currently.

"Q. And you are familiar, are you not, with the fact that such monthly statements on form 174A revised were made by the Western Pacific Railroad Company? A. They were."

Q. Did you give those answers to those questions at that time?

A. I undoubtedly did and I readopt the documents as having been taken from my files.

Q. Referring to form 174A revised, which you have in your hand, for December, 1943, that form shows, does it not, the reversal of the tax accruals of the Western Pacific Railroad Company in [888] a very large sum?

A. Can you indicate the line it is on?

(Testimony of Frank C. Nicodemus, Jr.)

Q. "Railway tax accruals, federal income." You will find that just below the net revenue railway operations. Do you find that?

A. I see a heavy black figure.

Q. $6,759,886.13? A. Yes.

Q. You understand, do you not, that the black figures are minus figures?

A. I do not so understand. Ordinarily it is red, but if you say——

Q. Will you read the note, Mr. Nicodemus, at the bottom of this form 174A?

A. "Black face figures indicate entries in the reverse of the item as shown on the left hand column."

Q. Yes.

A. Apparently this is intended as the equivalent of a red figure.

Q. You were familiar with these forms, were you not?

A. I was when they were coming into my office currently.

Q. Do you recall whether at or about the time this form came in that it came to your attention?

A. I do not.

Q. Now then, the record shows, Mr. Nicodemus, that on or about February 21, 1944, a petition was filed in the reorganization [889] proceedings requesting authority to establish a reserve fund for contingent tax liabilities. I hand you a copy (handing document to witness).[889A]

(Testimony of Frank C. Nicodemus, Jr.)

Q. Now, as counsel for the debtor, Mr. Nicodemus, you received copies, did you not, of all petitions filed in the reorganization proceeding?

A. I did.

Q. And did you or Mr. Campbell make it a practice to read the petitions and orders that were filed in that proceeding?

A. They were referred to Mr. Campbell ordinarily, and he called my attention to anything that he thought was of special significance.

Q. Do you have any recollection of reading this particular petition? A. I do not.

Q. I hand you a copy of an order authorizing establishment of a reserve fund for contingent tax liability, made March 3, 1943, by the United States District Court. (Handed to witness through clerk). Your office received, did it not, all copies of orders as they were made from time to time in the bankruptcy proceeding? A. Yes.

Q. Do you recall seeing a copy of that order?

A. I do not; but I adopt it as an order which came to my office in the regular course of business.

Q. Do you recall looking at it at the time it came? A. No, I do not.

Q. Do you have any recollection of discussing with Mr. [890] Schumacher or Mr. Curry or anyone else, the reserve fund of $7,100,000 that had been set up?

A. I do not. I have no recollection of ever discussing that with Mr. Schumacher.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Or with anyone else prior to the time that you spoke of, along at the end of 1945 or the beginning of '46? A. That's right.

Q. Is that right? A. That is correct.

Q. Now, you have read the 1943 annual report of the company, have you not, Plaintiff's Exhibit 20-B?

A. I received the annual reports in the regular course of business at the time they were issued.

Mr. Adams: May I ask that Plaintiff's Exhibit 20-B be exhibited to the witness, and I direct his attention to page 6. And at this time, your Honor, while the witness is looking at that page, may I offer as Defendant's Exhibit 12 the copy of the petition?

Mr. Phleger: That is already in evidence.

Mr. Adams: Is it? Will you give me the designation?

Mr. Phleger: I will find it here. We put it in.

(Plaintiff's Exhibit 20-B handed to witness by clerk.)

Mr. Adams: I am advised that the petition is in, not the order.

Mr. Phleger: Just a moment. I will give it to you. [891] Plaintiff's 58.

Mr. Adams: Is what?

Mr. Phleger: The petition to establish reserve fund for contingent tax liability, otherwise Interveners' 447-B.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Adams: I offer the order as Defendants' Exhibit 12.

(Order establishing fund referred to above was received in evidence and marked Defendants' Exhibit 12.)

Q. (By Mr. Adams): Now, Mr. Nicodemus, directing your attention to page 6 of the report of the Western Pacific Company, "T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization, for the calendar year ended December 31, 1943," on page 6—— A. Page 6?

Q. Yes. Do you have it before you? I direct your attention to the statement there under the heading "Taxes," and I read a portion of it as follows:

"Owing to an unusual situation resulting from the recent final confirmation of the plan of reorganization, no accrual was set up in respect of Federal income and excess profits taxes for 1943. Since 1916, Federal tax returns of this company have been made through a consolidated return filed by the parent holding company, the Western Pacific Railroad Corporation, which parent owned all the capital stock of its subsidiary, the Western Pacific Railroad Company. [892]

"The confirmed plan of reorganization for the railroad company characterizes the capital stock stock owned by the holding company as being 'without equity or value.' A consolidated tax return

(Testimony of Frank C. Nicodemus, Jr.)

for 1943 can and will be filed by the holding company.

"Tax counsel has advised that the holding company's loss on its stock of the railroad company will result in an elimination of the liability of the holding company for Federal income taxes for the year 1943, and therefore indirectly eliminate such taxes for the subsidiaries of the holding company.

"However, pending a final settlement with the Treasury Department, the reorganization trustees, by authority of the court, have set aside a contingency reserve tax fund of $7,100,000, invested in United States Government Treasury savings notes—Series C."

And I direct your attention to what I have just read, and I will ask you if, at or about the time you received that report, you examined that statement.

A. I have no recollection of ever having read that statement. If I did read it, it left no impression on my mind. The reason perhaps being that tax matters had been referred to the firm of Whitman, Ransom, Coulson & Goetz, and were not my responsibility. [893]

Q. Would you say now that you are sure whether or not you saw that statement I have just read at or about the time that it was published?

A. I am sure that that made no impression on my memory. I have no recollection of having read it.

Q. You have no recollection one way or the

(Testimony of Frank C. Nicodemus, Jr.)

other, is that your statement? I am trying to find out the fact.

A. No, that is not my statement. I have no recollection of ever having read it.

Q. It is the fact, is it not, that you from time to time have referred to this annual report?

A. I am sure that from time to time I referred to all the reports for statistical information.

Q. Now, you recall that upon your deposition we inquired with regard to certain studies you made in Moody's Manual for 1943, do you not?

A. Yes.

Q. And you recall that at the time of your deposition, I produced for you the Moody's Manual for that year, which is the large volume?

A. That is correct.

Q. Manual of Steam Railroads?

A. That is correct.

Q. And that I directed your attention to the statement therein about the Western Pacific Railroad Company? [894] A. That is correct.

Q. And you recall that that statement set out the facts with regard to this tax matter in much the same form, substantially, as the one that this annual report you have just seen did?

A. I remember that.

Q. You recall that? A. I recall that.

Q. And is it now your recollection that though you did read Moody's Manual on the Western Pacific for other purposes, you have no recollection of reading that portion of it?

(Testimony of Frank C. Nicodemus, Jr.)

A. That was my recollection, and I should like to add that I examineed Moody's Manuals over a series of years for a specific purpose that had nothing to do with taxes.

Q. You examined Moody's Manuals, specifically in that connection—that is, the Western Pacific connection—in reference to this Sacramento Northern litigation? A. That is correct.

Q. That is right, is it not? A. Yes.

Q. Now, then, you received, did you not, the Eighth Annual Report and Account by the trustees of the property of the debtor and petition for approval of their acts and accounts? And I will read a section from page 2, as follows:——

Mr. Levy: What year is that?

Mr. Adams: The eighth report and accounting by the trustees was filed September 25, 1944, in the files in the [895] reorganization proceeding in this court, and there appears in that account, at page 3, beginning line 9:

"The net income as reported for 1943 did not reflect accruals for any Federal income or excess profits taxes in respect of 1943. The trustees have been advised and believe that the debtor and trustees have no liability for such taxes. Pending a final settlement of the question with the Commissioner of Internal Revenue, a reserve fund for contingent tax liability was established by order of the court, dated March 3, 1944, in the amount of $7,100,000,

(Testimony of Frank C. Nicodemus, Jr.)

which fund was invested in United States Treasury securities."

And I hand the document to the witness and ask if he recalls seeing that document at or about the time it was received in his office.

(Document handed to witness through Clerk.)

A. I make the same answer; this document undoubtedly came to me in the regular course of business. It was the report of the trustees, submitted over the signature of Mr. Allan P. Matthew, counsel. There was no special reason why I should scrutinize it.

Q. You have no recollection of seeing that portion of the document? A. I have not. [896]

Q. Mr. Nicodemus, I hand to you Interveners' Exhibit 32-A, and Interveners' 32-B; Interveners' 32-A being a letter from Mr. Curry to Mr. Polk, copy to Mr. Nicodemus, of May 19, 1944; and Interveners' 32-B being an enclosure referred to in Interveners' 32-A. Now, the enclosure is a letter of May 17, 1944, from Robert L. Whittaker & Co., addressed to Western Pacific Railroad Corporation, 37 Wall Street, New York, saying:

"Gentlemen:

"It has occurred to us as holders of Western Pacific fives, due 1946, that the large tax credit in the earnings statement for December, 1943, of the Western Pacific, could take place annually for some years to come, as long as the revenue act allows

(Testimony of Frank C. Nicodemus, Jr.)

holding companies to consolidate their returns of subsidiaries for income tax purposes. Since the ownership of the Western Pacific Railroad was declared valueless for 1943, we thought possibly this loss, which must involve upwards of $50,000,000, could be used as a tax credit for future years until the total loss is used.

"We would appreciate hearing from you regarding this situation."

And I ask you if you recall receiving those papers at or about that time. That is to say, particularly 32-B.

(Documents handed to the witness by the clerk.) [897]

A. I recall them. I can identify this as a letter that was produced from my files, and I undoubtedly received it at or about the time of its date, and noted that the matter had partly been referred by Mr. Curry to Mr. Polk. Whether or not I examined the letter from Whittaker or not, I can't remember at this late date.

Q. Do you have any recollection that the Whittaker letter, which came to your office and you saw, brought anything to your mind in referring to a tax loss that might be taken over the years?

A. I say, I don't remember reading the Whittaker letter.

Q. You have no recollection of it?

A. I have no recollection of having read it.

Q. Now, I direct your attention to the Inter-

(Testimony of Frank C. Nicodemus, Jr.)

veners' Exhibit 5, which is a letter dated February 21, 1945, from Mr. Curry to you.

But I am getting ahead of myself, your Honor. I should offer it in evidence, and now do offer the two letters just produced as Defendants' Exhibit 13—being Interveners' 32-A and -B.

(Letters formerly identified as Interveners' Exhibits 32-A and -B were received in evidence and marked Defendants' Exhibit 13.)

Mr. Adams: May the witness please have Plaintiff's 5—or, rather, Interveners' 5—no, not Interveners'—— [898].

Mr. Clark: Now, is that Interveners' 5 on deposition or trial exhibit?

Mr. Adams: Yes, Interveners'. I understand this is the trial exhibit. The letter of February 21, 1945, addressed by Mr. Curry to Messrs. Pierce & Greer is what I refer to.

(Handed to witness by the clerk.)

Q. (By Mr. Adams): Mr Nicodemus, your office received this at or about its date, did it not, this letter of February 21, 1945?

A. This is a copy of a letter which I assume I received, or the original, or that the firm did.

Q. Yes. And I direct your attention to the third paragraph of the letter. Is it a fair statement that the first two paragraphs relate to the Delaware franchise taxes of the plaintiff corporation?

A. It is.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Now, the third paragraph reads:

"The question in my mind is whether we should pay these taxes or let them go by default. If we default and our charter is voided, the question arises what would be the effect on the consolidated income and excess profits tax returns filed by the corporation as parent for the years 1942, 1943 and 1944."

Then the words "To May 1" in parentheses is crossed out. [899]

"As you know, a very large deduction was taken in 1943, which wiped out any tax liability for that year; and will also have an effect upon the 1942 and 1944 consolidated returns. I understand the total tax saving to the Western Pacific Railroad Company will amount to about $15,000,000. Therefore I feel the payment or non-payment of these franchise taxes must be determined, particularly from the Federal income tax angle.

"I would suggest that before arriving at a decision in this matter, you confer with the firm of Whitman, Ransom, Coulson & Goetz, our tax counsel, who are aware of this situation and are considering the consequences which the non-payment of these franchise taxes would have from an income tax viewpoint."

Now, do you recall the portion of the letter that I have just read to you?

A. No, I do not, Mr. Adams, and this is a subject that was ordinarily dealt with by my partner, Mr. Campbell.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: That letter was written by Mr. Curry in what capacity?

Mr. Adams: As president of the parent corporation. This is plaintiff corporation's letter to its counsel, Messrs. Pierce & Greer. [900]

Mr. Clark: Suggesting that the matter be referred to its tax counsel, Messrs. Whitman, Ransom, Coulson & Goetz.

The Court: Well, they were also counsel for the defendant, too, at the same time.

Mr. Adams: Whitman, Ransom, Coulson & Goetz had been engaged by the reorganization trustees to handle these tax matters.

The Court: Well, it is certainly much to the advantage of the defendant company to see to it that the plaintiff company maintained its corporate status, in order that the affiliated return might have effect at the time, isn't it?

Mr. Adams: Well, it isn't a question of whether the affiliated return might have effect; I don't think that the corporate existence was indispensable to that, but it certainly meant that as far as the handling of tax matters was concerned, if the corporation should be dissolved, there would simply be some practical impediments in the way of getting trustees' signatures and all that sort of business.

The Court: No, but they were talking about taxes, weren't they, there in that letter?

Mr. Adams: Yes.

The Court: So the only value attached to keep-

(Testimony of Frank C. Nicodemus, Jr.)

ing the corporation alive was so that the effectiveness could be had with respect to the income tax return?

Mr. Adams: Well, I don't think that is true, your Honor; [901] just simply that there was a relationship between the two things.

The Court: Well, what other thing of moment, what other thing of value, was there?

Mr. Adams: Well, Mr. Nicodemus has said that the plaintiff corporation has been a successful litigant in the suit against the RCC.

The Court: Well, it might have some other reasons, but he did refer in this letter, though, to the income tax returns.

Mr. Adams: That is just right, that is just it.

The Court: I don't quite see the purpose of this.

Mr. Adams: To remind Mr. Nicodemus that here is another piece of notice of all these facts in something that came to his office on February 21, 1945, and to inquire if in any way it refreshes his recollection as to his knowledge with regard to that matter. [902]

* * *

The Court: All right. Go ahead, Mr. Adams.

Mr. Adams: Just one or two more items, your Honor. May I have Defendants' Exhibit 17 upon the depositions?

(Handed to counsel by the clerk.)

Q. (By Mr. Adams): Mr. Nicodemus, I show

(Testimony of Frank C. Nicodemus, Jr.)

you Defendants' Exhibit 17, introduced upon the depositions; your letter of [905] September 12, 1944, addressed to Mr. Ehrman. I will read a little part of this. It begins:

"Dear Mr. Ehrman:

"From your letter to Mr. Schumacher, which he was good enough to show me, it seems evident that there is a lack of understanding in San Francisco of the nature and extent of the services rendered and being rendered by our firm as counsel for the Western Pacific Railroad Company. These services are under employment for the railroad company, continued by the trustees. They may be roughly placed in four general categories, which I will set out below, in which seems to me to be the order of their importance."

Then I will pass over No. 1 and 2 as designated here and refer to the paragraph on page 2, beginning:

"3rd. Services rendered in the matter of Federal taxation"——

Mr. Phleger: Excuse me. If you want to refer to this, read the whole letter. It is a fine letter.

Mr. Clark: Or if it is going to be read from, your Honor, may we have it in evidence, and then counsel may read such portions as he wants.

The Court: I take it this is the letter counsel is just going to offer in evidence; is that your wish? [906]

Mr. Adams: Right, your Honor.

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Clark: If it is going to be offered in evidence, all right.

The Court: What was the date again?

Mr. Adams: September 12, 1944. Of course, your Honor can see the whole letter, but I think I am privileged to read a portion, and in the exercise of that privilege I am following the example that has been set here by able counsel.

(Continuing reading):

"3rd. Services rendered in the matter of Federal taxation. All tax returns for the Railroad Company and the Trustees have been made from New York under advice of New York counsel. Owing to the heavily increased tax burdens incident to the war economy, the complex Federal tax structure and the necessity of recurring conferences with the Commissioner of Internal Revenue and the Treasurer, the firm of Whitman, Ransom, Coulson & Goetz, on our advice, were brought in a year or more ago as tax consultants. They are peculiarly well equipped to serve in that capacity.

"The responsibility of New York counsel for the Railroad Company has not, however, been limited to work under the existing tax laws, but has required constant attention to proposed changes that [907] might adversely affect our property. In the last Congress, the so-called 'Johnson Bill' was orginally so drawn that it would deprive the Western Pacific of the invaluable carry-over and carry-back provisions of the present act. Our firm

(Testimony of Frank C. Nicodemus, Jr.)

prepared and submitted amendments to protect the situation, which Senator Johnson accepted. At the present time legislation is in process of incubation, which, unless the interests of the Western Pacific are guarded, may prove equally embarrassing."

That ends the paragraph under that heading.

Q. I will ask Mr. Nicodemus if, where reference is made to New York counsel for the railroad company, he refers to his firm; and I will ask that the document be exhibited to the witness.

(Document handed to witness.) [908]

The Witness: Is there any particular part of the letter you want me to read?

Q. I want you to have a fair opportunity to look at it because I will have one or two questions to ask, but if you would prefer me to ask the questions and then look, either way is satisfactory. Shall I ask the question, Mr. Nicodemus?

A. Go ahead.

Q. Directing your attention in particular to the first sentence in that paragraph third that I read, "All tax returns for the railroad company and for the trustees have been made from New York through the advice of New York counsel"—do you find that?

A. That is correct.

Q. Were the tax returns to which you referred in that sentence the returns for the year 1943 and prior years? A. 1942 and prior years.

Mr. Adams: May I refer the witness to his deposition, page 1220?

(Testimony of Frank C. Nicodemus, Jr.)

The Witness: Oh, date of this letter is September 12, 1944.

Q. (By Mr. Adams): Yes. Is your recollection refreshed by that? A. It is, yes.

Q. Would you like to answer again the question I just put? What were the tax returns to which you referred in that sentence [909] of your letter?

A. The tax returns for 1942 and 1943.

Q. Does that refresh your recollection in any way, Mr. Nicodemus, that you were aware at that time of the fact that in the tax returns for 1943 the stock loss of the parent corporation had been taken as a deduction, so that no tax liability was shown in the returns?

A. No, it does not; because the returns were made under the immediate direction of Messrs. Whitman, Ransom, Coulson and Goetz.

Q. Is that the reason why it does not refresh your recollection?

A. And I have no recollection of any discussion as to the 1942 returns—1943 returns.

Q. Mr. Nicodemus, prior to October, 1946——

The Court: This is defendant's 14 now?

Mr. Adams: Thank you, your Honor, yes. I will offer it as Defendant's 14, and perhaps it would be an appropriate time to take a recess. I will have a very brief examination to conclude in the morning. I say very brief; not over a half hour, I think.

(Testimony of Frank C. Nicodemus, Jr.)

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 14.) [910]

* * *

Q. Prior to the time when the stockholders' suit that we have talked about was instituted in New York, in the middle of 1946, the VanKirk litigation, did you ever suggest to Mr. Polk or [911] to Mr. Coulson that either of them had any obligation to advise the corporation of possible claims among group members arising out of the tax returns? A. Prior to that?

Q. Yes.

A. I did not. I assumed under the contract of employment of the firm of Whitman, Ransom, Coulson and Goetz that they were under obligation to advise me of any unusual circumstances connected with the federal tax return.

Mr. MacKinnon: I move to strike out everything after "No, I did not," on the ground it is not responsive.

Mr. Phleger: May I suggest, your Honor, that that is a perfectly proper answer because this is an adverse witness, and the implication of the question is that it was his obligation to have asked them.

The Court: I will deny the motion. The wording of the question was such that I think the answer is not unresponsive.

Q. (By Mr. Adams): Mr. Nicodemus, prior to

(Testimony of Frank C. Nicodemus, Jr.)

the time that this suit began, did Mr. Polk or Mr. Coulson ever refuse to provide you with any information that you requested in connection with the tax transactions?

A. So far as I know, I never requested any.

Q. Your recollection is you never made any requests of them for any information with regard to those matters prior to that time?

A. I assumed the obligation was the other way. [912]

Mr. MacKinnon: I move to strike that out on the ground it is not responsive.

The Court: He has already answered that question. I will strike out the answer on that ground. He has already said he did not make any such requests.

Mr. Adams: Your Honor's point is he has already said that?

The Court: In the previous answer he already said that.

Mr. Adams: As long as the record shows that, that is all I am interested in.

Q. Now, Mr. Nicodemus, do you recall receiving advice in April, 1947, that a settlement proposal had been made to the Bureau of Internal Revenue?

A. I do.

Q. Were you advised of the terms of the proposal? A. I was.

Q. You know, did you not, that the corporation was free to accept or reject the settlement proposal

(Testimony of Frank C. Nicodemus, Jr.)

as it might see fit? A. Restate that question.

(Question read.)

A. I think I did understand that at that time.

Q. Now, considered only from the point of view of settling the claim with the government and leaving out of account any inter-company complaints about the matter, did you consider the settlement was a good one? A. I did.

Q. Was that the judgment of your fellow directors? [913]

A. I can't speak for my fellow directors except that they voted ultimately to accept the settlement.

Q. You were a member of the committee of Mr. Osborn, Mr. Wood and yourself which considered this very matter, were you not?

A. We did. We were a committee.

Q. Did you seriously consider withdrawing Mr. Polk's power of attorney and refusing to go along with the settlement?

A. I do not think that was discussed.

Q. And did the Board of Directors of the corporation finally agree with the settlement and approve it?

A. I think there is a resolution in the record that covers that.

Q. Prior to that time you gave full consideration to the problem, did you not, as to what action the Board of Directors should take?

A. Yes, sir.

Q. And prior to that time you and Mr. Osborn,

(Testimony of Frank C. Nicodemus, Jr.)

with Mr. Goodrich acting in behalf of the corporation, took up and discussed an arrangement to obtain a stipulation which eventuated in a stipulation here in court? A. We did.

Mr. MacKinnon: You had better have the question read back. You referred to Mr. Goodrich.

The Witness: That is correct. Mr. Goodrich testified to it. [914]

The Court: Mr. Goodrich was one of the attorneys at that time.

The Witness: At the present time.

Q. (By Mr. Adams): Mr. Nicodemus, was the Board of Directors of the Corporation at all times aware of the fact that in the reorganization you were acting as attorney for the debtor, and that you were in receipt of compensation from the trustees on a salary basis? A. They were.

Q. Did they know that you were advising Mr. Schumacher as trustee from time to time on an informal basis? A. They did.

The Court: May I ask a question there? You referred to that as an informal basis and some other lawyer said that account was approved in the reorganization proceeding.

Mr. Adams: No, your Honor. As attorney for the debtor—Mr. Nicodemus can tell us about this—. I will state it, and see if I am right—as attorney for the debtor, Mr. Nicodemus received allowances approved by the Interstate Commerce Commission and by the court.

(Testimony of Frank C. Nicodemus, Jr.)

Q. That is correct, is it not, Mr. Nicodemus.

A. That is correct.

Q. Under the order of Judge St. Sure the firm of Pierce & Greer received a monthly salary payable by the railroad organization in the hands of the trustees, just as it had prior to reorganization. [915] That is a different matter. They received both of those compensations, the firm did. That is right, is it not, Mr. Nicodemus?

A. That is correct.

Q. Prior to June 1, 1943, the firm of Pierce & Greer also received a monthly salary from the parent corporation, is that right, Mr. Nicodemus?

A. I believe it is. [915A]

Q. And then after June 1, 1943, that monthly salary, which by that time had been reduced to some $416.66 a month, was paid by the trustees in reorganization, whereas prior to that time it had been paid by the plaintiff corporation. I am not sure of my figures, but I am certain of the fact, and I think Mr. Nicodemus will agree that the full compensation of Pierce & Greer, which had formerly been split between the company and the corporation, was taken over by the court's trustees at that date.

Mr. Clark: Some part of it.

The Court: I was asking about it. You had mentioned the fact that this witness was acting informally as attorney for Mr. Schumacher. I recall that one of the attorneys said that that com-

(Testimony of Frank C. Nicodemus, Jr.)

pensation was approved in the Bankruptcy Court. Is that right?

Mr. Phleger: That is right.

Mr. Adams: I think that is a mistake.

Mr. Phleger: Not as a separate item, but they were in receipt regularly of compensation from the trustees for services rendered the trustees, and those accounts were periodically filed and approved by the Bankruptcy Court.

The Court: Is that something different from services rendered to the debtor company?

Mr. Phleger: No, not separately—yes, the debtor in bankruptcy. In that category they received a separate fee, [916] did they not?

Mr. Clark: And allowances.

Mr. Adams: There are three compensations. Now, compensation as attorney for the debtor—and in hat capacity, Mr. Nicodemus, the fact is——

The Court: All I was trying to find out is why you were calling these services to the trustees informal. If he represented the trustees and he got paid for the services in the Bankruptcy Court, then he represented them. That is all there is to that.

Mr. Adams: I had better answer that question to your Honor direct. I call it informal to distinguish the formal, the legal representation of the trustees by the counsel appointed by the Court to be the counsel to the trustees. Mr. Nicodemus did not act in that position.

The Court: He was not the court-appointed attorney for the trustees?

(Testimony of Frank C. Nicodemus, Jr.)

Mr. Adams: That is right. That is all I had in mind.

The Court: He represented the debtor, for which he was paid a fee, and he also rendered services to the trustees, is that right?

Mr. Adams: Yes, surely. Yes, indeed, on a monthly basis.

The Court: That was approved and authorized by the Bankruptcy Court, as I understand it?

Mr. Adams: Yes, your Honor, and there is a special [917] bankruptcy order, No. 40, I believe it is, which prescribes in Section 77 proceedings it is appropriate to continue company lawyers.

The Court: It is not unusual in proceedings of that kind where the attorney for the debtor is employed to render services to the trustee in bankruptcy. It sometimes happens, particularly where there is litigation involved and other matters of a special kind.

Mr. Adams: It was only in that sense that I was using the word "informal," and perhaps I can think of a better word to describe this by.

Mr. Phleger: We could think of a better word.

Mr. Adams: That may be the time to speak, because we are going to get into some issues about this.

Q. We were talking about this date, June 1, 1943, Mr. Nicodemus, when the trustees undertook to pay all the expenses of the New York office, including whatever monthly sum your firm had

(Testimony of Frank C. Nicodemus, Jr.)

previously been receiving from the plaintiff corporation. Do you have that in mind?

A. Will you state that again?

(Question read.)

A. I don't understand the question.

Q. I asked you if you had those facts in mind.

A. I wish you would reframe the question. I do not know what the answer is. What facts?

Q. You bear in mind that on June 1, 1943, the salary that your [918] firm had previously been receiving from the plaintiff corporation as its counsel was taken over by the reorganization trustees?

A. I recall that, yes.

Q. And thereafter and until the end of the reorganization, the reorganization trustees paid that salary? A. I recall that.

Q. After that arrangement was made did you still feel entirely free to represent whatever interest of the plaintiff corporation you thought required action on your part as its counsel?

A. I do not know that any question of that kind ever arose in my mind.

Q. Do you have any idea about it one way or the other? If you have, you are on the stand and you can answer.

A. No such question ever arose in my mind.

Q. Do you mean by that, Mr. Nicodemus, that it never occurred to you that that arangement in any way impaired your ability to act for the plaintiff corporation?

(Testimony of Frank C. Nicodemus, Jr.)

A. No, I had been acting for the plaintiff corporation and for the trustees and for the debtor since the beginning of the proceeding under Section 77 in 1935.

Q. And during all of that time, Mr. Nicodemus, the fact is, is it not, that you felt that you were able to and that you felt that you did represent the corporation's claims to the best of your ability? [919]

A. I did, yes.

Q. And that you still thought you were in a position to do that after this arrangement was made on June 1, 1943?

A. I did not think it changed the situation.

Q. Were you aware of the arrangement that Mr. Curry made with the firm of Whitman, Ransom, Coulson & Goetz on or about the 1st of May, 1945, whereunder he was to receive a retainer and have an office in their suite? Do you recall knowing about that?

A. I recall knowing that he was to have an office in that suite, but I do not recall the arrangement and the retainer.

Q. When you say you do not recall that, do you mean you had never heard of it until this time?

A. I never heard of it until the institution of the stockholders' suit.

Q. Is it your best recollection that Mr. Curry did not tell you about that until after the institution of the stockholders' suit?

A. That is my very definite——

(Testimony of Frank C. Nicodemus, Jr.)

Q. That you never discussed that with Mr. Schumacher?

A. That is my very definite recollection.

Q. Do you have any recollection of talking to Mr. Schumacher at the time the New York office closing was under consideration about what would be done for Mr. Curry?

A. No, I do not. [920]

Q. You have no recollection of considering that at all?

A. I can recall no particular discussions on that subject.

Q. Any discussion of it between you and Mr. Osborn?

A. Not that I recall at the present time.

Q. Did you ever suggest to Mr. Coulson that something should be done for Mr. Curry?

A. I did.

Q. When did you do that?

A. Sometime in the fall of 1944 Colonel Coulson told me that he was arranging to take over certain of the employees of the railroad company, that he was arranging for a pension for Mr. Schumacher, but that he did not feel under any obligation to look after Mr. Curry. I told him that I thought that that was rather raw treatment for Mr. Curry, and that he was just as much entitled to a pension as Mr. Schumacher. He said he did not agree with me. He felt no particular obligation to Mr. Curry.

(Testimony of Frank C. Nicodemus, Jr.)

Q. Is it your testimony that you never discussed doing anything for Mr. Curry with Mr. Schumacher at any time?

A. No, I do not recall that I ever did.

Q. You have no recollection of any such discussion?

A. No, but I do recollect this conversation with Colonel Coulson very distinctly.

Q. Yes, and you have told me about that. Have you stated your complete recollection with regard to that conversation? [921]

A. I have, the substance of it.

Q. Yes. Have you anything more to add to it?

A. Nothing to add to it.

Q. Is it your testimony, then, that although you knew Mr. Curry was officing in the Whitman, Ransom suite, you hadn't any idea that he was receiving any retainer from them or from the railroad company? A. No.

Q. Is that your testimony?

A. I learned afterwards that there had been some pension arrangement, but I never heard of this so-called independent contractor arrangement until after this stockholders' suit was instituted.

* * *

FRANK C. NICODEMUS, JR.

Direct Examination
(Resumed)

By Mr. Adams:

Q. May I ask that the transcript of yesterday's testimony be presented to Mr. Nicodemus, and I direct his attention to a question and answer on page 914?

(Court's copy of transcript was handed to witness.)

Q. (By Mr. Adams): Mr. Nicodemus, directing your attention to the testimony beginning two lines from the top of 914, as reported in this transcript:

"Q. You were a member of the committee of Mr. Osborn, Mr. Wood and yourself which considered this very matter, were you not?

"A. We did. We were a committee.

"Q. Did you seriously consider withdrawing Mr. Polk's power of attorney and refusing to go along with the settlement?

"A. I do not think that was discussed."

A. That answer is incorrect. [923]

Q. I did not hear that answer that way, and I wanted to give you a chance to answer it again.

A. That is not correct. The answer is, "I think that was discussed."

Mr. Adams: I have no further questions.

The Court: Any questions by other counsel?

Mr. Adams: Pardon me, your Honor; I think

(Testimony of Frank C. Nicodemus, Jr.)

it would be appropriate, before I conclude this examination, to offer a document which I referred to yesterday, so that if counsel wish to ask the witness or examine this document, it may be on the record upon this examination. I now offer as Defendant's Exhibit 15 a letter from Mr. Ehrman to Mr. Nicodemus of September 14, 1944, written in response to Mr. Nicodemus' letter of September 12, 1944, to Mr. Ehrman, which went into evidence yesterday.

(Letter from Mr. Ehrman to Mr. Nicodemus, dated September 14, 1944, referred to above, was received in evidence and marked Defendant's Exhibit 15.)

Mr. Adams: The letter reads as follows (reading). This is from San Francisco:

"Mr. F. C. Nicodemus, Jr.
Messrs. Pierce & Greer
40 Wall Street
New York 5, New York

My dear Mr. Nicodemus:

"I am in receipt of your letter of September 12 going into some detail in regard to the nature and extent of [924] the services which are being rendered by you on behalf of the Western Pacific Railroad Company and its trustees. I wrote to Mr. Schumacher after you had filed your petition so that if both of us are called by the judge at the hearing on the subject of your compensation, our testimony would be in harmony. I have always

(Testimony of Frank C. Nicodemus, Jr.)

been under the impression that the monthly compensation paid to your firm is the only compensation for which the trustees or the trust estate have incurred any liabilities. Your representation to the debtor company in the reorganization proceedings is, as I view it, a separate matter with which we as trustees are not concerned.

"With kind regards,

"Very truly yours,

"SIDNEY M. EHRMAN."

And at this time, your Honor, I offer as Defendant's 16 the form 174 revised, operating results and general statistics, the Western Pacific Railroad Company, which I discussed with the witness yesterday, and which is the document upon which appears the item reversing the federal income taxes.

The Court: Has it a date?

Mr. Adams: It is identified at the bottom in print, "San Francisco, California, February 1, 1944," and at the top, "operating results and general statistics, December, 1943." [925]

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 16.)

Mr. Adams: I have nothing further.

Mr. Phleger: Mr. Clerk, will you please hand Plaintiff's Exhibit 39 to the witness, or let me have it.

(Testimony of Frank C. Nicodemus, Jr.)

Cross-Examination

By Mr. Phleger:

Q. Plaintiff's Exhibit 39A, Mr. Nicodemus, is a letter on the letterhead of the Western Pacific Railroad Company, 37 Wall Street, New York; T. M. Schumacher and Sidney M. Ehrman, Trustees, dated March 23, 1943, addressed to Mr. F. C. Nicodemus.

"Dear Mr. Nicodemus:

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942. The return filed is a tentative one, an extension having been granted until May 15, 1943, to file a final return. As one of the trustees of the Western Pacific Railroad Company, I am looking to you to cooperate with Mr. Matthew, general counsel for the trustees, in protecting the trust estate in the preparation of the final return.

"Very truly yours,

"T. W. SCHUMACHER."

Did you receive that letter at or about its date?

A. I did. That is T. M. Schumacher.

Q. I direct your attention to the succeeding sheets in Plaintiff's Exhibit 39. 39B is a letter which you wrote to Mr. Schumacher, is it not, under date of March 23?

A. The file handed me shows a letter dated April 20.

(Testimony of Frank C. Nicodemus, Jr.)

Q. 39B is a letter which you wrote to Mr. Schumacher under date of March 23 in respect to the letter I have just read?

A. That is correct.

Q. And in that you suggested the employment of Mr. Coulson's firm as tax experts in this matter?

A. That is correct.

Q. I will not read the succeeding letters but will call your attention to the final letter in the series, being Plaintiff's Exhibit 39F.

A. I have 39F.

Q. That letter reads as follows, on the letterhead of the Ransom firm, under date of April 20, 1943, addressed to yourself, signed by Mr. Robert E. Coulson, reading as follows:

"Dear Mr. Nicodemus:

"This is a belated acknowledgment of your letter of April 8, 1943. I had assumed from its text and from the fact that Mr. Polk and you were already at work when I received your letter that you needed no formal acknowledgment. However, it may be better as a matter of record that you should have a formal acknowledgment of [927] the fact that we have undertaken the federal tax work for the trustees as advisory counsel in conjunction with yourself and Mr. Matthew."

Did you receive the original of that letter at or about its date? A. I did.

Mr. Phleger: That is all.

Mr. Clark: May it please the Court, we have

(Testimony of Frank C. Nicodemus, Jr.)

just one exhibit to offer in connection with Mr. Nicodemus' testimony regarding his employment by the reorganized company after December 31, 1944, and in that connection we will offer in evidence a copy of a letter heretofore marked Interveners' Exhibit 331 on deposition, dated June 8, 1945, addressed to H. E. Poulterer by J. E. Hennessy. Plaintiff's Exhibit 25 already in evidence, your Honor, shows that Mr. Poulterer was the vice president of the defendant company in charge of traffic in San Francisco.

Mr. Adams: That is right.

Mr. Clark: And I would like a concession from you, Mr. Adams, that Mr. Hennessy was the representative of the defendant company in New York in charge of traffic.

Mr. Adams: Well, Mr Hennessy was a representative of the railroad company. Whatever his description is I am not sure, but that is what you want, isn't it?

Mr. Clark: That is all I want. [928]

Mr. Adams: May I state an objection to this offer, your Honor? This is an offer which relates to certain legal services performed by Mr. Nicodemus and his firm for the reorganized company, but Mr. Nicodemus testified yesterday that he did carry over some legal services, and he did do some work for the railroad company; this is an offer relating to that. My objection is that it is wholly immaterial to any issue in this case. That Mr.

(Testimony of Frank C. Nicodemus, Jr.)

Nicodemus may have had some employment with regard to matters for the reorganized railroad company is wholly unrelated to any matter in issue in this action. I see nothing inconsistent between his carrying on some ordinary work wholly disconnected with any matter in which the corporation was interested, his availability to act in behalf of the plaintiff corporation at all times, nor is there any duality that arises from the employment of an attorney of that sort.

Mr. MacKinnon: I object to it, your Honor, on the ground it is irrelevant and immaterial to any of the years in question and to the issues which I understand your Honor has stated you consider in the action, namely, the tax question for the years 1942, 1943 and the first four months of 1944.

Mr. Clark: May I direct your Honor's attention to the testimony of the witness yesterday which Mr. Adams solicited, and with respect to it this offer is being made, at page 844 of yesterday's transcript, line 2:

"Q. It is a fact, is it not, that your employment as [929] a counsel for the railroad company terminated as of the end of 1944?

"A. December 31, 1944, except as to minor matters.

"Q. You did continue to handle a few minor matters which were then in your hands?

"A. A few minor matters which were in my hands and one or two still pending, I think."

(Testimony of Frank C. Nicodemus, Jr.)

Then there is colloquy of counsel and here is the next question:

"Mr. Adams: Mr. Nicodemus, the fact is, is it not, that you received a letter from Mr. Elsey, the president of the reorganized company, to be late in December, 1944, which informed you that the reorganizing company did not expect to continue with the services of the firm of Pierce & Greer?

"A. My answer is my relationship as corporate counsel was terminated as of December 31, 1944, with the reservation that we would continue to handle certain matters that were pending.

"Q. That were pending with you, and you did continue to handle such matters?

"A. We have.

"Q. And it was as to such matters that you sent special bills to the railroad company which were paid."

Now, the letter which I am offering, may it please the Court, shows that in the middle of 1945 the company advised Pierce & [930] Greer, or rather people in the company were told that in the event legal process should be served on the company, he was to turn such matters over to Mr. Campbell of the firm of Pierce & Greer. That is the middle of 1945, and we renew the offer. They were not pending matters. They were new matters, and it demonstrates that Mr. Nicodemus' firm was the New York counsel for the reorganized company during the year 1945, just as is demonstrated by the bill Mr. Phleger called your Honor's attention to yesterday.

(Testimony of Frank C. Nicodemus, Jr.)

showing the payment for that year.

The Court: Well, I think counsel's objection goes to the weight of the testimony. I will overrule it.

Mr. MacKinnon: May I be heard on my objection? I don't want to take time on this, because I don't think it is important; but your Honor has stated you perceive the issues in this case to be the tax relationship. That is not the tax relationship, but one year and three months later. Now if that is relevant, then it seems to me we are opening this question wide open.

Mr. Clark: May it please your Honor, the refund claim was filed March of 1945, on March 9. The '44 return was filed as late as June 15, 1945. It is the very time in question.

The Court: Counsel, the witness was interrogated yesterday as to the circumstances under which his employment by the company was or was not terminated.

Mr. MacKinnon: That is right. [931]

The Court: So that you brought that out, or rather, counsel for the defense brought it out. It certainly has something to do with that examination. The objection may be as to the weight of the testimony, but I wouldn't think as to its admissibility.

Mr. Adams: I would just like to state that I offered, or brought it out, because plaintiff has offered in evidence documentary material relating to payments made to Mr. Nicodemus for such purposes.

(Testimony of Frank C. Nicodemus, Jr.)

The Court: It may be admitted.

(Letter of June 8, 1945, Hennessy to Poulterer, was thereupon received in evidence and marked Interveners' Exhibits 17.)

Mr. Clark: That is all from us, your Honor.

The Court: I think that is all.

(Witness excused.) [932]

* * *

Mr. Adams: Reading from page 4570 of the deposition of Willis D. Wood, taken in this action in New York, commencing April 20, 1948.

"WILLIS D. WOOD

"called as a witness by the plaintiff, being first duly sworn by the notary public and stating his address as 635 Park Avenue, testified as follows."

And then on page 4572:

"Q. In 1898 did you go to work for a different firm? "A. I formed a firm in 1898.

"Q. What was the name of the firm that you formed? "A. Ladd, Wood & King.

"Q. What was the business of the firm?

"A. The same.

"Q. Brokerage business, investment business?

"A. Yes.

"Q. How long did that firm continue?

"A. Ladd, Wood & King were on for about four years, and then Ladd & Wood until about 1924.

"Q. Did you form the firm of Ladd & Wood?

"A. Yes.

"Q. And that was a brokerage business?

"A. Continuing the same business." [933]

To shorten this, may I ask if counsel will agree with me that then Mr. Wood stated that the name became "Wood, Low & Co." in 1924 and that firm remained in business until 1941, and that thereafter Mr. Wood became a limited partner in a similar firm? Turning to page 4574, again to shorten the reading——

Mr. MacKinnon: You haven't gotten your concession.

Mr. Phleger: Yes, certainly.

Mr. Clark: Yes.

Mr. MacKinnon: All right.

Mr. Adams: Mr. Wood's deposition, page 4574, shows that he is a member of the New York Stock Exchange, becoming such in 1902, and is now and was a governor of the Exchange from 1911 to 1927, and was for eleven years a member of the listing committee. Is that conceded?

Mr. Phleger: Yes.

Mr. Clark: Yes.

Mr. Adams: I am continuing on the following pages. Also, that he has been a director of several corporations, a trustee of the Brooklyn Trust Company, a director of the Corn Products Refining Company, having been a director on that company since 1915, when it was organized; a director of the Fidelity & Casualty Company, on which he has been a director from 1925 to the present date. And

on page 4579, a director of the Missouri, Kansas, Texas Railroad Company from its reorganization in 1923 to his resignation in 1946; a director of the New York Railways Corporation [934] from 1925 to date. That is page 4580. And the following questions and answers on page 4581, beginning three lines from the top of that page:

"Q. Mr. Wood, have you had anything to do with the Seaboard Airlines during its reorganization?

"A. I was the only man who lived through it, thirteen years.

"Mr. Levy: Is that the one that was just completed?

"The Witness: Yes.

"Q. (By Mr. Dickerson): Were you a member of the reorganization committee?

"A. The entire time."

Now turning to page 4583, I will read from that page, beginning at the top. Question by Mr. Dickerson who was, as your Honor knows, of counsel to the plaintiff:

"Q. Mr. Wood, did anyone ask you to become a director of the Western Pacific Railroad Corporation? "A. Mr. James.

"Q. Do you remember the conversation that you had with Mr. James at that time?

"A. I remember having a conversation with Mr. James, asking me to become a member of the board, surely.

"Q. What was the conversation? Give us the substance of it, if you remember.

"A. The substance of it was that, as a matter of fact, [935] he knew how well informed I was about that district. I had known the properties of the Denver & Rio Grande for ten years before. I saw him continuously, socially, and talked to Mr. James about it. And he knew I went out there every year on the Denver & Rio Grande situation and I knew a good deal about it. And he wanted me to join the board for those reasons."

Page 4590, question four lines from the bottom of that page:

"Q. Did you know Miss M. C. Valouch?

"A. Same way."

I had better read above, your Honor, to see what that answer means, I suppose.

Mr. Phleger: What page is that?

Mr. Adams: 4590. At the top of the page, the second line, is this:

"Q. Mr. Wood, did you know Mr. John F. Wienken?

"A. As a director of the board.

"Q. Did you know him prior to the time he became a director of the board?

"A. No, excepting when he was working in the office there.

"Q. This was at 37 Wall Street?

"A. Yes."

I think counsel will agree that the answer "same way" relates to those answers? [936]

Mr. Phleger: Yes.

Mr. Clark: That's right.

Mr. Adams (reading):

"Q. You knew her in the office at 37 Wall Street, did you?

"A. Yes, her time wasn't wholly given to that. I had met her in connection with Western Pacific matters before she became a director. I cannot tell what the occasion was, but I was very happy to see her become a director; I admired her as a person."

The record shows that Miss Valouch became a director of the plaintiff corporation May 1, 1945.

Mr. Phleger: Which is about the time of this communication that has just been objected to.

Mr. Adams: Well, I am giving the dates, your Honor, and I think that I might proceed without these interpolations.

Page 4666 of Mr. Wood's deposition:

"Q. Did you know the reputation of Mr. James for fair dealing? "A. Yes.

"Q. What was that reputation?

"A. One of the most generous souls I ever knew. He inherited it from his father. I know, for instance, in Mr. D. Willis James' will, he provided that his beneficences should not be known until twenty-five [937] years after his death. I knew of the generosity of Mr. A. C. James and it was greater than people ever had any idea.

"Q. And in his business transactions, Mr. Wood, what was his reputation as to fair dealing in his business transactions? "A. The best.

"Q. You spoke yesterday of Mr. James speak-

ing to you about becoming a director of the corporation. Do you recall that? "A. Yes.

"Q. Was it your understanding that Mr. James expected you to exercise your best judgment in your acts as a director?

"A. He wouldn't have asked me if he hadn't thought so.

"Q. Did he ever tell you how to vote on any matter that came before the Board of Directors?

"A. No, sir. I discussed the wisdom of policies with him, but he never attempted any dictation.

"Q. So far as you know, did he ever give you any orders or directions to other directors as to how they should vote? "A. No.

"Q. Did Mr. James ever ask you to favor the James interests at the expense or disadvantage of other stockholders [938] of the corporation?

"A. No.

"Q. Did he ever ask you to do anything which you believed would favor the James interests at the expense or disadvantage of other stockholders?

"A. No.

"Q. Have you, as a director, ever done any act for the purpose of favoring the James interests at the expense or disadvantage of stockholders of the corporation? "A. No."

Mr. Levy: There was an objection to the form of the question at that time, your Honor, on the ground that it called for a conclusion of this witness and character of his own conduct, rather than a statement of the facts. I should add that while we have not objected to any of what Mr. Adams has

read, your Honor will be mindful that Mr. James died in 1941, so that all Mr. Adams' questions here are directed to a period preceding 1941.

Mr. Adams: That is not true, as to the last question, not accurate, Mr. Levy.

Page 4669, question at the top of the page——

Mr. Levy: I don't think we have a ruling on the objection.

The Court: I don't know whether you are objecting to it or not.

Mr. Levy: Yes, I read the objection as it was stated at the [939] deposition.

The Court: What was the question?

Mr. Adams: "Q. Have you, as a director, ever done any act for the purpose of favoring the James interests at the expense or disadvantage of other stockholders of the corporation?"

The Court: Well, a lot of other questions along the same line were asked heretofore, weren't they?

Mr. Levy: Yes, they have been; just as improperly, I think.

The Court: You didn't object to those.

Mr. Phleger: We haven't objected to many questions that we think are quite improper. We didn't want to delay the trial. I think it is immaterial, your Honor.

The Court: I believe it is immaterial, but I will overrule the objection. I think this line of questioning is immaterial but I will overrule that objection.

Mr. Adams: Page 4669:

"Q. I take it from your testimony that you have known Mr. Schumacher since about 1920?

"A. I think it may have been a little before that, even. I am sure it was before that."

Then further down, same page:

"Q. After you became a director of the Western Pacific Railroad Corporation, did you then see him frequently? [940]

"A. In the duties of the corporation, yes."

Page 4674, six lines from the top of the page:

"Q. Do you recall, Mr. Wood, any discussion you had with Mr. Schumacher in connection with the engagement of Mr. Polk on tax matters?

"A. I had Mr. Schumacher in mind, and I had my associates on the board discuss the matter."

That is the way the transcript reads.

"Q. Do you remember at this time any discussion you had with Mr. Schumacher on that subject?

"A. Not specifically alone, no.

"Q. Do you recall any discussion of that subject with Mr. Nicodemus?

"A. I do not recall any. I would be surprised if I didn't have numerous discussions, but I cannot recall any specific one. They were discussed many times outside of the board room and fully at the board meetings.

"Q. Is it your best recollection that the Board of Directors of the corporation generally knew of the engagement of Mr. Polk in that work?

"A. Yes."

Mr. Levy has an objection he may wish to state.

Mr. Levy: No, we will pass the objection.

Mr. Adams: Very well. That is all I have from the deposition of Mr. Wood. [941]

Mr. Phleger: I take it this is an appropriate time for us to at this time read from the balance of his deposition?

The Court: Well, whatever procedure you wish to follow; unless you wish to wait until a later time. If counsel is willing, I suppose you might.

Mr. Adams: We are entirely willing; whatever procedure would be most advantageous for the Court's point of view.

The Court: It will be in the nature of cross-examination?

Mr. Phleger: In the nature of cross-examination, yes.

The Court: All right.

Mr. Phleger: 4682, question by Mr. Adams:

"Q. When was it, Mr. Wood, that you knew about the railroad company being freed from the 1943 taxes and the first four months of 1944, and about the railroad company paying the $4,200,000 for 1942?

"A. The first time I knew anything about the benefit of that position was in my talk with Mr. Nicodemus in the last part of July, 1946.

"Q. Prior to that time, had you heard anything about the railroad company setting up a reserve on account of its not paying income taxes?

"A. No.

"Q. Prior to the time that you had that talk with Mr. Nicodemus, what was your knowledge with

regard to the taxes that the railroad company was paying? [942]

"Mr. Levy: For the years 1942, 1943 and 1944.

"Mr. Adams: Yes, for those years.

"A. I was a director of the corporation. I felt absolutely confident, as I have said before, that it was a corporation without assets, and I felt I was justified in acting as I did. I had had so long an association with the Denver & Rio Grande that I was positive that there was no value in the stock. I felt there was no duty to perform, excepting to approve a pro forma return to take care of the corporation, and that was my whole idea at that time, and I felt that that function was in competent hands.

"Q. Did you know during those years, 1942, 1943, and 1944, that the corporation had deficits?

"A. Yes, of course.

"Q. Did you assume that then the corporation would not have any income tax liability?

"Mr. Levy: I object to the form of the question as calling for an assumption."

Mr. Levy: Objection withdrawn.

Mr. Phleger: "A. I felt the company was foreclosed, as to preferred and common. The Court acted on March 15, 1943, and after that there was no action necessary on my part, and hence I did not give it the attention that I did in former years. I felt that I did not have to give it [943] the detailed attention that I had formerly given it.

"Q. Was it your understanding that the corporation did not have any taxable income during those years?

"A. I considered it a non-entity. It had no assets; how could it have any income?" [943A]

Mr. Phleger: 4687.

"Q. (By Mr. Adams): Do you recall any discussion with regard to paying the franchise taxes of the corporation?

A. Yes, I do. You mean the Delaware franchise taxes?

Q. Yes, precisely. A. Yes.

Q. Will you state your best recollection as to that discussion?

A. I remember the sum involved seemed to us small, but it was represented, or I recall that I was convinced that it was one of those things that ought to be done, that the corporation was not ready for interment, was not through.

Q. Do you have any further recollection of any further discussion as to why it was desirable to keep the corporation going?

A. No, excepting as I have just stated, I regarded the thing as a pro forma situation for the liquidation of the corporation, which was beyond reviving in my mind as of March 15, 1943.

Q. So far as you can remember at this time you do not remember any discussion with any of your fellow directors that the consolidated returns [944] would be any advantage to the railroad company?

A. No, sir."

4608, near the bottom:

"Q. (By Mr. Dickerson): As to the 1944 return was there any discussion by the board of di-

rectors at any time concerning the capital loss sustained by the holding company which might be used by the group to avoid taxation?

A. No.

Q. Did Mr. Polk or any other member of the firm of Whitman, Ransom, Coulson & Goetz ever explain to you the possibility that the capital loss sustained by the holding company could be used by the group to avoid taxation?

A. No, decidedly."

That is all.

Mr. Adams: I have some responsive reading from the same deposition. Page 4677 of Mr. Wood's deposition.

"Q. Now, I ask you to state, as well as you can recollect it, what was the discussion with regard to the filing of the consolidated returns for 1943?

Mr. Levy"——

Mr. Levy, do you want me to read this?

Mr. Levy: Skip it.

Mr. Adams: Page 4678:

"Q. Do you bear the question in mind, Mr. Wood? [945]

A. What is your question to me?"

Then the question was read.

" 'Q. Now, I ask you to state, as well as you can recollect it, what was the discussion with regard to the filing of the consolidated returns for 1943?'

A. There was never a time when I had any question but that the consolidated returns were filed. They were from the start. I do not recall any

specific question debated or referred to. As to questioning the possible desirability of the corporation's benefit, it never occurred to me. I feel that you are pinning me down by trying to make me recall a specific conversation about a specific subject. I do not recall anything of that kind because it was a continual assumption based on fact that those consolidated returns were filed right through. Is that an answer?"

And then on page 4683, two lines from the bottom, and this immediately follows what plaintiff's counsel just read to your Honor.

"Q. So, it was your understanding that for those years the corporation could not possibly have any income tax? A. Absolutely not.

Q. Did you know that the company during those years [946] had large earnings?

A. The railroad company?

Q. Yes.

A. I knew the progress of the railroad company.

Q. Were you aware that during those years, 1942 and 1943 and 1944, the company was having large earnings?

A. I remember that so well as to feel that an event which occurred in 1931 and which was of great promise for the Western Pacific road, the building of the Klamath Falls division, was beginning to bear fruit many years afterward.

Q. Was it your understanding that any income taxes for those years would be paid by the railroad company?

A. If paid at all, it was the only company that had any money.

Q. And it was likewise, was it not, the company that had the earnings? A. Yes."

Now, if your Honor please, I should like to read from the deposition of William W. Hatton taken in New York on February 19, 1948, in this action, page 712. Your Honor will recall that Mr. Hatton was a director at certain times of the plaintiff corporation, and as in the case of Mr. Wood, I will try to state, without reading the questions and answers, the preliminary statements describing the witness who was called in behalf of the interveners.

Mr. Hatton testified that he was employed at the time of giving his testimony by the Denver and Rio Grande Western Railroad Company with an office at 37 Wall Street; that he had been employed by that company for 25 years; that during 1942, 1943 and 1944 the office of the Denver and Rio Grande was at 37 Wall Street; that his position with the Denver and Rio Grande was assistant secretary and assistant treasurer; and the record shows, your Honor, that that office at that time was the same office occupied by the plaintiff corporation, the New York office we have heard talked of. Now, at page 726 these questions are asked by interveners' counsel:

"Q. Do you remember who it was that asked you to go on the board?

A. I couldn't say. I don't recall.

Q. Do you have any recollection at all on that subject? A. No, only what I think.

Q. What do you think?

A. I think Mr. Curry asked me.

Q. You think it was Mr. Curry?

A. I think, yes.

Q. How long had you known Mr. Curry prior to that [948] time? A. Over ten years.

Q. In what connection, please?

A. In connection with the Denver and Rio Grande being 50 per cent owned by the Western Pacific and more or less under the tutelage of Mr. Schumacher.

Q. To whom you looked up as your superior and chief? A. That is right.

Q. From time to time after September—by the way, Mr. Hatton, what did Mr. Curry do in the office of 37 Wall Street when you were there, and particularly during the period 1942, 1943 and 1944?

A. He was managing head of the Western Pacific. He did not have anything to do with me.

Q. Was he the head of the office there?

A. He was."

Mr. Clark: Mr. Adams, will you please read the next two lines?

Mr. Adams: Oh, surely.

"He ran the office management?

A. Right.

Q. For the Western Pacific, is that right?

A. Right."

Page 728, your Honor, under Examination by Interveners' counsel: [949]

"Q. During the meetings that you attended,

after you went on the board, during the years I have called your attention to, did you take any part in the discussion of various problems that affected the corporation? A. I did not.

Q. At any time did you ever cast a dissenting vote with respect to any resolution that was offered?

A. I did not.

Q. Is it a fair statement, Mr. Hatton, to say that you simply followed the majority of the directors in any decision that they might reach?

A. That is correct.

Q. In other words, you did as you were told?

A. I was not told.

Q. You simply followed the majority?

A. I followed my own judgment as to the proper thing to do."

Now, turning to page 740, if counsel will permit me I will state Mr. Hatton testified that he never had anything to do with the Western Pacific Railroad Company, that he understood the plaintiff corporation was a holding company in its relation to the Western Pacific Railroad Company. I have nothing further from Mr. Hatton.

Mr. Phleger: I have about four sentences. Page 713. [950]

"Q. What position did you hold with the Denver and Rio Grande Railroad at that time?

A. Assistant secretary and assistant treasurer.

Q. Were there other representatives of that company in the office at 37 Wall Street during that period?

A. Yes, sir. I had one clerk.

Q. What was his name, please?

A. His name was John Wienken."

John Wienken's name appears on the chart there as a director of the plaintiff corporation.

Mr. Adams: At a subsequent time.

Mr. Phleger: Reading on page 714:

"Q. Is it a fair statement to say that your duties during that period at the office at 37 Wall Street was purely clerical? A. Yes.

Q. There were no management problems that you attended to? A. None whatever.

Q. And I take it that you had no discretion to exercise on policy or things of that sort?

A. That is correct.

Q. What salary were you receiving from the Denver and Rio Grande during the period that I directed your [951] attention to, that is, 1942, 1943 and 1944? A. $4500 a year."

And on page 723: The questions before had to do with an attempt to fix the date when he became a director. The questioning then proceeds:

"Q. Does that refresh your recollection as to the date on which you became a director of the corporation? A. Yes.

Q. Does that accord with your memory?

A. No, I had 1943 in mind.

Q. With regard to the particular incident or occasion when you were invited to become a member of the board of directors of the Western Pacific Railroad Company? A. No, I do not.

Q. No memory on it at all?

A. Just a general hazy memory that they required another board member to bring it up to the legal requirements of the board."

That is all.

Mr. Adams: Your Honor, I will read from the deposition of Katherine C. Sheehan, which appears at page 751 and following, and will state again that this examination, taken on behalf of the interveners in this action, was taken at about the same time as the taking of the deposition of Mr. Hatton. [852]

Mr. Clark: The same day, wasn't it?

Mr. Adams: I think it was; that is right. It shows that Mrs. Sheehan at the time of the taking of her deposition was employed as a bookkeeper by a firm of lawyers in New York having no relation to this litigation, that she was employed in 1942, 1943, 1944 and up to about May 1, 1945, in the office of Mr. Schumacher, trustee for the Western Pacific Railroad Company.

Mr. Clark: The next question and answer does show, Mr. Adams, does it not, that she had been employed in the office since 1932?

Mr. Adams: That is right, yes.

During the period with respect to which she was testifying, specifically during the period 1942 and so on, to May 1, 1945, she was receptionist. She also helped on stock transfer work when the corporation took over that work. Everybody in the office worked on that. Her immediate superior in the office on that work was Mr. Curry. I do not recall where her salary is stated, but I think that

is in evidence now. In any event, if counsel desire the figure, if they will advise me we will put it in. I think it was about $2000 a year, something like that.

Mr. Clark: That is my recollection. It is on page 757: approximately $2000 a year.

Mr. Phleger: It is on the chart. [953]

Mr. Adams: Now, page 758, your Honor:

"Q. Do you remember, Mrs. Sheehan, when you became a director of the corporation?

A. Yes, February, 1944.

Q. The record in this case shows it was February 15, 1944. A. That would be right.

Q. Do you remember the particular incident or occasion when you were invited to become one of the directors of the corporation?

A. Yes, I was asked to become a director to fill the board to effect a quorum.

Q. By whom were you asked?

A. By Mr. Curry."

Mr. Phleger: Would you read the next two lines?

Mr. Adams: Yes, surely.

"Q. Was that while a meeting was in progress?

A. While a meeting was in progress, yes; I was invited in before I was appointed."

And further down on the same page:

"Q. Am I correct in stating that a gathering of the board had taken place in the board room prior to the time you went in there? A. Yes."

Mr. Phleger: And the next three lines? [954]

Mr. Adams: Very Good.

"Q. And thereupon you were invited in and asked to be a director, is that right?

"A. That's right."

And a question at page 771—no, wait; there is one other first. In the examination by the interveners' counsel, page 763, beginning at the bottom of page 762:

"Q. During that period that you were a director of this corporation—that is, the Western Pacific Railroad Corporation—Mrs. Sheehan, did you take part in the discussions of any problems that were posed to the board having to do with the corporation?

"A. No, I attended the meetings.

"Q. Did you take part in the discussions?

"A. No.

"Q. Did you ever cast a negative vote or a dissenting vote on any resolution that was offered on any proposition?

"A. No, I don't believe so. I usually went with the majority.

"Q. You simply followed the majority decision on whatever matter was before the board?

"A. That is right.

"Q. Did you know during that time who the tax counsel [955] for the corporation was?

"A. No."

Mr. Clark: Well, Mr. Adams, will you develop the rest of that subject so that it will all be before us? The next question and answer.

Mr. Adams: Yes, I will read it if you want. I hadn't intended to read it, though.

Mr. Clark: Well, it finishes that up, if I may suggest it.

Mr. Adams: Very well.

"Q. Let me mention the name of James K. Polk or Whitman, Ransom, Coulson & Goetz; does that strike any chord of recollection with you as to who represented the corporation in tax matters?

"A. Well, yes, I knew Whitman, Ransom, Coulson & Goetz.

"Q. Were the tax counsel?

"A. I knew they were the attorneys; I did not know they were the tax counsel.

"Q. Attorneys for whom, please? Your understanding at that time?

"A. Attorneys for the company, I believe.

"Q. The company or the corporation?

"A. I am a little confused at this point.

"Q. Take your time. The only thing we want is your best recollection and your actual understanding of [956] the position that you occupied at that time. Did you know or did you have an idea as to who Whitman, Ransom, Coulson & Goetz represented, as between the Western Pacific Railroad Company and the Western Pacific Railroad Corporation?"

Your Honor will appreciate that I am reading this at the request of opposing counsel.

Mr. Clark: That is correct.

Mr. MacKinnon: I think he should keep on reading.

Mr. Adams (continuing reading):

"A. I really do not know definitely.

"Q. Did you know Mr. Nicodemus at that time?

"A. Yes.

"Q. And you saw him at board meetings, I guess? "A. That is right.

"Q. What did you understand Mr. Nicodemus' position to be, if any?

"A. He was the attorney for the corporation.

"Q. He was the attorney for the corporation?

"A. Yes.

"Q. During those meetings of the board of directors of the corporation, while you were on the board, and those you attended, did you hear any statements or representations to the directors that the tax matters were being handled by Mr. Polk or Whitman, Ransom, [957] Coulson & Goetz?

"A. Yes, now I believe I did hear Mr. Polk's name mentioned in such regard."

The Court: I think I had better take a recess now. I have a criminal matter to hear.

(Recess.)

Mr. Adams: Your Honor, I was reading from the deposition of Mrs. Sheehan. Page 769:

"Q. Mrs. Sheehan, have you ever met Mr. Coulson? "A. Yes, I have.

"Q. Do you recall when that was?

"A. Well, I do not recall the exact time, but he was a director on the corporation board at one time, and he came into the office quite often.

"Q. It is true, is it not, that Mr. Coulson was

never a director of the corporation at the time you were a director?

"A. No, he was not a director?"

Then at page 770:

"Q. Did Mr. Coulson ever tell you how you should vote as a director?

A. No.

Q. Or give you any instructions as to how you should act as a director?

A. No, he did not. [958]

Q. Did you ever meet Mr. James K. Polk?

A. I never met him."

Then at page 771:

"Q. I will ask you this general question: Did anyone ever tell you how you should vote; that is to say, give you instructions about it?

A. No."

I have nothing further from Mr. Sheehan's deposition.

Mr. Clark: We have just one question and answer, your Honor, at page 768. May the record show that the last portion of the deposition read by Mr. Adams was in response to questions put by him?

Mr. Adams: That is correct.

Mr. Clark: And page 768, a question by Mr. Clark:

"Q. Did you exercise any independent judgment on any of these matters which were discussed during this period?

A. I do not think there was any occasion to."

Mr. Adams: Now, if your Honor please, I should like to read from the deposition of the intervener, Henry Offerman; and turning to page 4705 of Mr. Offerman's deposition, being at the beginning of his deposition, which was commenced April 26, 1948—Mr. Offerman having been called as a witness in behalf of the defendant railroad company, and as an adverse witness. Now, I will attempt to state the material here in order to save the Court's time.

Mr. Offerman is one of the interveners, he is 53 years of age, attended the Lawrenceville school at Lawrenceville, New Jersey, from which he graduated in 1914. He then went to Yale until the first war and returned after the war. He was in the class of 1918, honoris causa, and then returned and graduated in 1919.

Some years prior to the taking of his deposition, he took a course in the New York Institute in railroads. He thinks that was about 1945 or '44.

At the bottom of page 4706, Mr. Offerman said that he is a customer's broker, employed by Goodbody & Company, and has been engaged in that occupation since 1940. A customer's broker has detailed handling of accounts. Some people call them "account executives."

And then there is a question on page 4707.

"Q. What are the functions and duties of a customer's broker, Mr. Offerman?

A. To consult with clients regarding their investments, to suggest various investments, changes

in their portfolio, to handle the detail of their transactions, give them any financial information that they ask for."

Prior to 1940 he was in the same business but in a different capacity. He was the manager of the bond department of [960] Babcock, Rushton & Company, which in January, 1940, merged with Goodbody & Company. Both of these firms are engaged in business in New York, or rather Babcock, Rushton was until the merger.

Page 4709:

"Q. Have you had business relations with Russell M. Van Kirk, one of the other interveners in this lawsuit? A. Yes, sir.

Q. Please describe what those business relations were.

A. I acted as broker for him mainly on securities listed on the New York stock exchange and curb, sometimes Chicago.

Q. Over what period of time did you have such business relations with Mr. Van Kirk?

A. From about 1935 until the date of his death.

Q. Which was quite recently, in this year?

A. In December, 1947."

I stop to say that Mr. Van Kirk's deposition was not taken in this action for the reason that he was ill at the time and then died.

"Q. Have you had business relations with Farlee & Company? A. Yes, sir. [961]

Q. What were those relations?

A. The same as with Mr. Van Kirk.

Q. Over the same period of time? A. Yes.

Q. Do they continue up to the present time?

A. Yes, sir."

At this time, your Honor, I will offer as Defendants' Exhibit 17 a schedule identified as Railroad Company Defendants' 770, entitled "Schedule of Preferred Stock of Western Pacific Railroad Corporation Owned as of April 1, 1948, Showing the Dates of Purchase and Costs of each Certificate."

The Court: "Company," did you say?

Mr. Adams: Preferred stock of the Western Pacific Railroad Corporation.

Mr. Phleger: If it please your Honor——

Mr. Adams: May I complete my offer?

Mr. Clark: To whom does that schedule pertain, may I ask, your Honor?

Mr. Adams: Henry Offerman. That is 770.

Then I offer as Defendants' Exhibit 18 a schedule identified as Railroad Company Defendants' Exhibit 787, entitled "Henry Offerman, Summary Schedule of all Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock."

The Clerk: Mr. Adams, the last exhibit in evidence was 16. [962]

Mr. Adams: This is offered as 17.

The Clerk: And the last one you referred to is 18.

Mr. Adams: And I offer as Defendants' 19 a schedule entitled "Cleta C. Offerman, Schedule of All Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock," each of these

schedules having been produced at our request by interveners.

Mr. Phleger: May I record our objection? This evidence has absolutely nothing to do with the merits of this case. It is incompetent, irrelevant and immaterial. We might just as well go on and make proof of the fact that the preferred stockholders in the plaintiff corporation invested more than $35,000,000 in their stock. In fact, the record shows that. But I take it that is not the matter we are trying here. To say that these interveners, who own a very small portion of the stock, paid so much for it is utterly incompetent, irrelevant and immaterial as to the issues of this case. I say the stock of this company, for which millions and millions and millions of dollars were paid, is represented by this corporation, which is the plaintiff.

Mr. Levy: Your Honor, just to record the position of the interveners on this, I wholeheartedly agree with Mr. Phleger, but the information was requested, we furnished it, and if your Honor thinks it is of any materiality, it is here. But I do not think it is either, and while we do not record an objection, [963] because we do not want to be in the position of appearing to keep from this Court any facts, we nonetheless concur in Mr. Phleger's position.

Mr. MacKinnon: Let me state our position with respect to this material. This is an equitable action. The interveners are in the action. This relates to the interveners' cause of action. Its

purpose is directed to that complaint. There is a motion before your Honor which you reserved decision on, and in connection with that motion, if nothing else, which will be renewed at the proper time, this material in my opinion has a very relevant and material bearing.

Mr. Adams: May I add a word, your Honor, to what has just been said by Mr. MacKinnon? This material was not furnished until there had been an argument presented before a Federal judge in New York and it was refused.

Mr. Levy: That is not true, Mr. Adams. I do not like to say that to you, but it is a fact, and I wish you would withdraw your statement.

Mr. Adams: Let me be sure about this.

Mr. MacKinnon: I think you are mistaken, Mr. Adams.

Mr. Adams: Very well, I am wholly mistaken. I should not have made the statement. I was entirely in error about that. I have a recollection of an argument, but I thought it pertained to this material.

Your Honor, one further statement in addition to what Mr. [964] MacKinnon has said: We rely, among other things, upon the authority of a decision of the United States Supreme Court in what I have referred to heretofore as the Comstock case, decided last year by the United States Supreme Court, and in a decision written by Mr. Justice Jackson. Mr. Justice Jackson stated that the appellant Comstock came into that proceeding at low

prices for the particular securities he held, and after an investigation he had made, going to show that here was a speculative possibility, that he was a speculator in that litigation, that he himself had no equities whatever, and I suggest that if the United States Supreme Court sees fit to make those statements in regard to a matter quite similar to this one—that was a proceeding in reorganization—the evidence we are offering is material and relevant.

The Court: I think I remember reading that case, but I do not carry it in my mind. It was some right of an intervener that was being asserted?

Mr. Adams: Yes, your Honor. Comstock was an intervener in that proceeding.

Mr. Levy: They were bondholders in a reorganization.

The Court: Some equitable right was asserted by them with respect to their position with the company, and the fact that the interveners had acquired the stock with the idea in mind that maybe they could litigate the matter and get something out of it was taken into account by the Court as an equity in [965] the case.

Mr. Adams: That is right, your Honor.

Mr. Levy: That was not a stock case at all. It was a bondholder's case, where the bondholder purchased the bonds after a certain plan had been promulgated and approved by the Court, and then he fought the question of the plan up to the Supreme Court.

The Court: I understand the point. What difference does it make in this particular case?

Mr. Adams: It goes to the equities of the interveners' case.

The Court: If the Western Pacific Railroad Corporation and its stockholders are entitled to some relief in the case, would the Court deny it because these men, as they sometimes do, go in on these shoestrings in the hope that something may come from it? Would that decrease the right of the plaintiff in the case?

Mr. Adams: Your Honor, we are entitled to show this as an equity, and involved in the equity is the question of the laches of these stockholders, the parties who bring this case before your Honor. There are no other stockholders here. The plaintiff is bringing the suit itself. This does not go to the plaintiff's case. It goes to the stockholders' case, the stockholders saying they bring something to your Honor that the plaintiff does not have.

The Court: Equity does not punish anyone. If the stockholders of the plaintiff corporation are entitled to relief in this case, would it make any difference that the interveners were speculators who appeared on the scene and stirred this thing up?

Mr. Levy: Not the slightest.

Mr. Adams: Your Honor's queries as to whether this has anything to do with this lawsuit I should like to respond to. This lawsuit is a lawsuit originated by these stockholders who were speculators,

and one of the questions involved in the lawsuit is the defenses that we bring forth, and our defenses include not only the statute but laches and bar of the reorganization. These stockholders, we think we are entitled to show, had not only full opportunity of knowledge but busied themselves about this and had no equity. They could have come into the reorganization court and brought this case to the court. They were subject to no domination or control. The court was open.

The Court: Is it your theory that the plaintiffs could prevail in this case and the interveners could not?

Mr. Adams: I think that is a fair statement, yes.

The Court: In other words, equity should say that the plaintiff should prevail because they have a right, but the interveners being speculators who started the thing should, let us say, suffer the burden or punishment of not being able to recover as stockholders a share of the corporation's [967] recovery?

Mr. MacKinnon: That is stating it very differently from what your question posed.

The Court: Perhaps so. I find sometimes if I put these questions sort of crudely, I get more response from the lawyers.

Mr. MacKinnon: The question as was posed, the answer is definitely yes; the interveners stand or fall on their own bottom. The plaintiff stands or falls on its own bottom. Whatever equities are against the interveners are against them.

The Court: There could be a different defense, then, to the interveners than to the plaintiffs?

Mr. MacKinnon: Definitely.

Mr. Phleger: May I state for just one moment? The Comstock case has been mentioned here, and about the only real application the Comstock case has here is that Mr. Justice Jackson said it did not make a bit of difference how the interveners or the plaintiffs in that proceeding got their stock; the matter would be considered by the District Court on its merits, because the right was the right of all people who were similarly circumstanced, the very point we are talking about. The intervention was allowed here in order that a cause of action belonging to the corporation might be asserted. The interveners have no separate cause of action. All they do here can aid the plaintiff. The plaintiff is entitled to any cause of [968] action exposed by the facts. But what they paid for their stock is utterly immaterial. The idea that the plaintiff's right could be destroyed by an equity running against people who held only a small number of shares shocks the conscience.

Mr. Adams: It did not shock Mr. Justice Jackson's conscience.

Mr. Phleger: I suggest that you read that case to the Court:

Mr. Adams: Yes, I would be very happy to do so.

Mr. Levy: Your Honor will find in this very district, in the case of Blum v. Fleishhacker, de-

cided by Judge St. Sure; the Judge made an express finding that the motives of this particular plaintiff who brought a derivative action had not the slightest thing to do with whether or not the corporation on whose behalf he was suing had or did not have a right of recovery, and he so decided the case.

Your Honor will find that in the famous Penn-road case, which we have cited in our brief and I think Mr. Phleger has cited it also, the Court made the same conclusion. And your Honor will find that the Circuit Court of Appeals for the First Circuit has expressly stated, and Judge St. Sure relied on it, that when you have a derivative right asserted by shareholders, if the corporation has the right, they may assert it.

I just want to point out one thing to your Honor. Mr. Adams examined Mr. Offerman on deposition for two weeks. [969]

Mr. Adams: There is nothing surprising about that. These depositions in many cases lasted a long time.

Mr. Levy: Mr. Adams, may I continue uninterruptedly? The examination went on for two weeks and was directed to show the motives, whatever Mr. Adams conceived them to be, of Mr. Offerman in launching this lawsuit, and your Honor will find that in an effort to show Mr. Offerman's motives he went into matters that were completely unrelated to this tax transaction, because this tax transaction did not occur, your Honor will recall, until

July 15, 1944, and Mr. Offerman became a stockholder of this corporation for the first time in June of 1942. Now, it is a fine-spun theory that had no legal basis, it has no factual basis, and I think you will find that it will serve only to clutter this record with something that has nothing to do with the fundamental question, and that is whether or not this corporation, because of the relationship between it and the defendant during the critical period, had a claim which is now properly being asserted. If your Honor wants to try the issues, I think they will contribute nothing to the end result of who is entitled to win this case.

Mr. Adams: I can read what I am going to read out of Mr. Offerman's deposition in an hour, if I read without interruption. I am not going to impose on your Honor at any great length.

Mr. Clark: The objection was directed to the exhibits. [970] Mr. Phleger made the objection; we did not. We are simply stating our position.

Mr. Adams: I take it you make no objection?

Mr. Clark: I think the record will show we made no objection.

Mr. Levy: It was so stated, though I concurred with Mr. Phleger's position.

Mr. Clark: Your Honor must find on the basis of decisions in this district and elsewhere in the end that the amount of stock, the price paid for it, and the so-called motive is immaterial, and factually the Offerman situation does not square up with Mr. Adams' contention, but if your Honor wants it in the record we do not care.

Mr. Levy: I do not want it understood by not making objections that your Honor will permit Mr. Adams to go on as he did in the depositions.

The Court: Are you going to read other testimony which you say will take some time from this deposition on the same subject matter as referred to in the exhibits?

Mr. Adams: No, your Honor. I am going to read some testimony, but it won't be very long. It is in Mr. Offerman's deposition. It is not testimony about prices or purchases that are shown in these exhibits.

Mr. Levy: It bears on the same subject, doesn't it, Mr. Adams, namely, your defenses? [971]

Mr. Adams: Certainly it bears on our defenses or we would not offer it.

The Court: I will reserve ruling on these exhibits until I hear what you are going to read from the deposition.

(The schedules referred to were marked Defendants' Exhibits 17, 18 and 19 for Identification.)

Mr. Adams: Now, if counsel will turn to the top of page 4736——

The Court: Do you happen to have the citation of that Comstock case?

Mr. Adams: I haven't it here, but I will get it.

Mr. Phleger: I have it.

Mr. Levy: Would your Honor like to have the citations of the cases I mentioned as well?

The Court: The Comstock case?

Mr. Levy: No, but the three cases I referred to.

The Court: Before we adjourn for lunch you may give them to the clerk.

Mr. Phleger: I have the Comstock citation, your Honor: 335 U.S. 271.

Mr. Levy: Here are the three cases to which I referred: 21 Fed. Supp. 527, which is the Blum v. Fleischhacker in the District Court here; Johnson v. King-Richardson, 36 Fed. (2d) 675, page 677, relied on by Judge St. Sure—that is the Circuit Court for the First Circuit—the Pennroad case, [972] which is 42 Fed. Supp. 586, at page 625, which is the finding and conclusion of law, a Delaware case, since this is a Delaware corporation and the rights of the stockholders derive by Delaware law, Echleman v. Keenan, 181 Atlantic 657.

Mr. Adams: At page 4743, being the last question on that page:

"Q. At the time you made this first purchase, what did you learn about the status of the various subsidiaries of the Western Pacific Railroad Corporation?

A. Well, my recollection is that after much investigation, that the whole matter was quite confused as to the exact status of the subsidiaries, the loans that had been made and the pledging of the various stocks, were a question of some doubt whether there had been a capital contribution there or just how they stood.

Q. What was the question as to the capital contribution that you learned about in July, 1942?

A. By the loaning of the money to the Western Pacific Railroad Company without security, inasmuch as they had the same officers and directors.

Q. Did you learn at that time that they had the same officers and directors? A. Yes, sir."

Now, I read the preliminary questions solely for the [973] purpose of leading up to the last question the witness learned "that they had the same officers and directors."

Mr. Levy: By preliminary questions, do you refer to the first and second?

Mr. Adams: Yes, the first and second, and I can only get to the third one by reading the first two.

Mr. Levy: And that was the purpose of your reading?

Mr. Adams: That was the sole purpose of my reading. Page 4747:

"Q. Did you inform yourself and learn prior to the time you made your first purchase that there were interlocking directors and officers?

A. I gained such information from the reports, yes, sir.

Q. And that was one of the factors that you had in mind at the time you purchased the stock?

A. Yes, sir." [974]

Mr. Adams: Page 4853. Question at the bottom of that page: "Q. Do you have any recollection that the railroad company's reports for 1942, 1943 and 1944, or any of them, were among papers that you removed from your files and destroyed?"

"A. No, sir.

"Q. Do you have any recollection one way or the other on that subject?

"A. I know that they were not removed from the file, if they were ever in there.

"Q. Have you any recollections to whether or not they were ever in there?

"A. If they are not in there now, they never were in there, because I may have used Goodbody's file, and those copies would be returned for their files. This was my own personal file, in which I had extra copies. I used the combination of the two, and after a while, I ceased collecting a lot of things in my own file and just used what was available in Goodbody's. I didn't see any use in having two reports."

Page 5002:

"Q. Did you know Mr. Thomas M. Schumacher and Mr. Sidney M. Ehrman were the trustees in reorganization of the Western Pacific Railroad Company during the period 1935 to the end of 1944, and were discharged as such in May [975] of 1945?

"A. Yes, sir."

Then the witness supplemented the answer, saying, "My knowledge does not concern the dates."

"Q. What was the source of your information as to the fact that Mr. Schumacher and Mr. Ehrman were trustees in reorganization of the Western Pacific Railroad Company?

"A. The annual reports."

Page 5128:

"Q. Mr. Offerman, how long had you known Mr. Russell Van Kirk?

"A. About twenty years.

"Q. Were you near neighbors for several years prior to the death of Mr. Van Kirk in 1947?

"A. Yes, sir.

"Q. Were you and Mr. Van Kirk engaged in the same business in New York during the period of your acquaintance with him?

"A. A similar business.

"Q. Did you act as brokers for each other in connection with securities transactions over the period of years that you knew him? "A. Yes.

"Q. Did you frequently discuss matters of common interest [976] with Mr. Van Kirk?

"A. Yes, sir.

"Q. Would you say that you have known Mr. Van Kirk closely and intimately?

"A. Yes, sir.

"Q. What was the relation of Mr. Van Kirk to J. S. Farlee & Company?

"A. I believe he was the chief stockholder."

Your Honor will bear in mind J. S. Farlee & Company is the other intervenet in this case. Page 5137:

"Q. Did Mr. Van Kirk at any subsequent time tell you that he had made any further investigation or inquiry into the Western Pacific?

"A. Yes, sir.

"Q. When was that subsequent occasion?

"A. Early in 1946.

"Q. What did Mr. Van Kirk tell you at that time

about investigations or inquiries made by him?

"A. He had looked into the matter of the filing of consolidated tax returns. He had seen a clipping in a newspaper about Consolidated Electric & Gas, I think it was. I saw the same thing and we discussed it. We discussed the consolidated tax returns.

"Q. Referring to that time early in 1946, was the substance of what Mr. Van Kirk told you as regards any [977] inquiry or investigation at that time that he had seen some newspaper clippings about Consolidated Electric & Gas that related to consolidated tax matters? A. Yes, sir.

"Q. Did he tell you at that time that he had made any other inquiry or investigation in regard to the Western Pacific? A. Yes, sir.

"Q. What did he tell you in that regard?

"A. That he had looked into the matter carefully, talked it over with attorneys, and thought that the same principle as referred to in the clipping would apply to the Western Pacific.

"Q. Did you understand from what Mr. Van Kirk told you that his interest in this particular subject was aroused by reading the newspaper releases on the Consolidated Electric & Gas?

"A. Yes, sir."

Page 5192:

"Q. Mr. Offerman, have you made any commitment or agreement with anyone that in any way limits your privilege or right to buy or sell Western Pacific preferred?"

Mr. Levy: Now I object to that, your Honor. I can't see the slightest materiality to that. I object because it is part of this effort of Mr. Adams to inject completely immaterial [978] matters into this case.

The Court: Have you made any agreement with anyone for what?

Mr. Adams: Limiting his privilege or right to buy or sell stock.

The Court: Limiting whose privilege?

Mr. Adams: Mr. Offerman's personal privilege or right.

The Court: What does he answer it, "no"?

Mr. Adams: Yes.

The Court: Go ahead.

"Q. (By Mr. Adams): You are entirely free to buy or sell Western Pacific preferred at any time? A. Yes, sir."

Page 5194:

"Q. Mr. Offerman, during the year 1943, did you as broker or customer's man purchase or sell preferred stock of the Western Pacific Railroad Corporation for the account of your clients or customers?

"A. It is my recollection that some customers bought and sold the stock."

Then going toward the bottom of that page:

"Q. And subsequent to 1943, have you continued as broker or customer's man to buy and sell stock for the account of your customers or clients?

"A. Yes, sir."

Page 5200: [979]

Well, it is noon hour, your Honor, and I seem to have missed a spot. If it is convenient to your Honor to take the recess now?

The Court: Well, we will reconvene today at 2:15. I have this criminal matter at 2:00 o'clock. We might as well take the extra time.

Do you consider that, from the equitable point of view, Mr. MacKinnon, there is anything essentially wrong in a person's buying on speculation stock in a corporation with the hope of perhaps thereafter increasing the value of the stock by instituting or causing the instituting of litigation?

Mr. MacKinnon: I certainly do.

The Court: That is the essential, equitable point that you are urging?

Mr. MacKinnon: That is only one of the points.

The Court: That is one of the points?

Mr. MacKinnon: Yes.

The Court: Now is that the subject matter of the discussion in these cases?

Mr. MacKinnon: No, I don't think so.

Mr. Adams: I think it is referred to in the Comstock case.

Mr. MacKinnon: Yes, in the Comstock case. It is not dealt with only in the sense of that question, though.

Mr. Levy: It is referred to in the cases I supplied to you, your Honor. Your Honor is mindful of the fact that Rule [980] 23 provides that you must be a stockholder at the time of the wrong in order to bring the action, and the situation is thus

encompassed in the Federal Rule, all of what was previously urged as efforts to buy stock in order to bring litigation. Now if you comply with that rule, as I understand the cases, you have done what you are supposed to do to be properly in the Federal Court; and I think that constitutes the complete answer to Mr. MacKinnon's question as well.

Mr. MacKinnon: I am not saying they have a right to do whatever they have a mind to with this stock, but they are coming into this court and asking this court to exercise equitable principles in their favor, and I say in the exercise of those equitable principles, your Honor has to see the facts and weigh their purposes and their motives and the price they paid, their activities in creating a market.

The Court: Only if there is some equitable disability.

Mr. MacKinnon: That is right. This is such a case. This is an equity case. Nobody can point to any law on this subject.

The Court: But granted it is an equity case; do you have to have an equitable disability on the part of the plaintiff, recognized by law?

Mr. MacKinnon: That is right.

The Court: Before you can——

Mr. MacKinnon: No, I wouldn't say that at all—not recognized by law. [981]

The Court: I think that is where we sometimes make mistakes in decisions, where we reach out into the air and pull in something which we think ought to be the way to do things.

Mr. MacKinnon: But that, your Honor, is the very thing you are asked to do in this case, because they cannot point to any law in this case. There is no precedent for this case.

The Court: Well, that still doesn't mean——

Mr. MacKinnon: That means that you, as a chancellor, will have to determine on the basis of all the equities whether you believe there was overreaching. You are not going to find your basis in stare decisis or anything of the kind. You are asked as the chancellor to determine whether or not you should involve equitable principles under the circumstances here present.

The Court: Well, I don't see that that thing is the precise issue that we have now, as to whether or not there is any equitable disability on the part of the interveners.

Mr. Levy: Your Honor, may I say one more word on the point?

The Court: In other words, if the stockholder is entitled to bring the action, it wouldn't make any difference how many shares of stock he traded in.

Mr. MacKinnon: His motive in an equitable case is certainly, in my opinion, of the most material importance.

The Court: Well, let's suppose that I owned 5000 shares of the corporation's stock, and had owned it for ten years before 1934. [982]

Mr. MacKinnon: I would say there, your Honor, there would be no question.

The Court: Well, this man owned some stock in '42, didn't he?

Mr. Adams: Yes, he bought it on a spec after he looked into the matter of the disabilities possibly arising from interlocking directors.

Mr. Levy: It has nothing to do with taxes.

The Court: Don't all your clients buy stock in corporations on speculation?

Mr. Adams: Not only after investigating the importance of, or the possibility of, having a lawsuit and investigating whether there would be any disability arising from interlocking directors.

The Court: Well, there are lots of reasons people buy stock. They buy stock because they think the corporation is a losing proposition; I think I have heard of people doing that. So they could take stock losses. I don't think that that has anything to do with this.

Mr. MacKinnon: No, I don't think that has. I don't care whether, as a matter of fact, they want to invest this money in stocks and bonds—that is their business and that is perfectly o.k. But this is a market operation, in my opinion. When the schedules indicate that their stock, by reason of their market operations, cost them about 37c a share, or nothing—it is all concentrated into a very limited period. Now I do think that is [83] an equitable factor of considerable importance for your Honor's weighing.

The Court: Well, of course, wouldn't that affect the right of any stockholder then, who owned stock in the company, as to whether he traded it during the times that are involved here?

Mr. MacKinnon: No, I wouldn't say so at all. I would say if a person went out and bought stock in this period of time and was a holder of that stock, your Honor would approach the equities in that situation very differently than a man who was in a position of a customer's broker, going out and stirring and creating interest in the stock for the very purpose of raising the price of the stock.

Mr. Clark: Are you testifying, Mr. MacKinnon?

Mr. MacKinnon: I am making an argument to the court, and that is the purpose that the court addressed his question to me, and that is where my argument will be addressed at all times.

Mr. Levy: Will Mr. MacKinnon state to the Court that the evidence justifies that assertion?

Mr. MacKinnon: I believe it does.

Mr. Adams: So do I.

Mr. Levy: Your Honor will be mindful of the wild charges. I think there is absolutely nothing in the record to justify it, apart from any legal argument of relevancy.

Now just hypothesize that instead of this plaintiff corporation having determined after we brought the New York action that [984] action should be brought; hypothesize that they didn't do that and that these stockholders, instead of being interveners, were the plaintiffs before this court, suing on the same situation; just assume that we proved the same case that has been proved here, and let's assume, to carry it one step farther and pose the question at the North Pole, that your Honor con-

cluded that this corporation was 1000% entitled to the recovery which the intervener said it ought to get. Then Mr. MacKinnon would come to you and say that because they are in Wall Street, that that name, and because they have bought some stock, that therefore the corporation couldn't get any of these tax savings, and Mr. Adams' clients should not do otherwise than nobly be left with a windfall.

Now that is what that argument comes to.

The Court: Well, I don't understand that Mr. MacKinnon has made the argument that anything that the interveners have done prejudices the plaintiffs.

Mr. MacKinnon: No, I did not.

The Court: He has some theory that the interveners——

Mr. MacKinnon: They stand on their own body.

The Court: He has some theory that the interveners are going to be under some disability with respect to this case; that is the point as I understand it.

Mr. MacKinnon: That is right.

Mr. Levy: That is the point, but I only want to emphasize [985] the nature of the point by pointing out to you that if the interveners were here on behalf of the plaintiff, without the plaintiff corporation, for instance, as they are in New York, if Mr. MacKinnon's argument is sound, then the action would be defeated for these reasons. I don't want your Honor to think——

The Court: Well, I understand.

Mr. Levy: I want to focus it that way. I think——

The Court: Counsel, I think the heavier burden to sustain is on your side of this precise question.

Mr. MacKinnon: To show the disability? Yes. Well, that is the burden we took on. That is what we are trying to do. That is the purpose of these schedules.

The Court: Well, I am trying to find out what the logical reason is for the rule which you contend should apply.

Mr. Adams: Your Honor, may I address myself to the court as to that question? The plaintiff comes to court, and there are certain defenses raised against the plaintiff. Now those are good or bad, as against the plaintiff; and an issue lies between the plaintiff and the defendant. There are the affirmative defenses—the bar, laches, time of various sorts, estoppals. Now then, maybe those defenses are good, but the intervenors come in and they say to your Honor, "Well, your Honor, those defenses aren't good defenses against us. They are not good defenses against the stockholders," because of some of these things they point to. Some of these assertions they make, that there is [986] duality, domination, control and that sort of thing. They say they are in a position to obtain a judgment for this plaintiff, that the plaintiff itself, perhaps, is prevented from getting; for the reason that those defenses don't run against them. They say we hadn't notice. Those contentions, as I understand it, have been in this case.

The Court: I don't understand that to be Mr. MacKinnon's point.

Mr. Adams: No, I don't think so either, but I am presenting that suggestion to your Honor.

The Court: I can't see much merit in that. I am just wondering whether or not there is anything that would mean that equity is such, shall I say, that even though a meritorious cause of action be developed and sustained, that equity would be so heartless as to say that the fellow who brought it about, no matter how much he may have been a speculator for his own benefit, that that is going to shut him out from the recovery, if there were one made. It seems to me that is kind of a cold blooded doctrine, and I am just trying to find out your position.

Mr. MacKinnon: I think equity is a cold blooded doctrine under certain circumstances.

Mr. Levy: Not as I learned it in law school.

Mr. MacKinnon: Well, if you cite the maxims, you won't have much difficulty.

The Court: I think we had better let you gentlemen go to [987] lunch.

Mr. Phleger: I would simply like to point out that we filed this lawsuit, we made the evidence, and if that evidence shows that the plaintiff is entitled to recovery, it seems to me it is utterly and wholly immaterial what this intervener did, how he got his stock; or evidently we are trying to have a trial within a trial here. I don't see how the plaintiffs are affected in the slightest degrees by this issue.

Mr. Adams: Your Honor will bear in mind that the objection comes and is stated solely from this side of the house. There is no objection before your Honor from the interveners.

Mr. Levy: I just want to make that point, too, your Honor.

The Court: Well, perhaps Mr. Phleger is feeling in a generous mood today and wants to do something for the interveners, even though they have been shooting a few barbs at him once in a while.

Mr. Adams: I suggest that that may pertain to your Honor's consideration.

Mr. Levy: I want to say, because we have not made many objections because, as so often happens, when you generate this kind of a fuss there is some lingering thought that there is something in the position of the defendant. For that reason, we haven't made the objections, and the evidence can go in for some purpose and go so far, and then maybe we will fight about it. But I do think that in principle, Mr. Adams' position is wrong. [988] I think Mr. MacKinnon's position is wrong. I think it would be a mistake of law if your Honor ruled in favor of it.

Mr. MacKinnon: Your Honor understands that if we thought the plaintiffs and interveners were right, we wouldn't be having a lawsuit, so it is fairly obvious Mr. Levy thinks we are wrong.

The Court: Well, we will continue this afternoon.

(Thereupon a recess was taken until 2:00 p.m. this date.) [989]

Afternoon Session—2:00 P.M.

Mr. Adams: May I have the Offerman deposition, beginning at about page 5000? Page 5005:

"Q. Do you assert that either Mr Schumacher and Mr. Ehrman as trustees or either of them were party to a plan to deprive the corporation of any rights they felt they had in connection with the income tax returns for 1942, 1943 and 1944?

A. I do not understand the question, sir.

Mr. MacKinnon: Read it.

(Question read.)

Mr. Levy: Answer if you know, Mr. Offerman.

The Witness: No.

Q. (Still by me, your Honor): Do you assert that the board of directors of the railroad company during the period it was in reorganization—I am speaking of the board of the company—while the railroad company was in reorganization, do you assert that the board of directors had anything to do with the income tax returns for 1942, 1943 and 1944? A. No.

Q. Do you assert that the board of directors of the company, after it was reorganized, the present board of directors, was party to a plan to deprive the corporation of any rights which the board considered the corporation had in connection with the income tax returns for 1942, 1943 and 1944?

A. No.

Q. Do you assert that this board of directors, that is, the board of the present railroad company,

had any intent or purpose in the income tax matters to aid or favor the James interests?

A. No.

Page 5200:

"Q. In the advice you have given to your customers subsequent to June, 1946, what have you advised them was the relation between the litigation and the value of the Western Pacific preferred?"

Mr. Levy: Your Honor, what has that to do with this litigation? I object to that as being incompetent, irrelevant and immaterial.

Mr. Clark: Also it assumes something not in evidence.

The Court: Did he answer it and tell what important advice he gave?

Mr. Adams: Yes.

The Court: What is the relevancy of that?

Mr. Adams: It is directly relevant to the matter under discussion this morning, your Honor, Mr. Levy's contention [991] being that there was nothing in the way of the activities of these gentlemen, in the way of market transactions in relation to this lawsuit, and this answer is directly responsive to that question.

The Court: I think the objection is good. I will sustain it.

Mr. Adams: Page 5265: The question at the bottom of the page:

"Q. Do you have any authorization from any stockholders of the corporation to act in their behalf in this litigation?"

Mr. Levy: I want to object to that question as being utterly immaterial, incompetent and irrelevant, and having no importance in this litigation that I can see.

The Court: This is a representative suit, isn't it? I mean the intervention is a representative suit?

Mr. Clark: It is a question of law, your Honor.

Mr. Adams: This is a question of fact, your Honor, that I asked of the witness, not meaning to have any discussion about the law at all. I want to find out from him whether in fact he held any authorization from any other preferred stockholder.

The Court: I do not see the materiality of that. I will sustain the objection.

Mr. Adams (reading):

"Q. Had you solicited any such authorization from [992] the preferred stockholders of the corporation?"

Mr. Levy: Same objection, same grounds.

The Court: Same ruling.

Mr. Adams (reading):

"Q. What financial interest do you have in this litigation?"

This is on page 5266.

Mr. Levy: Same objection, same grounds. The evidence in the case shows what his financial interest is.

Mr. Adams: There has been an objection to that evidence.

Mr. Levy: The stock holdings of this witness have been put in by stipulation.

Mr. Adams: Oh, no, the fact that this particular witness has not a dollar invested now that he has profited on the transaction, those facts are not in evidence. They have been offered and his Honor has not ruled on them.

The Court: If it is necessary to determine this matter, I think I should be ready to rule on that now. I read the decision—I did not have an opportunity to study it—in the so-called Comstock case. I do not see that that has any bearing on this matter.

Mr. Adams: I shan't argue that, your Honor. I will only state that in the Comstock case the evidence was received, that each of the courts that dealt with the Comstock case in turn, the District Court, the Circuit Court of Appeals and [993] the Supreme Court considered and they commented upon that evidence.

The Court: In the Comstock case the man came along after the reorganization had been in progress ten years and then acquired some stock, and then sought to have the Court redetermine the claim of a creditor that had been filed a long time before that time, despite the fact that obviously that was a dilatory procedure in the course of the administration of the estate; the court nevertheless let the man be heard and still decided the matter whether the claim was proper on its merits and held that it was. It held that even though there was domination and control, that nevertheless the domination and control did not have the effect of accomplishing any

unconscionable or improper result on the merits of the case. But I cannot see how there can be any possible relevancy as long as the intervener, bringing an action in a representative capacity, satisfies the requirements of our procedural rules and was a stockholder prior to the time the cause of action arose. Anything else is immaterial, and the fact that this is a suit in equity should not result in the imposition of any sanctions by virtue of the activities of the intervener that haven't got anything to do with the cause of action. I do not think that there is any judge that has ever held that, and if there were, unless he were a higher judge, I would not be inclined to agree with him. I do not think that equity could [994] possibly act in such a harsh manner as that. There is just no point to it. The objects of the principles of equity are to do equity. And in the guise of and under the panoply of equitable rules, if you do just the reverse, you are certainly not doing equity in the matter. I think all this line of testimony is incompetent and I so hold, and I will sustain the objections to this.

Mr. Adams: May the exhibits be marked for identification?

The Court: They have already been marked for identification.

Mr. Adams: They have?

Mr. MacKinnon: As 17, 18 and 19.

The Court: That is right.

Mr. Adams: And I think, just to be sure I have a ruling on the question, I will ask the question once more, the last one I read:

"Q. What financial interest do you have in this litigation?"

to which I understand objection was made. Did your Honor sustain the objection?

The Court: Well, I don't know whether this question involves—I don't know just what you mean by the question. What financial interest the man has—I assume he had some, because he sued.

Mr. Clark: The stock reflects it, your Honor; whatever the stock reflects of his assets, the assets of the corporation. It has been conceded that Mr. Offerman holds 4000-odd shares [995] of the stock and has been a stockholder since early 1942. That is all there is to the matter.

Mr. Adams: I am just offering this for the record.

The Court: Well, have you in mind some other purpose? I am not ruling in the dark on the matter—is there some other field or purpose, some other field of investigation or purpose to the question?

Mr. Adams: The last question, your Honor, "What financial interest do you have in this litigation?" was asked to find out specifically what that financial interest is. There was no other purpose.

The Court: Well, I will sustain the objection.

Mr. Adams: Now, your Honor, at this time, with your Honor's permission, Mr. Matthew will put in a part of our defense relating to proceedings in the reorganization court.

The Court: Did you have any other matters that you wanted, either side, in connection with the deposition of Offerman?

Mr. Clark: No, sir.

Mr. Levy: May we reserve the right to read some part—

Mr. Clark: No, it is struck out.

Mr. Levy: It is struck out?

I didn't understand the Court's ruling that everything that has been read was struck out.

The Court: Well, everything that has to do with activities of the witness with reference to acquisition of stock [996] and matters of that kind. I don't recall—though there was some preliminary matter of whether he went to Yale and things of that sort which I don't think is important.

Mr. Clark: As I understand it, your Honor, everything developed along the line that we have been discussing and with respect to which the offer of certain documents was made is stricken from the record as the result of this ruling—or at least your Honor has indicated you don't intend to give any weight to it.

The Court: Well, Mr. Adams has read all of the questions and answers, and they are all in the record, and I think that with what is in the record and the ruling that the Court has made, you are protected.

Mr. Clark: I think so.

Mr. MacKinnon: Well, if your Honor is striking, will you so indicate, because I would like to have an exception?

The Court: You will not have to take an exception.

Mr. MacKinnon: I do have to take an ex-

May I just add, if your Honor please, that I have quoted this text in part for the purpose of showing that it was by order of the court that the trustees were to conduct the business in the name of the debtor and be its regularly appointed officers, agents and employees.

May I also direct the Court's attention to paragraph 3 of this order on page 5, which I think will be responsive to the inquiry made by the Court a moment ago. Perhaps I should read that paragraph. It is quite brief, commencing at line 10:

"That said trustees shall have all of the powers, rights, privileges, duties and obligations heretofore granted to or imposed upon the debtor pursuant to the order of this court entered herein August 2, 1935, and any and all orders supplementary thereto or amendatory thereof; and each and all of the orders heretofore entered in this proceeding shall, with respect to the said trustees and the property of the debtor, be of like force and effect as though said trustees were therein specifically named in the place of the debtor, all of said orders being hereby incorporated in and made a part of this order by reference."

If the Court please, I should simply add that by paragraph 1 of this order on page 4 the Court appoints three trustees, namely, [1006] T. M. Schumacher, Chairman of the Executive Committee of the debtor; Charles Elsey, President of the debtor; and Sidney M. Ehrman.

I desire to offer as our next exhibit a copy of the

opinion and order of Judge St. Sure entered in the reorganization proceedings on November 9, 1935, entitled "Opinion and order confirming the appointment of trustees as appointed by the court and ratified by the Interstate Commerce Commission."

(Document referred to was thereupon received in evidence and marked Defendant's Exhibit No. 22.)

Mr. Matthew: I think that the Court will allow me to state, in order to save a little time, that when the order of the court appointing the three trustees was considered by the Interstate Commerce Commission, the Commission concluded that there shall be no more than two trustees for the Western Pacific and accordingly it determined to approve the appointment.

The Court: The court appointed two trustees and appointed Mr. Elsey as manager.

Mr. Matthew: They thought two trustees should suffice for this property, and accordingly the Commission approved the appointment of Mr. Schumacher and Mr. Ehrman, and so of necessity the matter again came before the court with the result that this opinion and order which has just been received as Exhibit No. 22 was issued and assigned by the court. I think that all of the text of this opinion and order is pertinent, as your Honor will [1007] find, but I desire to read only a portion of it. I am now reading from the second page of this opinion and order commencing with the text in

ception to that; there is a specific motion, as I understand it, which is being brought in through the back door, on the question of all the testimony that has been adduced. There is no necessity of an exception with respect to the three or four objections that have been made and sustained. As I understand it now, the interveners take the position that your Honor is striking everything that is in the record. [997]

The Court: Well, I didn't mean that. I meant just everything to which this objection applies.

Mr. MacKinnon: The last objection?

The Court: The objection to which I referred in the ruling. [997-A]

Mr. Clark: Right. Well, may it please your Honor, so that we can get a motion to strike which meets all the technical requirements, may I reserve the right to make that after we get the record written up, and then I will mark the places which I think are consistent with your Honor's ruling, and make a formal motion to strike that in that fashion to satisfy Mr. MacKinnon?

The Court: Counsel's rights will be protected then.

Mr. MacKinnon: Any way they wish to do it.

Mr. Adams: Surely.

Mr. Matthew: May it please the Court, I ask leave to present certain documentary material from the record of the reorganization proceeding in this matter, and first I would like to offer certain excerpts from the commission's plan of reorganization.

The Court will recall that Mr. Phleger referred to the plan, deeming it unnecessary to offer it physically in the record, in which suggestion I fully concurred. He read briefly from the plan, and I desire to read briefly two or three excerpts. The Court will have in mind that in the preliminary memorandum of the defendant, the Western Pacific Railroad Company, we reproduced in the appendix certain excerpts from the commission's reorganization plan, and likewise certain excerpts from orders of the reorganization court. It might be convenient for the Court just to refer to that appendix in following some of my quotations. I have a copy here, if it is not readily available [998] to the Court.

The Court: Do you have another copy?

Mr. Matthew: Yes, I have.

(Handed to the Court through the Clerk.)

Mr. Matthew: First, I desire to read some of the text which appears upon page 3 of appendix A to the preliminary memorandum of defendant, the Western Pacific Railroad Company, to which I have just referred. It appears about in the middle of this printed pamphlet. I read first from the commission's plan or order certain definitions as follows:

"The debtor shall mean the Western Pacific Railroad Company.

"Consummation of the plan shall mean the transfer to the reorganized company to the extent con-

templated by the plan of the properties and assets of the debtor.

"The reorganized company shall mean the corporation whether the debtor or a new corporation which shall acquire substantially all of the properties now held by the bankruptcy trustees and issue the new securities provided for by the plan."

That ends the quotation. I think the pertinence of those definitions is obvious without the aid of comments. I now desire to read Subdivision Q of the plan, appearing on page 4 of Appendix A to this preliminary memorandum. I am now quoting:

"Claims against the debtor entitled to priority over any [999] mortgage of the debtor, current liabilities and obligations incurred by the trustees of the properties of the debtor during the reorganization proceeding, and expenses of reorganization allowed by the court within the maximum fixed by this commission, shall be paid in cash or assumed by the reorganized company, provided that any amounts so assumed by the reorganized company shall constitute a charge upon the properties of the reorganized company prior in lien to all new securities issued under the plan. When so treated, claims against the debtor entitled to priority over any of its mortgages are found not to be affected by the plan, obligations under the debtor's equipment trust certificates, the Baldwin lease, and the Pullman contract, are found not to be materially and adversely affected by the plan. The reorganized company shall be deemed to have assumed the executory contracts of the debtor, which by their terms do not

terminate at or prior to the conclusion of the reorganization proceeding, and which shall have been affirmed or shall not have been disaffirmed by the trustees of the properties of the debtor with the approval of the court prior to the confirmation of the plan, and also any executory contracts made by the trustees of the properties with the approval of the court, which by their terms do not terminate at or prior to the conclusion of the reorganization proceedings."

I now desire to read from Subdivision R of the plan, the text appearing upon page 5, appendix A, to which I have referred:

"The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be cancelled."

After some text which is omitted and not deemed immediately pertinent, the quotation continues as follows:

"The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company, or by transferring said properties to a new corporation organized for the purpose and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan."

That is all the text I desire to read, from the commission's plan at this juncture. I now desire to offer a copy of the court's order of August 2, 1935, in the reorganization proceeding, approving the petition for reorganization as properly filed.

I understand that under the stipulation, it is not necessary to actually introduce physically in the record copies of these orders, but I thought it might be convenient to court and to counsel if I do actually offer for the record a copy of that order No. 1, signed by Judge St. Sure on August 2, 1935. I would like to have it received and marked with the next succeeding [1001] exhibit number.

The Clerk: Exhibit 20.

(Order No. 1, signed by Judge St. Sure, of August 2, 1935, was thereupon received in evidence and marked Defendants' Exhibit 20.)

* * *

Mr. Matthew: There are certain provisions of this order No. 1 which I think should be drawn particularly to the attention of the Court, and without preliminary comment, I think that I will ask leave to read briefly from the order which has just been received in evidence as Defendant's Exhibit No. 20.

Paragraph 2 of the order on page 1 of this typewritten text confers the customary authority upon the debtor as to the operation and the maintenance of the property. I need not read the entire text, I think. I desire to read a portion of the text appearing in lines 29 to 31 toward the bottom of the page. I now quote:

"And to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees."

I think I should state to the court at this junc-

ture that it is that particular authority pursuant to which the firm of Pierce & Greer and Mr. Nicodemus was continued in the service of the trustees during the trusteeship, as has been shown in this proceeding.

The Court: Wasn't there another order made when the trustees were appointed?

Mr. Matthew: No, except this.

The Court: Or was this order incorporated?

Mr. Matthew: Yes, I was going to say, and I will come to that order a little later on, the later order of the court, which I shall shortly bring to your Honor's attention, confirms this particular authority and I make this explanation now for the reason that the court may have gained the impression that there was some specific order which authorized the continuance of the employment of Pierce & Greer, who had been counsel prior to the filing of the petition. It was this general authorization pursuant to which the firm of Pierce & Greer was continued in service and pursuant to which other counsel and attorneys were retained by the trustees from time to time.

I now turn to page 2 of the order, and again I shall not read the greater part of the text, which confers general authority of the conventional character upon the company, but I should like to read two sentences and particularly connecting at line 21 on page 2:

"The authority given by the foregoing shall not include authority to incur expense other than such

as is necessary in the course of the usual and ordinary maintenance and operation of the debtor's property. Any extraordinary [1003] expense and expense incident to reorganization of the debtor shall be subject to the prior approval of the court."

I now desire to read a portion of the text of paragraph 3 of the order commencing at line 27 on page 2:

"That the debtor is authorized in its discretion from time to time, and until further order of this court, out of funds now, hereafter, or hereafter coming into its hands, to pay (A) all taxes and assessments due or to become due upon the property of the debtor; (B) all necessary expenses of operating the railroads and conducting the business of the debtor, including among other expenses the wages, salaries, and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the debtor."

I think I need not read further at this juncture. I will just make the observation that this particular provision is in a sense correlated with or perhaps supplementary to the information given by the court to the company to perform as services, including the employment of counsel, and then complements that authority by authorizing the payment of the wages, salaries and other expenses thereby incurred. I think I need not read further at this time at least from this initial order, No. 1.

I now offer as Defendant's Exhibit No. 21 a copy of an order made by the reorganization court, by

Judge St. Sure, on [1004] September 23, 1935, entitled, "Order appointing trustees." May I refer the Court at page 3 of the copy of this order which has just been received of record. I desire to read the text commencing at line 3 and extending through line 7.

"And it appearing to the court that the creditors and stockholders of the debtor represent that the appointment of trustees herein should not disturb the continuity of operations by the corporate organization of the debtor and should be at minimum cost to the debtor";

I now turn to page 4 of this order and ask leave to quote the entire text of paragrph 2, which commences on line 27 of that page:

"That said trustees shall have all the title and shall exercise, subject to the control of this court and consistent with the provisions of said amendatory Section 77, all of the powers of trustees appointed pursuant to Section 44 of said act; and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in equity proceedings; and, subject to the control of this court and jurisdiction of the Interstate Commerce Commission, as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor, which business shall be conducted in the name of the debtor by its regularly elected or appointed corporate officers, agents and [1005] employees, but under and subject to the direction of said trustees."

the fourth line from the bottom of the page. May I say by way of interpolation the court is referring here to its prior order of appointing three trustees. I now quote:

"Subsequently to the order referred to, the Bankruptcy Act was amended by Congress making it mandatory upon the court to appoint one or more trustees——"

May I interrupt the quotation because I have misstated. The court is here referring to its initial order which contemplated that there would be no trustees but the property should be operated by the debtor with Mr. Elsey as its president. May I now resume the quotation because I think that clears a misconception of which I was guilty.

"Subsequently to the order referred to, the Bankruptcy Act was amended by Congress making it mandatory upon the court to appoint one or more trustees, and providing that if one who was connected with the debtor were appointed, there should also be appointed one who had no such connection, such appointment to be subject to confirmation by the Interstate Commerce Commission. Immediately upon such amendment being made, the Court proceeded on formal hearing in the manner required by the act to appoint trustees for the property of this [1008] particular debtor. The court desired that at least one trustee should be a person residing within the district, experienced in railroad management, and familiar with the railroad of the particular debtor, and in whom the court had con-

fidence. Such a person was Mr. Elsey. The large creditors of the debtor and the controlling stockholding interest in it requested the appointment of Mr. T. M. Schumacher, Chairman of the Executive Committee of the debtor, representing that he had conducted all negotiations looking to the formulation of a plan of reorganization. Mr. Schumacher had his residence and his office in New York. The court was willing to accede to this request provided there was also appointed as trustee one who resided and had his office in this district and could attend to the immediate management and operation of the property. The selection of Mr. Elsey and Mr. Schumacher required the selection of a third trustee not connected with the debtor. As such trustee the court selected Mr. Sidney M. Ehrman, a lawyer of large experience, in whose discernment, judgment and integrity it had full confidence."

May I remind the court on that showing of the record that at the time when this appointment of trustees was made, Mr. Schumacher was the president of the plaintiff corporation. He was also the highest officer of the debtor company, being the chairman of the [1009] Executive Committee, as I recall it, and when the court says, as it does in the text which I have quoted, that the largest creditors of the debtor and the controlling stockholding interests in it requested the appointment of Mr. T. M. Schumacher, it will be understood that this controlling stockholding interest was the plaintiff corporation, namely, the holding company which owned all of the stock in the debtor company.

The Court: This order sort of demonstrates the folly of having some administrative agency 3000 miles away tell the court, which is right here in control of the situation, that it could only appoint two trustees instead of three; so the court has to go through a lot of roundabout motions in order to accomplish that which is obviously the proper thing to have done. Not that it is pertinent to this proceeding, but this order and Judge St. Sure's opinion is very clarifying on that subject.

Mr. Matthew: I think the court's observation is generally pertinent in any event. And may I add this further comment, that we have in this order and in the prior order the explanation, at least a factual explanation for the creation of the so-called dual relationships which existed throughout the trusteeship, and which have been referred to from time to time in the course of this trial. And by the order of the court, paragraph 1, the fourth page, the court orders that T. M. Schumacher and Sidney M. Ehrman be and the same are the trustees of the properties of the debtor, duly appointed by this court and ratified [1010] by the Interstate Commerce Commission.

May I now pass to the next succeeding page and to paragraph 3 of this order:

"That said trustees be and they are hereby instructed and directed to engage Charles Elsey as their agent, to operate and manage the railroad and properties of the debtor."

I now read paragraph 4:

"That said trustees shall have all the title, and shall exercise subject to the control of this court and consistent with the provisions of amendatory Section 77 of Chapter 8 of the Act of Congress relating to bankruptcy, all of the powers of trustees appointed pursuant to Section 44 of said Act, and to the extent not inconsistent with said Section 77, the powers of a receiver in equity proceedings, and subject to the control of this court and jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as it now exists or hereafter may be amended, power to conduct the business of the debtor with authority to them to conduct such business to the extent that they deem advisable in the name of the debtor and by its officers, agents and employees."

I ask leave to read one further paragraph, which is comparatively brief, and that is paragraph 5:

"That these trustees shall have all the powers, rights, privileges, duties, and obligations heretofore granted to or imposed upon the debtor by the order of this Court entered herein August 2, 1935, and any or all orders supplementary thereto or amendatory thereof, and each and all of the orders heretofore entered in this proceeding shall, except so far as the same are not inconsistent with the express provisions of this order, be of like force and effect with respect to the said trustees and the property of the debtor as though said trustees were therein specifically named in the place of the debtor, all of said orders being hereby incorporated in and made a part of this order by reference."

I think that paragraph will further respond to your Honor's inquiry as to whether certain authorities conferred by the intial order were likewise carried into effect in the orders appointing the trustees.

I now desire to offer as our next succeeding exhibit the copy of an order signed and filed by the reorganization court on December 17, 1943, entitled "Order authorizing and directing transfer of preferred and common stock of the debtor to the reorganization committee and approving action of the committee in joining in a contract for securing control of such stock and acts of the committee in connection with such contracts."

(The document referred to was thereupon received in [1012] evidence and marked Defendant's Exhibit 23.)

Mr. Matthew: The Court will have in mind that this order is related particularly to an agreement which has been referred to in this proceeding, namely, the agreement dated November 22, 1943, between the Western Pacific Railroad——

Mr. Adams: Plaintiff's Exhibit 11.

Mr. Matthew: Plaintiff's Exhibit 11—between the Western Pacific Railroad Corporation and its secured creditors and the reorganization committee, whereby it is provided among other things that the holding corporation would upon the request of the reorganization committee transfer to the committee or to its nominee all of the stock in the debtor com-

pany held by the plaintiff corporation. The reorganization committee had petitioned the court for the approval of that contract. [1013]

Mr. Matthew: I desire to read into the record at this point a portion of the order of the Court:

"Now therefore it is hereby ordered, adjudged and decreed: (1) That the Western Pacific Railroad Corporation, in order to carry out and make effective the plan of reorganization of the debtor, be and hereby is, directed to assign, transfer and deliver or cause to be assigned, transferred and delivered, to the reorganization committee or its nominee, all of the preferred and common stock of the debtor company, provided that such assignment, transfer and delivery shall be made at the time and place fixed in a written request of the reorganization committee;

"(2) That the action of the reorganization committee in joining in and becoming a party to the agreement dated November 22, 1943, with the Western Pacific Railroad Corporation and its secured creditors, a copy of which was filed with the Court on December 1, 1943, be and the same hereby is, in all respects, approved;

"(3) That the reorganization committee is hereby authorized in its discretion to make written request upon the Western Pacific Railroad Corporation for the assignment, transfer and delivery of [1014] the preferred and common stock of the debtor company and for such other action by the Western Pacific Railroad Corporation as the re-

organization committee may deem necessary or convenient for the purpose of carrying out and making effective the plan of reorganization of the debtor, and the reorganization committee is authorized to accept transfer of such stock for the purpose of carrying out and making effective the plan of reorganization of the debtor."

I think I need not read the fourth and final paragraph, which is not immediately pertinent to what I have in mind.

May I direct the Court's attention to the fact that the order of the reorganization court entered on March 3, 1944, upon the petition of the reorganization trustees, authorizing the trustees to set aside a reserve fund in the sum of $7,100,000 for contingent tax liability, has been received of record as Defendants' Exhibit No. 12. May I just state to the Court that for its convenience in examination we have reproduced in the appendix to this memorandum, commencing on page 6, the whole text of that order of the Court. It is very brief, and in its entirety is found on page 6 of Appendix A. I now offer as our next succeeding exhibit a copy of a petition of the reorganization committee filed in the reorganization court on August 23, 1944, entitled "Petition of Reorganization Committee [1015] for an Order Approving Use of the Debtor Company in Carrying Out and Making Effective the Plan Approving Proposed Amendments to the Articles of Incorporation and Proposed New By-Laws of Debtor Company and Approving Forms of Pre-

ferred and Common Stock Certificates, and Directing Action with Respect Thereto."

Mr. Phleger: I might point out that we introduced that as Plaintiff's Exhibit 12.

* * *

Mr. Matthew: The Court has heretofore received in evidence as Plaintiff's Exhibit No. 12 a copy of the petition of the reorganization committee filed on August 23, 1944, for an order approving mortgage indentures and certain other forms, and also for authority to make certain adjustments payments. [1016] I would like to refer to, and quote, one brief paragraph from that petition. This is subparagraph (c) in paragraph 11, and this paragraph relates to the earnings which has been realized from the operation of the properties in the hands of the trustees from January 1, 1939, through the calendar year 1943, subject to the following comments, and certain of these comments are in subparagraph (c), which I read as follows:

"The amount of such earnings for the calendar year 1943 is before deduction of a special funded tax reserve which has been set up in the amount of $7,100,000. However, after deduction of such reserve, there would still remain the amount of $11,583,299.07, which would have been available under the provisions of the plan for the payment of full interest on the general mortgage income bonds, the sinking fund requirements and a dividend of 5% on the preferred stock. And after such payment a balance of $8,929,844.07, available for dividends,

on the common stock and for other corporate purposes, would have remained."

There has also been received as Plaintiff's Exhibit 13 a copy of the court order of September 25, 1944, responsive to the petition to which I have just referred, approving the mortgage indentures and other forms, and also authorizing the adjustment payments to which I have previously referred. I would like to quote briefly from that order of the court. This is paragraph 6, appearing upon page 7 of the copy furnished for the record. I now read:

"That the balance of the available net income of the debtor and its subsidiaries for the years 1939 to 1943 inclusive, remaining after the payments directed in paragraph 5 hereof, be applied as follows:

A. $1,698,562.25 to be credited by the reorganized company to the capital fund account within 30 days after the consummation of the plan; provided, however, that such account shall be reduced prior to, or at the end of, such 30 day period, to $1,000,000, either by proper charges to such account under the provisions of the plan or by reducing said account by the amount of the excess over $1,000,000.

B. $424,360 to be applied to the making of the sinking fund payments required by subdivision L of the plan in respect to the general mortgage, 4½% income bonds, Series A and C; $20,658,938.92, or the remaining balance of said available net income, to be applied to any proper corporate purpose [1018] of the reorganized company."

I now desire to offer as our next succeeding exhibit a copy of an order entered by the reorganization court on October 23, 1944, entitled, "Order Approving Designation by the Reorganization Committee Under the Plan of Reorganization of the Debtor of the Trustees, Transfer Agents, Registrars, Scrip Agents, Depositary and Exchange Agent, and Engraver and Printer of Securities, for Purposes of the Plan of Reorganization and Authorizing Agreements or Arrangements Proposed by Said Committee for their Compensation and Expenses."

And if I may continue the offer for a moment, I also offer a copy of the order made by the reorganization court on the same date, namely, October 23, 1944, entitled "Order Making an Allowance to be Paid out of the Debtor's Estate for Certain Expenses Incurred and to be Incurred in Connection with the Proceedings and Plan or Reorganization by the Reorganization Committee."

I think I should state to the Court and to counsel that I attach no particular significance to either of these two orders. They are offered for the record merely for the purpose of accounting for them in this respect: In the final order of the court terminating the proceedings, there is a reference to a reservation of authority over expenses made by an order of the court entered on October 23, 1944; so without these two orders in the record we might not have fully accounted [1019] for the orders which are referred to by certain dates or otherwise in the final order of the court. For that purpose

only I offer these two orders to which I have just referred.

The Clerk: Are you offering them as one exhibit?

Mr. Matthew: Well, I would think it might be preferable to have them given separate exhibit numbers, but I will defer to the custom. I think they could be designated separately. They are companion orders.

The Clerk: 24-A and -B.

(Orders of reorganization court of October 23, 1944, were received in evidence and marked Defendants' Exhibits 24-A and 24-B.)

Mr. Matthew: The Court has also heretofore received as Plaintiff's Exhibit No. 14 a copy of the court order of November 27, 1944, directing the revesting of the debtor's property in the reorganized company and authorizing and directing the carrying out of the plan. I ask leave of the Court to quote rather extensively from that order. It is one of the most important orders in the reorganization proceeding. It is very important, or has a direct bearing upon various issues in the case—particularly upon the defenses predicated upon the bars of the reorganization proceedings. [1020]

* * *

I would like to read first a brief paragraph, (e), in the preliminary findings of the court in this revesting order, November 27, 1944, subparagraph (e), reading as follows:

"The proposed agreement attached to this order as Exhibit D provides for the assumption of obligations, liabilities, contracts, agreements and leases which are to be assumed by the reorganized company pursuant to the plan of reorganization. It is consistent with and conforms to the plan of reorganization and should be approved."

I now read a part of paragraph 9 of this order:

"The Western Pacific Railroad Company shall assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by the debtor's trustees and remaining in effect on the date of the actual delivery of possession by said trustees and the actual termination of the responsibility of the debtor's trustees for the operation of the debtor's properties as hereinafter provided in this order, and which have heretofore been assumed [1024] or not disaffirmed by said trustees which remained in effect on December 31, 1944, together with the expenses of this reorganization as allowed by the court within the maximum fixed by the Interstate Commerce Commission."

Now I come to a later portion of this same paragraph 9 of the order, being a part of subparagraph (e), and before I undertake to read that text, may I ask the Court to have in mind that included in the text is a reference to the agreement of assumption and certain language of the order which we think is very pertinent as to its meaning and effect. I now read:

"And, further, without limitation of the generality of the obligations hereinabove imposed upon the Western Pacific Railroad Company, that company shall (a) specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933"—I omit some further text there relating to the payment of the coupons, which is not immediately germane to what I have in mind—and also simply refer to item (b), which refers to the payments of taxes to the United States from the debtor or the debtor's trustees. I now continue: "The above ordered [1025] assumption and adoption shall be evidenced by the execution by said railroad company of the agreement of assumption referred to in paragraph '8(a)' above and of such other instruments of assumption as may be appropriate; and said railroad company shall succeed to all rights, privileges, liabilities and duties of the debtor or the debtor's trustees under such contracts, leases and agreements; provided, however, that this order shall not be construed as a modification of any former orders of this court barring or settling claims against the debtor or the debtor's trustees, and said railroad company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby canceled and discharged, and only such obligations and liabilities

as are preserved under the plan of reorganization and are not limited or discharged by the prior orders of this court."

I will omit reading paragraph 10. I think that paragraph has been reproduced in Appendix 8 to our preliminary memorandum. I do desire, however, to read a portion of paragraph 11:

"The date for the consummation of the plan of reorganization, and the date upon which the first mortgage bondholders and secured creditors of the debtor shall be entitled to receive in exchange for their old securities, the new securities and adjustment payments under the plan, as heretofore approved and authorized by this court, is hereby fixed as December 29, 1944; all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as trustees herein, shall vest in and be and become the absolute property of the Western Pacific Railroad Company on said date, free and clear of all rights, claims, liens and interests of said trustees, the former stockholders and creditors of the debtor, and of all other persons, firms and corporations whatsoever, except as is otherwise provided in this order, and the said railroad company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided;"

I think I need not read further from that paragraph.

May I just refer the Court very briefly to paragraph 15 of the same order, which I need not read. It will suffice if [1027] I characterize it as being the conventional injunction against suit and actions against the reorganized company.

I shall finally direct the Court's attention to the closing paragraph of the revesting order, namely, paragraph 20, which shows the extent to which jurisdiction has been reserved. I shall take only a moment to read it:

"This court reserves jurisdiction for all purposes necessary to put into effect and carry out this order and the plan of reorganization, including, without limiting the generality of this reservation, the right to enter, upon such notice as this court may direct, any further order or orders terminating the right to receive any securities or payments of cash under the plan of reorganization; and this court expressly reserves jurisdiction to determine all costs and expenses of administration, including the amounts to be paid as compensation for services heretofore or hereafter rendered or reimbursement for expenses heretofore or hereafter incurred by the reorganization committee and its attorneys, or by any other person, firm or corporation, in connection with this proceeding and the plan of reorganization, and generally in connection with putting into effect and carrying out the plan of reorganization." [1028]

I think I need not read further from that particular order.

I think that the ninth and final report of accounting of the reorganization trustees has not yet been offered in evidence. I offer at this time a copy of the ninth and final report and accounting by the trustees of the property of the debtor and petition for approval of their acts and accounts and for their discharge as trustees and for the exoneration of their bonds filed in the reorganization court on April 30, 1945, and I ask that it be received as the next succeeding exhibit number.

(The document referred to was received in evidence and marked Defendants' Exhibit 25.)

Mr. Matthew: I offer next copies of the court order of May 21, 1945, approving the ninth and final report and accounting of the reorganization trustees and discharging them as trustees, signed and filed on May 21, 1945. I think that a copy of that has not yet been received in evidence, although reference has been made to it. I see that I failed to bring a copy of that particular order with me. Might I ask the Court for an exhibit number at this time and to produce it at the next session of the court on Tuesday?

The Court: Very well.

(The document referred to was received in evidence and deemed marked Defendants' Exhibit 26.)

Mr. Matthew: I now offer a report of the reorganization [1029] trustees filed in the reorganization court on May 21, 1945, entitled briefly, "A Re-

view of the Operations of the Company's Railroad in the Jurisdiction of the District Court of the United States for the Northern District of California During Proceedings for Reorganization under Section 77 of the Bankruptcy Act, August 2, 1935, to December 31, 1944.".

Copies of this report were transmitted to all parties of record to the reorganization proceeding and to all counsel for the parties, as shown by an affidavit in our files. May I state that this is a rather convenient review of the entire period of the trusteeship, which was received by the court at the time when the trustees were heard upon their petition for the approval of their ninth and final report and accounting and for their discharge. It has in it likewise certain historical matter which may be of some interest to the Court. I do not offer it for any but a single purpose. I desire to offer it for the text appearing on pages 43 and 44 under the title "Income and Excess Profits Taxes 1943 to 1944."

Mr. Phleger: May it please the Court, I do not think this should be admitted in evidence. It is a printed document of some sixty pages or over. It is not a document upon which the court acted at all. I am willing, if counsel so states, to agree that the two paragraphs he refers to were in fact filed by the court, if that is all he wants to prove by it, but frankly, I have never seen it before and it contains a multitude [1030] of recitals of fact running back for years. I do not know what you seek to

prove, Mr. Matthew. Maybe I can accommodate you by a stipulation.

Mr. Matthew: Well, if the Court please, one of the matters of controversy in this case is the extent to which notice of these income tax returns and the use of the stock loss in the consolidated returns, with the resultant reduction in tax liabilities, has been brought home to the parties in the cause, including particularly the plaintiff corporation and its counsel. We have here a report of the trustees made to the court, reviewing their entire period of service, and again including very specific text about the income and excess profits taxes for the so-called critical period of 1942, 1943 and 1944. I have in my file here an affidavit showing that copies of that report were transmitted on the 22nd day of May, 1945, to a rather considerable list of persons, including the Western Pacific Railroad Corporation, its counsel, Mr. Nicodemus, and, if you will pardon me, Mr. Phleger, a copy also went to your firm, which, as you know, at that time was counsel to, I think, the Reconstruction Finance Corporation, counsel of record. It seems to me whenever we bring home fair notice in these official publications served upon the counsel to the plaintiff corporation and served upon the corporation itself of the essentials of these income tax returns, we have some evidence which is of definite value and important to our defenses. [1031]

* * *

Mr. Matthew: That is it.

The Court: And what gave rise to the discussion was whether or not that notice, at that time, had legal validity; and I take it that you can stipulate, I suppose, that you are only offering that portion of this report on pages 43 and 44, that have to do with the tax matters.

Mr. Matthew: That is true, and I am willing to withdraw my offer of the document in its entirety, if it is desired, because it is perhaps more comprehensive,—but I would like to read into the record at least the text to which I have referred.

Mr. Phleger: Your Honor, I have no objection to his doing that, if he will also state the date on which he states that it [1036] was sent out to this list.

Mr. Mathew: I can give you that date.

Mr. Phleger: I am not admitting its relevancy, your Honor; I will stipulate to it subject to our objection as to relevance.

Mr. Matthew: Well, I have in my files an affidavit or a copy, made on the 22nd day of May, 1945, by——

Mr. Phleger: What is the date?

Mr. Mathew: The date of the affidavit is May 22, 1945, and it recites that on the 15th day of May, 1945, copies of this report were mailed to each of the parties named on this list, and among them are, as I stated, the Western Pacific Railroad Corporation and Mr. Nicodemus.

Now I don't want to carry the argument to the court any further as to what might be the scope of

the jurisdiction of a court, but I am very certain that there is a period in there in which that claim might well have been entertained by the court, and that will require a good deal of discussion when we come to arguing the defenses of the bar.

The Court: Yes.

Mr. Matthew: And I wouldn't want to mislead your Honor as to just how far that argument, or in what respect that argument will go. There are a good many important legal principles and qualifying principles involved. But I do think it is important to our case and perfectly in order, to bring home to the plaintiff corporation and its counsel the fact that at this [1037] particular time a copy of this report was at least sent to them, and that it did have this text, referring to the income and excess profits taxes for the years 1942, 1943 and 1944.

Now is it the court's suggestion that the offer of the entire document be withdrawn, and that I may offer the text to which I have referred——

The Court: I think that would be better, Mr. Matthew.

The Clerk: The offer is withdrawn.

Mr. Matthew: Then I withdraw the offer of the review in its entirety, and I ask leave to read into the record a paragraph found on pages 43 and 44 of the report to which I have referred, under the caption, "Income and excess profits taxes 1943, 1944."

"The income account of the trustees, appendix A,

show that no federal income or excess profits taxes were accrued for the year 1943 or the first four months of 1944. For those periods, as for the several preceding years, tax returns were filed on a consolidated basis by the Western Pacific Railroad Corporation, a holding corporation which was the owner of all of the capital stock of the railroad company until May 1, 1944, when all of said stock was transferred to the reorganization committee as part of the procedure for effectuating the plan of reorganization. The trustees were advised that they had no liability for federal income or excess profits [1038] taxes in 1943 or the first four months of 1944, because of the loss suffered by the holding corporation when the United States Supreme Court finally approved the reorganization plan, which rendered the railroad Company's capital stock 'without equity or value'.

"However, the commissioner of Internal Revenue has not audited the 1943 and 1944 returns, and the reorganization trustees, pursuant to authority of the court, established a reserve fund in the amount of $7,100,000, to provide against the contingency that some tax liability of the railroad company might subsequently be asserted by the commissioner of Internal Revenue for the year 1943."

Then follows a sentence in parenthesis, reading as follows:

"(The Board of Directors of the company, on March 26, 1945, established an additional reserve fund in the amount of $3,000,000, to cover a similar

contingency in respect of the first four months of 1944)".

Mr. Phleger: Just a moment; I am puzzled. That recites that the returns have ben filed for '44, but have not yet been audited. According to the dates you gave, Mr. Matthew, that was sent out a month before the 1944 returns were filed.

Mr. Clark: That is exactly what I was going to say.

Mr. Adams: After the tentative returns and before the final returns had been filed.

Mr. Phleger: How could they be? Well——

Mr. Clark: No, this language is, may it please, your Honor, "The income account of the trustees, appendix A, shows that no federal income or excess profits tax were accrued for 1943 or the first four months of 1944. For those periods, as for several preceding years, tax returns were filed on a consolidated basis by the Western Pacific Railroad Corporation, a holding corporation, etc.,——"

Now this document, so reciting, went out according to the date given by Mr. Matthew, on May 15; but the returns which it recites were filed for the four months of 1944 were not actually filed until June 15 of 1945. In other words, they hadn't been filed at the time this was so reported.

Mr. Adams: Well, now, counsel will stipulate, no doubt, your Honor, that the tentative returns—and that tentative return was a tentative return of the plaintiff corporation for the year 1944—were filed in March, 1945?

Mr. Clark: No, the only return we know about is the one filed on June 15, 1945.

Mr. Adams: Well, we are speaking of the final return.

Mr. Clark: Right. For the first four months of 1944.

Mr. Phleger: No, I think there was an extension of time; but no returns were field. [1040]

* * *

Mr. Adams: Now, if your Honor please, if I might interrupt for a moment so that we might have the record correct; and I think counsel, if I call counsel's attention to Interveners' 80, a document not in the record in this case, but taken upon depositions, that we can get a stipulation without the necessity of introducing Interveners' 80.

Mr. Clark: Wait just a moment until we get it.

Mr. Adams: Please do. Look at the second paragraph.

Mr. Phleger: I think that the exhibits in evidence will show that an extension to file the returns was granted contingent upon tentative returns being filed; so I would assume they were filed.

Mr. Adams: I made a statement, and I would like to get the statement and the record cleared up.

Mr. Phleger: I think it is right in the record now, Mr. Adams, in the exhibits which we introduced, and the 1944 tax return. It is included in there. [1041]

Mr. Adams: Well, if your Honor please, may I

simply have the record cleared up right now, and I think it can be if counsel, all of whom want to have the facts correctly stated, will refer to Interveners' Exhibit 80. I think they will find confirmation, this being a telegram of Mrach 1, 1948, speaking of the fact that "There is to be filed a tentafive consolidated return for the corporation for the entire year, including its subsidiaries to May 1."

I think your Honor will find, if counsel will agree, that that was the procedure that was followed.

Mr. Clark: Well, I think maybe your Honor would find it best simply to put this——

Mr. Phleger: I don't think you have to do that. The exhibit in evidence shows the application for extension of time, and it shows the tentative return. This is Plaintiff's Exhibit for the year 1944.

Mr. Adams: Yes, and the tentative return filed covered the corporation for the whole year and the subsidiaries for the first four months.

Mr. Phleger: Correct.

The Court: So that when they refer to this excerpt that Mr. Matthew has been reading from to a return for 1944, they are referring to a tentative return, rather than the final return?

Mr. Phleger: Yes.

Mr. Adams: Well, I think the significant fact is, your [1042] Honor, that the tentative return was a return of the holding company for the whole year and for the subsidiaries for the first four months; so that that had become a determined procedure before this report was put out.

Mr. Matthew: May I just make this further comment, without encroaching upon your Honor's patience further? Irrespective of any possible inaccuracy in that particular statement as to the 1944 returns, of course the important and significant part of this text is that the part which relates to the fact that the stock loss of he holding company was used in the returns, with a resultant deduction in tax liability——

The Court: You have read that part, Mr. Matthew, and called attention to the fact that it was included in this report and then the report was mailed out to the various persons whom you named.

Mr. Matthew: Yes. May I just add this, if your Honor please: I haven't responded fully to your Honor's inquiry as to the powers and jurisdiction of the reorganization court and other courts, but in due course I know we will bring to your Honor many authorities which deal with the question of jurisdiction, and to what extent that jurisdiction may be reserved or has been reserved, and it would take a fairly considerable time to deal with those issues right now. So I trust your Honor will understand that in due course we will cover that field very fully. But we think that this particular text, having been [1043] brought to the attention of counsel for the plaintiff corporation and the corporation itself, as of the date shown, is pertinent to the case. I take it that your Honor may desire to adjourn at this time?

The Court: You have some more documents that you are going to put in, Mr. Matthew?

Mr. Matthew: Yes, but they would take some little while. May I suggest this, if your Honor please: We would like to offer for the record the chart which has been prepared by us and which has been hanging in the courtroom, and which counsel have no doubt examined, that of reorganization and tax chronology from 1935 to 1947. I think that every order therein listed has been covered, either by exhibits offered by plaintiffs or interveners or by defendants, with the exception of the closing order, March 28, 1946. Reference has been made to that order, and it will be offered. I think that the data on the chart is correct, at least as to the best of our knowledge and belief, and I simply call to the Court's attention the fact that in the scheme on the left-hand side of the chart we segregate the operations in 1935 with the debtor in possession, from the succeeding operations by the reorganization trustees to the end of 1944, followed by the period mentioned in 1945 when the property was revested, and thereafter operated by the reorganized company. We would like to offer that chart in evidence.

Mr. Phleger: May it please the Court, we will check that [1044] over the week-end; I don't know, I haven't examined it. Perhaps it is all right, but we would like to look at it. We probably will be able to stipulate.

The Court: You are offering it as a summary of the evidence offered by the defendant?

Mr. Matthew: Yes, to the extent that it appears on the chart. We have here a chronology of significant orders and significant events which we think will be helpful to the Court.

The Court: I will admit it for the same purposes I admitted the plaintiff's chart and to the same extent; and if you want to correct anything on it, you may correct it.

The Clerk: 27.

(Chart referred to, defendants' reorganization and tax chronology from 1934 to 1947, was received in evidence and marked Defendants' Exhibit 27.) [1045]

* * *

Mr. Matthew: If the Court please, may the record show that I have this morning handed to the Clerk for incorporation into the record a copy of the court order of May 21, 1945, approving the ninth and final report of the reorganization trustees and discharging them as trustees. I offered that report at Friday's session, the offer was accepted and the court assigned Exhibit No. 26 to it. I now furnish a copy for the record and have likewise furnished copies to counsel.

The Court will recall that toward the close of the last session, we offered and the Court received as Exhibit No. 27 the reorganization and tax chronology chart covering a period from 1935 to 1947,

which hangs upon the easel here in the courtroom (indicating).

May I call the Court's attention at this time to a further chronology which has been incorporated as Appendix B in the defendant Western Pacific Railroad Company's preliminary memorandum. That chronology is a little more comprehensive than the chronology which appears on Exhibit No. 27. The Court will notice that it has been prepared in two parallel columns, the one to the left being identified as the chronology of reorganization proceedings and the one on the right in red type, being [1046] identified as the chronology of tax returns and related occurrences.

We believe that the chronology there shown is accurate and since it is somewhat more complete, that is, has more detail in it, than the chronology appearing on Exhibit No. 27, we think the Court will find it available for convenient reference and have some assistance from it in that respect.

We would now request that the opinion and order of the Interstate Commerce Commission approving the plan of reorganization of the Western Pacific Railroad Company, issued under date of June 21, 1939, given docket No. 10913 and reported in 233 I.C.C. 409, be deemed to be a part of the record in this proceeding. I am inclined to think that that was the intent of counsel for the plaintiff in referring to the Commission's report and order. He quoted briefly from it. As I understood, the implication at least of his observation was, that that was his thought at the time.

Mr. Phleger: That was our intention.

Mr. Matthew: Yes, very well.

Now that is understood, we are content. And may I also suggest in that connection, that the earlier opinion and order, the Interstate Commerce Commission in the same proceeding—that is, the opinion and order dated October 10, 1938, and reported in 230 I.C.C. 61—be likewise deemed a part of the record in this proceeding. [1047]

I make that request particularly because that is in some respects a little more comprehensive as to history of the Western Pacific Railroad Company and of the reorganization proceeding. Of course the plan which was originally promulgated in that earlier report was modified by the later order of the Commission to which I have already referred.

Mr. Phleger: No objection.

Mr. Matthew: Very well.

I now offer a copy of the Court order of Feb. 21, 1944, entitled, "Order providing for hearing upon petition for authority to establish reserve fund for contingent liabilities." The Court will have in mind that the petition of the trustees is in evidence as plaintiff's Exhibit No. 58 and that the court order granting the petition for the establishment of the fund is in evidence as Defendant's Exhibit No. 12. We would also like to have in evidence this court order of Feb. 21, 1944, providing for a hearing upon the petition and fixing a date for it.

The Clerk: Exhibit 28.

(Court order dated Feb. 21, 1944, referred to above, was thereupon received in evidence and marked Defendant's Exhibit 28.)

Mr. Matthew: Now may I request a stipulation from counsel that on the 23rd day of February, 1944, copies of the petition of the trustees in this matter, together with copies of the order providing for a hearing upon the petition, just received as Exhibit No. 28, were mailed to all parties of record, including [1048] the Western Pacific Railroad Corporation, as well as to counsel, including Mr. Nicodemus and Judge Sloss. I am prepared to make that proof, but I think counsel may be willing to accept that as a stipulation.

Mr. Phleger: We will.

Mr. Clark: So stipulated.

Mr. Matthew: We now offer a copy of the court order of December 11, 1939, granting the petition of intervention of the Western Pacific Railroad Corporation.

The Clerk: Exhibit No. 29.

(Copy of court order dated December 11, 1939, referred to above, was received in evidence and marked Defendant's Exhibit No. 29.)

Mr. Matthew: May I say, with the approval of Court and consent of counsel, that this order granting the petition of intervention of the Western Pacific Railroad Corporation was made upon the petition of the Western Pacific Railroad Corporation, which was filed by Judge M. C. Sloss of the

firm of Sloss, Turner & Finney, on December 7, 1939; order granting leave to file the petition of intervention was dated December 7, 1939. I think it is unnecessary to offer for the record either the petition of the corporation to which I referred or the preliminary order made by the Court granting leave to file it. Is that statement acceptable to counsel?

Mr. Clark: Yes, indeed. [1049]

Mr. Phleger: Yes.

Mr. Matthew: That last exhibit——?

The Clerk: That last number was 29.

Mr. Matthew: We next offer a copy of the petition of the reorganization committee for approval of their expenses and for a final order discharging the committee and terminating the proceedings in the reorganization court, filed in the reorganization court on March 18, 1946.

The Clerk: Exhibit 30.

(Copy of petition and order of March 18, 1946, was thereupon received in evidence and marked Defendant's Exhibit No. 30.)

Mr. Matthew: I next offer a copy of the order of the court entered on March 18, 1946, entitled, "Order providing for hearing upon petition of reorganization committee for approval of their expenses and for a final order discharging the committee and terminating the proceeding.

Mr. Phleger: This is the committee, as distinguished from the trustees?

Mr. Matthew: Oh, yes, and the petition which has just been received in evidence is a petition of the committee.

Mr. Phleger: I understand, correct.

Mr. Matthew: And this is the order of the court providing for a hearing upon the petition.

The Clerk: No. 31.

(Court order dated March 18, 1946, was thereupon received [1050] in evidence and marked Defendant's Exhibit No. 31.)

Mr. Matthew: I desire now to offer a copy of the final order of the reorganization court, responsive to the petition which has just been received, signed on March 28, 1946.

The Clerk: Exhibit 32.

(Final order signed March 28, 1946, was thereupon received in evidence and marked Defendant's Exhibit No. 32.)

Mr. Matthew: The Court may recall that I had in mind perhaps reading some portion of the text of the final order which has just been received; but it seems to me upon reflection that the Court's observations in that connection are well advised, and now that we have physically in the record a copy of that final order, it will serve no useful purpose and would simply be time-consuming to read any part of the text of that order into the record. But may I call the Court's attention to the fact that we have reproduced in Appendix A to the preliminary memorandum of defendant, the Western Pacific

Railroad Company, certain portions of the text of that final order appearing upon pages 11 to 14 inclusive of Appendix A. Of course the Court will understand that we rely upon the entire text of that final order.

May I state to the Court that we have no further documentary material to offer at the present time from the record in the reorganization proceeding. It is possible that we might hereafter ask leave to supply additional documentary material [1051] from that record, but as we are presently advised, we have nothing further in prospect to offer from that record.

Mr. Adams: If your Honor please, upon the opening day's session of court, your Honor inquired (the reference is page 11 of the transcript) with regard to the effect of the plan upon the elimination or reduction of creditors' claims. At that time I made a response which was inaccurate, and I would like to correct it. I refer to the statement beginning at the bottom of page 11 and over on page 12, and particularly the statement on page 12, lines 10 to 13, in my response, which I stated, "One of the secured creditors, the A. C. James Company, was not fully paid." That is correct. Then I said, Page 12, lines 10 to 13, "The amount is not decipherable from the decision of the Supreme Court or the Interstate Commerce Commission. I think that is a correct statement."

Now the fact is, your Honor, having looked at this further, the precise amount by which the A. C.

James Company was not paid is, I believe, decipherable from the record; and I have prepared a memorandum on one page quoting paragraph 5 of paragraph P of the plan as prescribed by the Interstate Commerce Commission and then stating certain figures; that is to say, the figures that appear in paragraph 5 as to the amount of the claim of the A. C. James Company and as to the securities allotted to that company with a calculation showing the amount of the claim, principal and interest, to January 1, 1939, which was the date of the plan, exceeded by approximately three and a half million dollars the securities received by that claimant, giving to the bonds and preferred stock that claimant received, par value, and assigning to the common stock that claimant received the value of $62 a share, which was assigned to the stock in the Interstate Commerce Commission plan. And I should like to offer this as being identified as a single sheet which I have described, as our computation, numbered Defendant's Exhibit No. 33, and I will hand copies to counsel upon the understanding that counsel, of course can check and correct if they should find any errors or inaccuracy in the statement that I offer. [1053]

Mr. Phleger: May it please the Court, this is simply a computation. The material is in the record. I suggest that it is proper material to be included in their brief, not a matter of proof at all.

Mr. Clark: Or in the form of a memorandum simply handed up to your Honor, but not an exhibit. It is all in the record.

Mr. Adams: It would be a matter of convenience to the Court. I suppose that is why I handed it in.

The Court: You have these summaries in already, which perhaps is not altogether proper evidence, but it may be admitted as a computation subject to correction.

(The computation referred to was received in evidence and marked Defendants' Exhibit 33.) [1054]

* * *

May I call Mr. Ehrman.

SIDNEY M. EHRMAN

called on behalf of the defendants; sworn.

The Clerk: Will you state your name to the Court.

The Witness: Sidney M. Ehrman.

* * *

Direct Examination

By Mr. Adams:

Q. Mr. Ehrman, you are a resident of San Francisco and you are the senior member of the attorneys' firm of Heller, Ehrman, White & McAuliffe? A. Yes.

Mr. Adams: If you will pardon my going ahead with this rather rapidly, I think perhaps I can save time, your Honor, in stating what I have in mind by way of leading questions on this subject.

The Court: All right.

(Testimony of Sidney M. Ehrman.)

Q. (By Mr. Adams): How long have you been engaged in law practice, Mr. Ehrman?

The Court: Why don't you make a general statement?

Mr. Adams: Very well, I shall, your Honor.

The Court: Just state what you want to show.

Mr. Adams: Mr. Ehrman has been engaged in the law practice since 1897. He has been a director of numerous corporations, including banking and financial institutions, and has frequently dealt with business and financial matters, reorganizations and the like. He has served for many years on the finance committee of the Board of Regents of the University of California. In the course of his practice he has had occasion to consider the effect of taxes upon corporate and business transactions, and I might ask Mr. Ehrman this question:

Q. How frequently would you say that you consider such tax [1057] effects?

A. I should say in the last twenty years particularly, and before that, the tax effects would have to be weighed in almost every corporate matter that was under consideration where money was involved, and particularly in the matter of consolidations and mergers and other corporate procedures of a like nature.

Mr. Adams: May I add this further, your Honor: Mr. Ehrman has been a director of the California State Chamber of Commerce for ten years, and during the same period chairman of

(Testimony of Sidney M. Ehrman.)

the statewide Tax Committee of the California State Chamber of Commerce. He was one of the reorganization trustees in the reorganization of the Western Pacific Railroad Company, serving as such from his appointment, November 9, 1935, until his discharge, May 21, 1945, and he and his co-trustee, Mr. Schumacher, during that period had charge of the operation of the railroad until the end of 1944, when the railroad property was reconveyed to the reorganized railroad company.

Q. And it is the fact, is it not, Mr. Ehrman, that during that time Charles Elsey as the trustees' agent selected by the court was in direct charge of the operation of the railroad under the trustees?

A. That is correct.

Q. Did you seek appointment, Mr. Ehrman, as reorganization trustee of the Western Pacific Railroad Company? A. No, I did not. [1058]

Q. Who first suggested to you that you become one of the trustees?

A. His Honor Judge St. Sure.

The Court: I was just going to answer that question for you. I happen to know about that, not at the time, but Judge St. Sure told me about it. Judge St. Sure did not care very much about Mr. Ehrman, so that is why he appointed him.

Is that right?

The Witness: Yes. When I came to the office a little after nine o'clock I had a message there that Judge St. Sure wanted to see me. As a mat-

(Testimony of Sidney M. Ehrman.)

ter of fact, I inquired around whether anything was wrong with any cases we had pending before Judge St. Sure. I hadn't the slightest notion that a petition had been filed by the Western Pacific Railroad Company. He sent for me and then he told me he would like me to act as one of the trustees; Mr. Schumacher would be the other. That is the first I knew about it, and that is how it came about.

Mr. Adams: Your Honor, may I also ask counsel to follow these statements I am about to make about Mr. Ehrman's financial disinterest in the Western Pacific:

At no time during his trusteeship did he have any financial interest in the Western Pacific Railroad Company or any of its subsidiaries. Mrs. Ehrman had some Western Pacific bonds, but she sold those at the time he became a trustee. At no time during his trusteeship did he have any financial interest in the [1059] Western Pacific Railroad Corporation. At no time during his trusteeship did he have any financial interest in the Metropolitan Life Insurance Company, the Prudential Life Insurance Company, the Chase National Bank of New York, or the Central Hanover Bank. At no time during his trusteeship did he have any financial interest in the A. C. James Company or the Curtis Southwestern Corporation or Company or any company of Arthur Curtis James or any financial interest in the business or investment affairs

(Testimony of Sidney M. Ehrman.)

of Mr. James or the James Foundation of New York, Inc. At no time during the trusteeship did he or his firm at any time represent or act as attorneys for any of the companies I have named or for Arthur Curtis James. At no time during the trusteeship did Mr. Ehrman at any time have any personal interest, financial or otherwise, in any matter or transaction with which he dealt as trustee or any interest or representation in such matters other than the performance of his duties as trustee.

I take it that is all agreeable to counsel?

Mr. Clark: It is conceded.

Mr. Phleger: Yes.

Q. (By Mr. Adams): Mr. Ehrman, throughout your trusteeship did you exercise your independent judgment regarding all matters with which you dealt as trustee? A. I did.

Mr. Adams: May I read further, your Honor, and I will tell [1060] counsel the next point, that is, Mr. Ehrman's non-participation with respect to the plan of reorganization. I will read this briefly. At the beginning Mr. Ehrman made some suggestions to Mr. Schumacher regarding provisions of the original debtor's plan. Thereafter he had nothing to do with the plan of reorganization or plans of reorganization. Perhaps I should ask these questions of the witness.

Q. Did you consider, Mr. Ehrman, that as trustee you were concerned or not with the formulation of the plan?

(Testimony of Sidney M. Ehrman.)

A. I did not think the trustees had anything to do with that; not concerned with it.

Q. Did you consider that the trustees were concerned with the rights of claimants to participation under the plan?

A. I did not quite get that question.

Q. Did you consider that the trustees were concerned with the rights of claimants to participation under the plan? A. No, I did not.

Q. Did you at any time ever take any position as to the rights of any claimants?

A. Not at all. The trustees always tried to maintain an absolutely neutral position.

Q. Mr. Ehrman, who was in the control of the railroad's property and business during the period of trusteeship from November 9, 1935, to the end of 1944?

A. I should say the Court was in control represented by the [1061] trustees.

Q. And to whom did the trustees look for the direction of their conduct as trustees throughout this period? A. The Court.

Q. To whom did they look for advice with regard to business matters in their charge?

A. Mr. Elsey was the agent for operation, and they consulted with him. I do not think they looked for advice on conclusions that were reached. They made their own conclusions.

Q. To whom did the trustees look for advice on legal matters?

(Testimony of Sidney M. Ehrman.)

A. In the first instance to Warren Olney, Judge Warren Olney, Jr., who represented the trustees, and after his death to Mr. Allan Matthew, both of them appointed by the Court.

Q. Mr. Ehrman, will you tell the Court generally what work you did as trustee.

A. Well, I covered a rather wide range. I was in touch with Mr. Elsey, who was operating the railroad, constantly. I suppose I saw him on an average maybe twice a week. I telephoned to him four or five times a week asking him about things. That involved, of course, the reconstruction of the road and a great many details connected with that; the purchase of equipment from time to time, and practically all matters concerned, at least from a statistical standpoint, with the operation of the railroad. I was not an operating man. I would not know how to operate a railroad except on paper. But I kept in touch [1062] with what was being done. In the early part of the reorganization I devoted myself particularly to the financial side of the matter. We had to get money to rebuild that road and we had to issue trustees certificates, and the question was how to sell them and where to sell them and to whom, and I concerned myself with that particularly. I went to New York on it, I think two or three years, when they were sold, and had to be sold over again to new purchasers, until finally Mr. Jones made an agreement with us, with the Reconstruction Finance Corporation,

(Testimony of Sidney M. Ehrman.)

and took over the outstanding certificates, and it continued that way until the end of the trusteeship, although we paid him down some $7,000,000, I think—$6,000,000 first, and I think we gave him an extra million afterwards. We could have paid him off, but he wouldn't take it because he had a contract for the bonds.

Q. Mr. Ehrman, did the trustees operate the subsidiary properties, such as the Sacramento Northern and the Tidewater Southern, as a part of the railroad system?

A. I think all of those subsidiaries of the railroad company were included. They were operated, I know, and I spent some time particularly, I think, in considering the Sacramento Northern Railroad. At one time in the beginning of the trusteeship we were seriously considering ceasing operation, particularly passenger operation, and also abandoning parts of the road that were already pretty thoroughly served by the Western [1063] Pacific Railroad. No action, however, was ever taken in that respect, and of course when the war came on there was occasion to use the Sacramento Northern constantly. It was a great help.

Q. Will you state, please, to the Court generally the nature and scope of your contacts with the bankruptcy judge, Judge St. Sure, during the reorganization.

A. I saw Judge St. Sure very frequently during the reorganization, not only when proceedings took place in his court, but at the lunch hour. I

(Testimony of Sidney M. Ehrman.)

felt that I always wanted to report to him what was going on. He was very interested in knowing what was going on, and I wanted him at least to give an assent or not dissent from some of the things we were doing in the operation of the road, spending a good deal of money, and I felt the responsibility and I wanted the Court to know it.

Q. Do you recall any expressions on the part of Judge St. Sure regarding the services of your co-trustee, Mr. Schumacher?

A. Do I recall what? I did not quite get the question.

Q. Do you recall any expressions on the part of the bankruptcy court, Judge St. Sure——

Mr. Clark: We will object to that on the ground it is incompetent, irrelevant and immaterial to any issue in this case. [1064]

The Court: Well, ask him that question. [1068]

The Witness: Did Judge St. Sure know about it? Yes, he knew that we continued the employment of Mr. Nicodemus and his firm, Pierce & Greer, which had existed before the bankruptcy was filed, before the proceeding was filed.

Q. (By Mr. Adams): Now, Mr. Ehrman, there is in the record of this proceeding now paper memoranda showing that in June, 1943, the trustees assumed the whole expense of the New York office from that time forward. Was Judge St. Sure informed of those arrangements at or about that time?

A. Yes, I informed him about it.

(Testimony of Sidney M. Ehrman.)

Q. Did he express any disapproval of that arrangement?

A. No. He asked me whether it was necessary to continue the New York office. I said I thought it was necessary for the time being, at least, but the trusteeship would probably wind up within a year, and at that time I thought it advisable to let things stay as they were and let the new company that was going to take over, or the reorganized company, decide what they wanted to do about that.

Q. Now, Mr. Ehrman, were you personally acquainted with Mr. Schumacher before the beginning of the trusteeship?

A. I had met Mr. Schumacher, but not intimately at all. I met him out here when he was working for the Southern Pacific Company.

Q. Did you know his reputation in the railroad industry at the time he was appointed trustee?

A. Yes. He was supposed to be a very experienced railroad man. He had served in many capacities in the Southern Pacific, also in the Western Pacific, and the other James road, the El Paso Southwestern, I think is the name of it.

Q. Now, were your relations with Mr. Schumacher during the trusteeship satisfactory?

A. Entirely so. [1069-A]

Q. Did you form any impression as to his personal disinterestedness and independence of judgment in his conduct as trustee?

(Testimony of Sidney M. Ehrman.)

Mr. Clark: We object to that, may it please your Honor, on the ground it is incompetent, irrelevant and immaterial and calls for the opinion of this witness. There is nothing factual about it.

The Court: I think that is right.

Mr. Adams: Objection sustained, I take it, your Honor?

The Court: Yes.

Q. (By Mr. Adams): And you know, I take it, Mr. Ehrman, that the Western Pacific Railroad Corporation owned all of the stock of the debtor company? A. Yes.

Q. What was your understanding of the function of the New York office of which you spoke a moment ago?

A. The New York office—you mean during the trusteeship?

Q. Yes, precisely.

A. Well, they received copies of all correspondence that was going on. Mr. Schumacher kept his records there, of course. They also attended to freight matters, freight claims and business of that sort. Of course the office was used for interviewing people. When I was east on several occasions I used the office as much as a month at a time—had my office there. And I talked with a good many of those banking investment houses. I would make appointments there for them, sometimes I would go there and [1070] meet them at their place, talking about the sale of trustee certificates, the issuance, rates, all the details. Also equipment trust

(Testimony of Sidney M. Ehrman.)

certificates were issued by the trustees, and the place was used generally as an office. It was used with the Western Pacific Railroad Corporation. They had half of it, they paid half the expense of operating it.

Mr. Adams: Would it be a convenient time, your Honor, to take a short recess?

The Court: Very well, we will take a recess at this time.

(Recess.)

Mr. Adams: Mr. Ehrman, do you recall that in the spring of 1943, the trustees engaged tax counsel? A. Yes, sir.

Q. What was your reason for employing tax counsel at that time?

A. Well, I think that the reason was because matters had grown a little more complex on account of the large earnings that the company was making, and there were considerations for changing over some methods of accounting, and instead of just having our accountants handle it, we thought there ought to be tax counsel.

Q. And whom did the trustees engage?

A. Specifically, Mr. Polk was the man who was in charge. It was the firm, I think, of Whitman, Ransom, Coulson and Goetz.

Q. Did you consider the firm as suitable for the purpose? A. Yes.

Q. And you have said you learned that Mr. Polk

(Testimony of Sidney M. Ehrman.)

was to do the [1071] work. What was your understanding as to his qualifications?

A. I understood he was highly qualified, because I had heard that he had been connected with the Treasury Department, had had experience with the government, and I heard that he had been very successful in handling some most important tax matters for the Consolidated Edison Company and New York, and some other matters, too; that he was very experienced in tax matters.

Q. Now do you recall, Mr. Ehrman, a trip that Mr. Schumacher made to San Francisco in June of 1943? A. Yes.

Q. And an occasion when you met him in Salt Lake on the annual inspection trip? A. Yes.

Q. And that was an inspection trip on which Mr. Elsey and Judge St. Sure and others were traveling, in the annual inspection?

A. In that year, I think it was '43, Judge St. Sure went more than once—but I am quite sure that was the year that he did go, and when we all met at Salt Lake.

Q. Now referring to the time when Mr. Schumacher was here in San Francisco, do you have any recollection of the discussion with regard to the possible use of the corporation's stock loss in the railroad company as an offset to the trustees' taxable income?

A. I don't remember just when that was. I can't place it. But it may have been in June that

(Testimony of Sidney M. Ehrman.)

that was mentioned. It was merely [1072] mentioned; there was no talk about it. But there was a possibility. In other words, I place it some time before the date when we went to court to get authority, and it was definitely determined. There was talk about it, that there was a possibility. Now whether that was in June or some time later that I talked with Mr. Elsey or Mr. Schumacher, I couldn't say. I don't think I could have talked with him until he came out again the next year. But I have a recollection that it wasn't a new matter when I heard it at the time. It was definitely determined upon. Somebody had mentioned to me the possibility that it could be done.

Q. You do have in mind in giving your answer, that it was in January of 1944 that that matter was again taken up with you?

A. Yes, it was then definitely. We had been advised by Mr. Polk of the Whitman firm that in their opinion there was a good possibility of a return of that kind being accepted by the Treasury Department.

Q. Now in that connection, Mr. Ehrman, did you give consideration to the establishment of a reserve for contingent tax liability? A. Yes.

Q. And with whom did you discuss that subject?

A. Well, I discussed it with Mr. Elsey and Mr. Matthew—no, I think Mr. Schumaher's was by correspondence. It may have been on the telephone, because I telephoned him on occasions, talked these things over.

(Testimony of Sidney M. Ehrman.)

Q. Now did you have an understanding at that time that tax accruals—that is, the income tax accruals for the year 1943—had been reversed?

Mr. Clark: May I ask, your Honor, what time this is directed toward?

Q. (By Mr. Adams): I am speaking now of the beginning of 1944, are we not, Mr. Ehrman?

A. I understood that that was the period that you last referred to.

Q. And I was directing your attention to the question of your understanding about the fact that the accruals that had been carried on the books for tax liability were reversed, and I was asking you if you had a recollection about that.

A. Well, I think so, but I am not entirely clear.

Q. Now you do have in mind this matter of the reserve to be set up for contingent tax liability?

A. Pardon me, I didn't quite get that. Would you read that, Mr. Reporter?

(Question read.)

A. Yes.

Q. And what was the reason for setting up the reserve, Mr. Ehrman?

A. Well, the reason was that if the government or the Treasury Department refused to accept the theory on which the return was [1074] to be made, mainly, that the losses incurred by the Western Pacific Railroad Corporation could be offset against

(Testimony of Sidney M. Ehrman.)

the gains made by the railroad company or the gains could offset the losses, there wouldn't be the tax.

Q. And at that time did you know, Mr. Ehrman, what the principal loss was that would enter into those returns? A. Yes.

Q. And what was that?

A. That was the loss of the value of the stock of the railroad company.

Q. And whose loss was it?

A. That was the corporation's loss, the Western Pacific Railroad Corporation's.

Q. Now did you understand at that time that any particular kind of return would have to be filed in order to have this loss offset the trustees' income?

A. Yes, it had to be a consolidated.

Q. And filed by what company?

A. By the corporation.

Q. When you say the "corporation," you mean the parent company?

A. The parent company. It had been filed that way right through the trusteeship.

Q. Now you have referred to Mr. Polk's opinion; that was the opinion concerning which you stated he said it was proper to claim that loss in the tax return for '43. Did you rely on his [1075] opinion? A. Yes.

Mr. Clark: Well, does the question refer to the written opinion which is in evidence, may it please your Honor?

(Testimony of Sidney M. Ehrman.)

Mr. Adams: That is plaintiff's exhibit 11, is it?

Mr. Clark: 54.

Mr. Adams: Oh then, I have the wrong paper in mind. Let us look at plaintiff's exhibit 54.

Mr. Clark: Yes, plaintiff's 54 is the original opinion.

(Document handed to Mr. Adams by the Clerk.)

Mr. Adams: And will counsel agree that a print copy of plaintiff's 54, the opinion of January 11, 1944, is contained in the files of Mr. Ehrman, as one of the trustees in reorganization?

Mr. Clark: I will so agree; with the further concession or qualification that Mr. Ehrman received his copy on or about January 24, 1944, as demonstrated by the evidence taken on deposition. Will you accept that?

Mr. Adams: Yes, that is correct; that is my understanding of the matter. That is a correct statement.

Mr. Clark: Very well.

Mr. Phleger: And further, that the letter was signed by Mr. Coulson and not by Mr. Polk.

Mr. Adams: Well, Mr. Ehrman's file copy will only show the firm name.

Mr. Phleger: Well, you have been referring to it as the [1076] Polk opinion. It was Mr. Coulson's letter.

Mr. Adams: I think you carry it a little too far,

(Testimony of Sidney M. Ehrman.)

but I agree that the signature of the firm name is Mr. Coulson's signature.

Mr. Phleger: That is the point.

Mr. Adams: That is right. (Handing document to witness.)

The Court: I don't think you have any questions now.

Mr. Adams: No, I am waiting for Mr. Ehrman to look at the document.

The Witness: You want me to look at this?

Q. (By Mr. Adams): Mr. Ehrman, look at it as far as need be to answer this question, please: Is this the opinion that you referred to in your answers when you spoke of relying on Mr. Polk's opinion? I am referring, for the record, to plaintiff's exhibit 54.

A. Well, when you asked me about relying on the opinion, I knew there was an opinion. I knew that I had some opinion in my file. I had forgotten about it until I discovered it on the taking of my deposition, that it was there. But I don't recall that I saw this particular document. Mr. Elsey or Mr. Matthew both told me that the opinion had been given by our tax counsel, and I accepted that.

Q. Mr. Ehrman, the record shows, and we have just stipulated, that there is in your files a print copy of that document you have in your hand, and that it was received by you on or about [1077] January 24, 1944, as an inclosure in a letter Mr. Elsey wrote you at that time. A. Yes.

(Testimony of Sidney M. Ehrman.)

Q. I am showing you that because we have all seen the record. Now, with that in mind, would you say that that was the opinion you had reference to?

A. Well, that is the opinion. I think that is the only opinion, as far as I know, that was written by that firm on that subject.

Q. At or about that time?

A. At or about that time.

Q. Thank you, sir. Now, Mr. Ehrman, did it ever occur to you that if the government should allow these returns with the holding company's loss set off against the trustees' income, the holding company would have any claim against the trustees?

Mr. Clark: Object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Adams: Your Honor, as I said in my opining statement, this claim now before your Honor is an afterthought, and this is a part of the proof of that defense.

The Court: Well, what is the connection between those two statements; the fact that Mr. Ehrman didn't think of, or it didn't occur to Mr. Ehrman, wouldn't have anything to do with whether it was an afterthough of the plaintiff.

Mr. Adams: The fact that it didn't occur to Mr. Ehrman is significant, Your Honor, because had it occurred to either of [1078] the trustees, then the obvious question next would arise, they certainly

(Testimony of Sidney M. Ehrman.)

would have taken it before Judge St. Sure. Now these gentlemen were not acting in a position adverse to the corporation. They were acting as trustees of the court. And in our view, it is part of our defense. [1078A]

The Court: Would the plaintiff be bound by any thoughts or action or inaction on the part of the trustees at all? Assume that they did not consider that there was any obligation on the part of the plaintiff and they proceeded on that ground; it still would not make any difference on the question whether the plaintiff had a right to pursue what it claims as its claim in the case.

Mr. Adams: I am seeking, your Honor, to meet a claim here presented in behalf of our adversaries that the trustees and their lawyers, with no malign or improper purpose, took something of the plaintiff corporation.

The Court: But how Mr. Ehrman as one of the trustees regarded the acts that were done would not have any materiality.

Mr. Adams: I am seeking to show, your Honor, that if by any conception the trustees took—and that is an active performance—anything belonging to these people, they were wholly unaware of it. That is the purpose of this question.

Mr. Phleger: We will so stipulate. We will so stipulate.

Mr. Adams: As regards all parties acting on behalf of the defendant?

(Testimony of Sidney M. Ehrman.)

Mr. Phleger: We will stipulate that Mr. Ehrman did not have any idea of any claim.

Mr. Adams: The stipulation will be acceptable.

Mr. Phleger: I make the further stipulation that he never thought about the subject. I ask you to stipulate to [1079] that, Mr. Adams; not that it did not occur to him, but he never thought about it.

Mr. Adams: I will stipulate that the idea never came to him in anyway, shape or form.

Mr. Phleger: All right.

Mr. Adams: This notion that the corporation could have a claim of the sort now presented in this court never occurred to Mr. Ehrman at any time until after he heard that a lawsuit had been brought in which the claim was asserted, and I take it we are on common ground.

Mr. Phleger: I asked you to stipulate that he never thought on the subject, thought about it at all. Will you so stipulate?

Mr. Adams: I think what I have said is the same thing. How can one think about something which has never occurred to him?

Mr. Phleger: If it is the same thing you will so stipulate, will you not, Mr. Adams?

Mr. Adams: According to my own statement that they amount to the same thing. May I have the same stipulation from the interveners?

Mr. Clark: Certainly.

Mr. Adams: Then certainly the question should be unnecessary, your Honor.

(Testimony of Sidney M. Ehrman.)

Mr. Phleger: And all further questioning of the witness [1080] is unnecessary.

Mr. Adams: Let me see about that. I have not read all my questions yet. I think I can ask this one:

Q. Did anyone ever suggest to you that such a claim might exist?

Do you want to stipulate that no one ever suggested such an idea to Mr. Ehrman?

Mr. Phleger: He is a very bright man and I am sure if they suggested it to him he would know something about it.

Mr. Adams: Then I take it that it is agreed no such suggestion was ever made to Mr. Ehrman prior to the time he heard about this litigation by anyone.

The Court: You have a broader agreement than that already. The idea never occurred to him.

Q. (By Mr. Adams): It was your understanding, Mr. Ehrman, at the time that the holding company was to file a consolidated return, including the stock loss? A. Yes.

Q. What was your understanding as to who would pay the taxes if any should be assessed?

A. Well, I knew the Western Pacific Railroad Company would have to pay them, because I was told by Mr. Schumacher—that is hearsay—but anyway, I found out as a matter of fact that the Western Pacific Railroad Corporation could not even pay the expenses, the expenses of operating the New

(Testimony of Sidney M. Ehrman.)

York office, so it did [1081] not have funds with which to pay.

The Court: Irrespective of that, of course, the railroad company would have to pay it. It was their income.

Mr. Adams: I think that is right, your Honor. That is our position.

The Court: It would not make any difference what the understanding of anyone was concerning it.

Mr. Adams: The statute prescribes a joint and several liability, but I have no doubt that the parties who would have to pay that tax were those who had the income.

Q. Mr. Ehrman, referring to the taking over of the expenses of the New York office in June of 1943, did you approve of that? A. Yes.

Q. What was your reason for approving it?

A. Well, I approved that because I thought it was to some extent a necessary part of the railroad's operation at that time. Mr. Schumacher felt that he wanted it there, wanted the people who were in that office to continue the functions that they were doing for him as trustee, and in any event there was a short duration expected for the trusteeship and the people who were to follow, the reorganized company, could make up its mind then whether it wanted the office or not.

Q. Do you recall a discussion that you had in San Francisco about that subject?

A. Yes, there was a meeting on that. [1082]

(Testimony of Sidney M. Ehrman.)

Q. Who were the parties at that meeting, as far as you recall?

A. Mr. Schumacher, Mr. Elsey, Mr. Matthew and myself.

Q. In the course of that discussion, Mr. Ehrman, was that matter of taking over the expenses of the New York office in any way related to the income tax problems of the trustees?

Mr. Clark: Will you please fix the time of the discussion?

Mr. Adams: In June of 1943.

The Witness: No, that was something quite different.

Mr. Adams: I have no further questions, your Honor.

Mr. Phleger: I have no questions.

The Court: Any questions?

Mr. Clark: Yes, we have a few, your Honor.

Cross-Examination by Interveners

By Mr. Clark:

Q. Mr. Ehrman, have you ever specialized in income and excess profits tax law, Federal law?

A. Personally I never specialized.

Q. Particularly have you ever specialized in the matter of filing consolidated returns on the part of corporations? A. No, no, I did not.

Q. In connection with the consolidated return to be filed by the plaintiff corporation for the year 1943, did you personally discuss that matter with Mr. Polk? A. No.

(Testimony of Sidney M. Ehrman.)

Q. At that time had you ever even met Mr. Polk?

A. To the best of my recollection I only met Mr. Polk once in [1083] my life and that was very casually as he was coming from lunch with Mr. Elsey and Mr. Matthew, I believe, and I was coming from lunch in the Palace Hotel; we happened to meet and I was introduced to Mr. Polk.

Q. But you did not discuss the tax matter with which we are involved here with Mr. Polk at all?

A. I have no recollection of it.

Q. When you say that you relied upon your tax counsel in connnection with that matter, do you refer to this opinion that was called to your attention?

A. Yes. Early in the year 1943, I think—it was probably right after, it may have been before the Supreme Court handed down its decision in this Western Pacific case—this matter of having tax counsel taken up, and I was satisfied with it.

Q. From that time on did you rely upon this tax counsel for all tax matters pertaining to the trusteeship? A. Yes, sir.

Q. In January 1944, Mr. Ehrman, when you agreed to the tax procedure, it was then explained to you—I think you said by Mr. Elsey or Mr. Matthew possibly—did you at that time know whether or not that procedure had been submitted to the directors of the plaintiff corporation?

A. No, I did not know.

Q. Did you give that matter any thought at all?

A. No, I did not give it any thought. [1084]

(Testimony of Sidney M. Ehrman.)

Q. Did you give any thought to whether or not the plaintiff corporation had advice other than the Whitman firm with respect to those matters?

A. I never considered that at all.

Q. At any time, Mr. Ehrman, were you ever advised of the mechanics by which the 1943 return was ultimately filed, that is, who signed it, et cetera?

A. Well, I did not know who signed it. I knew it would have to be signed by the proper officers or some proper officer of the Western Pacific Railroad corporation.

Q. After the reserve fund was finally set up, which the record shows was on March 3, 1944, did you pay any further attention at all to that tax matter?

A. No. I knew of it, but I paid no attention.

Q. There has been put in evidence in this case a refund claim dated March 9, 1945, which was called to your attention on deposition. Do you remember about that?

A. I remember the fact that there was a refund claim put in, but I do not remember any details about it. I did not really concern myself with the tax situation as far as the railroad was concerned.

Q. Were you ever consulted at any time with respect to whether or not a refund claim should be filed?

A. I have no memory of it now, but I would not be a bit surprised——

(Testimony of Sidney M. Ehrman.)

Q. Directing your attention to the date March 9, 1945—— [1085]

Mr. MacKinnon: I submit that the witness should be permitted to answer the question. When he is attempting to answer a question he is interrupted right in the middle of his answer.

Mr. Clark: I merely wanted to call his attention to the date, March 9, 1945. That is the date of the refund claim.

The Witness: That does not ring any bell as far as my recollection is concerned, but I think I heard of the matter, knew that such a refund was to be filed or had been filed. I have some memory of it, but no particular memory of the details or the occasion. That was a refund for 1942, wasn't it?

Mr. Clark: Yes.

A. I know there was such a refund, and I think there was some settlement finally made, when it was finally settled with the Government; they paid something on that year. There was an offset, but whether I heard of that later or not, I do not know.

Q. That was long after the termination of the trusteeship?

A. Long after I was out of office.

Mr. Clark: That is all, your Honor.

The Court: Any other questions?

Mr. Adams: No further questions, your Honor.

The Court: That is all.

Mr. Phleger: Might I direct the Court's attention to a colloquy which occurred with Mr. Adams,

(Testimony of Sidney M. Ehrman.)

and I do not know that you got the significance of it. It is a fact, Mr. Adams, you will stipulate, that when consolidated returns are filed, all [1086] the parties, including the parent corporation, are liable for the entire tax?

The Court: I understand. That is payable to the Government.

Mr. Phleger: That is right.

The Court: As between parties, obviously the person on the company who had the income would have to pay the taxes.

Mr. Phleger: Right.

The Court: May I call Mr. Elsey?

CHARLES ELSEY

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court?

A. Charles Elsey.

Direct Examination

By Mr. Adams:

Q. Mr. Elsey, at this time are you an officer or director of the Western Pacific Railroad Company?

A. No.

Q. When did you retire?

A. December 31, 1948.

Q. Prior to that time, what offices have you held with the Western Pacific Railroad Company?

(Testimony of Charles Elsey.)

and it is not the best evidence—and that if, may it please your Honor, counsel would prepare a schedule of the facts, we possibly can all agree on it without getting the testimony second handedly through Mr. Elsey.

The Court: Well, if Mr. Adams won't object, I think I could reframe the question so as to avoid the difficulty about conclusions in the matter. I think that what you want to ask the witness, if I may suggest it, not as to what the practice was, but in the years in which the affiliated companies paid taxes, how did they divide the taxes?

Mr. Adams: Thank you, your Honor. [1111]

Q. Did you hear that, Mr. Elsey?

A. Yes, sir.

Q. Would you please answer that question?

A. The taxes was allocated among the various companies having a taxable income in proportion to their taxable income. These allocations were made in New York by Mr. Curry, and sent on to our general auditor in San Francisco.

Q. Now so far as you know, within the Western Pacific group, was payment ever made to any member of the group which reported a loss for the tax advantage which its loss conferred on other members of the group? A. No, sir.

Q. To your knowledge, was a suggestion ever made that any such payment should be made to a loss member of the group? A. No, sir.

Mr. Phleger: Well, now, I object to that; it seems to me—

(Testimony of Charles Elsey.)

The Court: That was, "Was any suggestion made"?

Mr. Adams: To his knowledge. I asked him if he knew of any such suggestion ever being made.

The Court: Well, of course that calls for a conversation. There is no foundation laid. I mean, that is too general a question. I will sustain the objection.

Mr. Adams: Very well, your Honor.

Q. Now, Mr. Elsey, after the reorganization trustees were appointed, was there any change in the manner in which the income [1112] tax returns were prepared?

A. No, sir, none whatever.

Q. Was there any change in the matter of the allocation of taxes? A. No, sir.

Mr. Phleger: Now just a moment; that assumes a fact which the evidence shows did not exist; there were no taxes from 1930 until 1942, and he is saying after the trustees were appointed, did they follow this practice of allocating taxes. There were no taxes.

Mr. Adams: Well, your Honor, there were such allocations handled by the trustees in respect of 1929, and of course there were allocations of the 1942 tax. With those two exceptions, I believe Mr. Phleger's statement is correct.

Mr. Phleger: The trustees came in 1935. So what happened in 1929 certainly didn't——

Mr. Adams: Oh, yes, it came before that particular time, that particular matter.

(Testimony of Charles Elsey.)

A. I was director and president.

Q. You are speaking now of the reorganized concern that came out of the court on January 1, 1945? A. Yes, sir.

Q. Do you now receive compensation from the company under a retirement plan?

A. I have been advised that the Board of Directors has passed on my pension.

Q. Will you please state to the court the offices which you have held with the Western Pacific Railroad Company, the old company, beginning December, 1907, if that is the date of the beginning, and run through it for the record. [1087]

A. I was elected assistant treasurer of the Western Pacific Railway Company on December 3, 1907, and continued in that office until September 10, 1908. On September 10, 1908, I was elected treasurer and held that office until October 10, 1916. On October 10, 1916, I was elected treasurer of the Western Pacific Railroad Company and held that office to February 24, 1920. I was elected a director on January 8, 1917. I was elected secretary-treasurer on October 24, 1920, and held that office until November 14, 1921. On November 14, 1921, I was elected vice-president in charge of finance, accounting, real estate and insurance. I held that office until May 29, 1929.

On May 29, 1929, I was elected vice-president to discharge the duties of the president in his absence. I held that position until September 3, 1929. On

(Testimony of Charles Elsey.)

September 3, 1929, I was elected executive vice-president and held that office until December 31, 1931.

On January 1, 1932, I was elected president. On November 9, 1935, I was appointed by Judge St. Sure as the managing agent for the reorganization trustees and I held that position until December 31, 1944.

I was elected president of the reorganized company on January 1, 1945, and held that position until December 31, 1948.

Q. Mr. Elsey, have you at any time been an officer or director or held any position with the Western Pacific Railroad Corporation? [1088]

A. No, sir.

Q. During the period prior to the beginning of the reorganization proceedings, by whom were the directors and officers of the Western Pacific Railroad Company chosen?

A. By the Western Pacific Railroad Corporation, the holding company.

Q. Referring to the period of trusteeship, what in general did you understand your responsibilities to be as the managing agent for the trustees?

A. My understanding was that I was fully responsible for the management and operation of the property.

Q. To whom did you consider yourself to be responsible?

A. To the trustees and through the trustees to Judge St. Sure.

(Testimony of Charles Elsey.)

Q. To what extent were you in contact in general with Judge St. Sure during the period of trusteeship?

A. All of our contracts and leases which were to be entered into by the reorganization trustees were submitted to Judge St. Sure through a petition, and those petitions were notice for hearing and I appeared at practically all the hearings before the judge. We had a blanket authority to settle personal injury claims up to a thousand dollars. Anything in excess of a thousand dollars was sent to the judge through petition, and I testified on those matters. We had annual inspections over the property and Judge St. Sure, Mr. Ehrman and occasionally Mr. Schumacher, accompanied me on those trips. [1089]

At times I have discussed matters with Judge St. Sure in his chambers and also discussed various matters with Judge St. Sure and Mr. Ehrman at lunch. We prepared annual reports under my direction. Those reports were filed with the court with petitions. Petitions were noticed for hearing, and after hearing in court they were approved by the judge.

Q. How and to what extent, Mr. Elsey, did you keep the reorganization trustees informed during the period of reorganization?

A. I kept up a very extended correspondence with both Mr. Ehrman and Mr. Schumacher. I would call on Mr. Ehrman at his office and dis-

(Testimony of Charles Elsey.)

cuss various matters, secure their advice and authority on various problems that came up from day to day.

Q. To whom did you look for legal advice during the period of reorganization?

A. I looked for legal advice from the counsels that were appointed by Judge St. Sure. That was Judge Olney and after his death to Mr. Allan Matthew.

Q. Mr. Elsey, during the period of the trusteeship, to what extent were you engaged in discharging any corporate business—and by that I mean business of the Board of Directors—of the Western Pacific Railroad Company?

A. Very little. We had meetings of the board at various times and, of course, we had an annual meeting of our stockholders and issued annual reports, but I spent very little of my time on any corporate matters. [1090]

Q. During the period of trusteeship did you keep yourself informed regarding the business and affairs of the plaintiff corporation and holding company? A. No, sir, not at all.

Q. During the period of trusteeship did you keep yourself informed as to the changes that took place among the officers and directors of the holding company? A. No, sir.

Q. Did you have anything to do with formulating the plan of reorganization? A. No, sir.

Q. Did you have any interest or concern with

(Testimony of Charles Elsey.)

the distribution of securities to be issued by the reorganized company? A. No, sir.

Q. Or with the persons or interests to whom such securities would be issued? A. No, sir.

Q. Have you ever owned any bonds or stocks of any corporation in the Western Pacific group?

A. Yes.

Q. Please state what you have owned and when.

A. I purchased 100 shares of the common stock very shortly after the company came out of the hands of the reorganization. Other than that I own no stocks or bonds of any of the companies affiliated with the Wetsern Pacific. [1091]

Q. During this entire period of trusteeship, Mr. Elsey, is it the fact that you held no securities of either the railroad company or the plaintiff corporation or any other member of the affiliated group? A. That is correct.

Q. During this trusteeship what was your practice with respect to furnishing information when it was requested by parties to the reorganization proceeding?

A. We always furnished any information that was requested just as promptly and just as fully as we possibly could to them.

Q. When did you first become acquainted, Mr. Elsey, with Mr. Nicodemus of the firm of Pierce & Greer?

A. I would say some time during the year 1944.

Q. What relation at that time did you under-

(Testimony of Charles Elsey.)

stand existed between the firm of Pierce & Greer and the holding company?

A. He was their counsel.

Q. What was the relation at that time, according to your understanding, of the relation of the firm to the Western Pacific Railroad Company?

A. He was the New York counsel.

Q. At that time did the railroad company in its San Francisco office have a law department of its own? A. Yes, sir.

Q. Was the law department continued after the appointment of the firm of Pierce & Greer? [1092]

A. Yes, sir.

Q. Did that firm have anything to do with the legal problems that were handled from the San Francisco office of the company? A. No, sir.

Q. How often did you see Mr. Nicodemus or his partner, Mr. Campbell?

A. Very occasionally, when I would make a trip to New York. There were times when Mr. Nicodemus came to San Francisco, but I can't recall of ever seeing Mr. Campbell. It is more than likely that I did, but I can't recall.

Q. How often would you say that you sought legal advice from Mr. Nicodemus or his firm?

A. Practically never.

Q. What was the relation, as far as you know it, of Mr. Nicodemus and his firm to the reorganization trustees during the period of trusteeship?

A. Mr. Schumacher requested that Mr. Nico-

(Testimony of Charles Elsey.)

demus be continued as New York counsel; various matters came up that he would like to have the advice of counsel on in New York, and we discussed that matter between Mr. Ehrman and Judge Olney and myself and we thought that Mr. Schumacher's request was reasonable.

Q. Now, Mr. Elsey, you were in court this morning when I was speaking with Mr. Ehrman about the taking over of the expense of the New York office? A. I didn't hear it. [1093]

Q. You recall a meeting held in your office in June, 1943, at which consideration was given to the taking over of the expenses of the New York office?

A. Yes.

Q. I see.

Mr. Adams: And may I have plaintiff's exhibit 28, please, Mr. Elkington?

(Document handed to counsel by the Clerk.)

Q. (By Mr. Adams): Mr. Elsey, I show you plaintiff's exhibit 28 in this case, being a memorandum for file dated June 2, 1943. This is a photostat (handing to witness). Is that photostat a photostatic copy of a record in the office, your office, as president of the Western Pacific Railroad Company during the period of trusteeship?

A. Yes, sir.

Q. Now does the memorandum enable you to fix the time of the meeting at which you say you discussed the taking over of the New York office expense? A. Yes, sir.

(Testimony of Charles Elsey.)

Q. And what is your recollection, as refreshed by this memorandum? A. June 2, 1943.

Q. Now do you have a recollection as to the discussion that took place at that meeting?

A. Yes, sir. [1094]

Q. Please state your best recollection of the discussion—strike that.

First, tell me, Mr. Elsey, who was present at the meeting?

A. Mr. Schumacher and Mr. Ehrman, Mr. Matthew and myself.

Q. And now please state your best recollection of the discussion.

A. Mr. Schumacher came out from New York and was very much concerned about the situation of being able to take care of the expenditures of the New York office. He stated that the holding company was without funds to meet their share of the expenses, and stated that it was very necessary for him to have an office in New York with the organization there to carry out his functions as one of the trustees of the company. And Mr. Ehrman and myself took the position that that request was a reasonable one.

Q. Was anything said at that meeting, so far as you can recall, with respect of the taxes?

A. No, sir.

Q. Was it your understanding that from that time on, Mr. Curry's entire compensation would be paid entirely by the trustees?

(Testimony of Charles Elsey.)

A. That is correct. [1095]

* * *

Q. (By Mr. Adams): Mr. Elsey, before the reorganization began, how were income tax matters handled in the Western Pacific organization?

A. Our general accounting department, which is headed by Mr. D. C. DeGraff, made up the figures for the Western Pacific and its subsidiaries, forwarded them on to New York to the office, the joint office of the holding company and the railroad company, and returns were completed and filed by the New York office.

Q. Throughout what period had this practice of filing the returns as prepared in the New York office been followed?

Mr. Clark: I object to it, may it please your Honor, as including the word "practice," which calls for the conclusion of this witness on a matter which may be of some importance in this case. I have no objection to the development of the facts as they occurred, but when it is described as "practice," that has the connotation that it was somewhat automatic. That point has been discussed before in this case.

Mr. Adams: I submit the question, your Honor.

The Court: Would you read that?

(Question read.) [1096]

Mr. Clark: I will withdraw that objection to that question.

The Court: All right. All right, Mr. Elsey, you may answer the question.

(Testimony of Charles Elsey.)

A. That practice was started in 1918 and continued up to practically the present date.

Q. (By Mr. Adams): What kind of returns were filed during that period?

A. Consolidated income tax returns.

Q. Who selected the officers and employees who prepared the returns?

A. The holding company.

Q. And were those officers and the employees joint officers and employees of the holding company and the railroad company?

A. Yes, sir.

Q. Who was the officer or employee that was directly in charge of the preparation of the returns? A. Mr. Curry.

Mr. Clark: Well, for whom, please?

Mr. Adams: May I proceed with my examination, your Honor?

Mr. Clark: Just a moment. I will object to that, may it please your Honor, upon the ground that it is indefinite. In his capacity as an officer of the company or as an officer of the corporation?

The Court: Well, you can cross-examine on that, counsel. [1097]

Mr. Clark: Very well, your Honor.

The Court: He simply asked for the name of the person. Overruled.

Q. (By Mr. Adams): Now, Mr. Elsey, do you know what practice was followed in regard to the allocation of the taxes between the members of the affiliated group? A. Yes, sir.

(Testimony of Charles Elsey.)

Mr. Phleger: Now, just a moment. I am going to object to any evidence now or hereafter as to what the tax practices were between these parties prior to these critical years, because in the critical years, a situation existed which had never theretofore existed; namely, the severance of the economic unity. They were divorced. They were separate companies. They were strangers, and it doesn't seem to me what their practice had been in previous years has the slightest bearing upon it.

Mr. Adams: Your Honor, may I respond to that argument?

The Court: Yes.

Mr. Clark: We will join in that objection, if the Court please. [1098]

* * *

Mr. Adams: I asked the question generally, over the whole period; of course, if there were some years when there wasn't any tax, that doesn't become involved and is not included in my question. My question was objected to, fundamentally, your Honor. Isn't it right, your Honor, that I should ask the witness about what was done about allocations of taxes? That is the question I put to him. Mr. MacKinnon gives me some help, and I will accept it. May I restate my question?

The Court: All right.

Mr. MacKinnon: Mr. Elsey, in the years during which taxes were paid, under these consolidated returns, what practice was followed in the allocation of the taxes?

(Testimony of Charles Elsey.)

Mr. Phleger: Just a moment. Now will counsel first state the years that he is talking about? Is he talking about '42, '43, '44? And secondly, I make my objection, as I say, upon a fundamental ground that this is irrelevant, incompetent and immaterial. I simply want the record to show it. If your Honor wants the evidence in—I think——

The Court: Well, counsel, I think that is a question I should decide when the case is decided, and not on a ruling on the form of the question.

Mr. Phleger: That is right; we simply want to put our objection. May it be deemed to run to any questions along this subject? [1110]

The Court: I think probably the best way to handle that would be to admit it, and then you can call my attention to it by motion to strike or by argument on the main case, because obviously this has some very definite and substantial bearing upon the defenses which the defendant is asserting, and if the evidence is competent and has weight, why, they are entitled to have it considered in their case.

Mr. Phleger: That is right, but we want simply to have the record show our objection on the grounds stated.

The Court: I think I shall overrule the objection as to materiality and competency of this line of examination, subject to a motion to strike in the ultimate disposition of the case.

Mr. Clark: May we add to the objection, your Honor, this: This witness hasn't been shown to be qualified to testify on the matter of tax allocation,

(Testimony of Charles Elsey.)

Mr. Clark: Not in '29.

Mr. Adams: Yes, the matter of the allocation of some taxes for '29. That is the way the Treasury works, many years late. That matter came before the trustees. However, I think the question has been answered, and it is subject to this colloquy, as I understand the record now.

The Court: Well, all right. [1113]

Mr. Adams: And just to clear this record for the benefit of all counsel, I will ask Mr. Elsey a question.

Q. Prior to the year 1942, was there any federal income tax paid by the reorganization trustees for any year during which they were operating the railroad properties? A. No, sir.

Q. Now, Mr. Elsey, what effect—strike that.

You have in mind that the railroad earnings for 1942 were very much greater than they had been in prior years? A. Yes, sir.

Q. And what was the principal reason for that?

A. The war traffic.

Q. Now during that year, did the accounting department of the railroad in San Francisco accrue taxes on those earnings?

A. Yes, sir, month by month.

Q. Did you have anything to do with determining the method of accrual? A. No, sir.

Q. Who had that in charge?

A. Mr. DeGraff, our general auditor.

(Testimony of Charles Elsey.)

Q. Do you know whether the accruals were made on a separate—strike that. [1114]

* * *

Q. Now, Mr. Elsey, speaking now of the accruals for 1942 taxes, do you know whether those accruals were made on the basis of a separate or a consolidated tax return? A. On a consolidated basis.

Q. And do you mean on a consolidated basis with or without the parent company?

A. With the parent company.

Q. Now do you recall that the trustees retained tax counsel to advise respecting the returns for the year 1942? A. Yes, sir.

Q. What were the circumstances that occasioned the employment of these tax counsel?

A. Our large increase in earnings, and the complex new tax law.

Q. And the name of the firm that was employed?

A. What is that?

Q. And the name of the firm that was employed?

A. Whitman, Ransom, Coulson and Goetz.

Q. Do you have any understanding as to who in the firm was to do the work as tax counsel? Did you have at that time?

A. Yes, Mr. Polk.

Q. And on whom did you rely for tax advice after the firm had been employed?

A. Mr. Polk. [1115]

Q. When did you first meet Mr. Polk?

A. June of '43.

(Testimony of Charles Elsey.)

Q. And do you know at whose suggestion he came to San Francisco at that time?

A. It is my best recollection he came to San Francisco at the request of Mr. Schumacher.

Q. Now at this time, Mr. Elsey, I show you Intervener's Exhibit 376.

Mr. Adams: This, your Honor, is a copy of the letter of May 20, 1943.

Mr. Clarke: 53, I think. Just a moment. 53 or 54.

Mr. Phleger: 53 is a letter of 1/8/44.

Mr. Clark: That is not the one.

Mr. Adams: I should have this, and I don't have it, your Honor.

Mr. MacKinnon: 50, Plaintiff's 50.

Mr. Phleger: Yes, that is the paradoxical letter, so-called.

The Court: This is Polk to Curry?

Mr. Adams: Yes, your Honor, that is the one.

Q. Plaintiff's 50 is the original of which this document, Interveners' No. 376, is a copy. And I will hand Interveners' Exhibit 376 to Mr. Elsey (handing to witness) and I ask you if that copy was produced from your files, as president of the railroad company and as agent for the trustees?

A. Yes, sir. [1116]

Q. Now, Mr. Elsey——

Mr. Adams: May the record show that, in referring to Interveners' 376, I am referring to a number assignable to the depositions, and not to the record in this case?

(Testimony of Charles Elsey.)

Mr. Clark: Well, it is a different paper, though, than Plaintiff's 50 in this case, is it not?

Mr. Adams: I have said that.

The Court: It is a copy.

Mr. Adams: Yes.

Q. Now, Mr. Elsey, directing your attention to the legend on page 1, "Recd.," meaning "received," from Mr. "T. M. S." at "S. F." with the "E"; is that Mr. Engelbright's notation? A. Yes.

Q. And who was Mr. Engelbright at that time?

A. My chief assistant in my office.

Mr. Adams: I will offer the document as Defendant's Exhibit 34.

Mr. Clark: No objection from us, your Honor.

Mr. Phleger: It is already in evidence, it seems to me. If they want to offer it as a copy, I suppose that would be all right.

Mr. Adams: That is right. May I see this? My purposes have been accomplished when I produced the fact that the copy of the letter containing that endorsement was in Mr. Elsey's files.

The Court: Well, you brought that out. That is a copy of Plaintiff's Exhibit No. 50. [1117]

Mr. Adams: If agreeable with all counsel, we need not encumber the record with a second copy of the paper, and I will therefore withdraw my offer of the document as an exhibit.

Q. Now, Mr. Elsey, following the time when you saw Mr. Polk in San Francisco in June, 1943, when did you next see him in connection with income tax matters? A. January of '44.

(Testimony of Charles Elsey.)

Q. And where did that meeting take place?

A. In my office in San Francisco.

Q. Now, you had a discussion at that time and place with Mr. Polk? A. Yes, sir.

Q. Will you please state the substance of your conversation with him at that time.

A. Well, Mr. Polk advised me that we were within our legal right in taking the corporation's stock loss as a deduction in our consolidated return. That loss far exceeded our income for that year. He also advised me that we should reverse our accruals for the entire year of '43. I was very much surprised at that statement and asked him if I could bank on it. He said No, that that matter will not be finally decided until the Treasury Department completes their audit on our '43 returns. I then stated to Mr. Polk that if that was a fact, I was going to ask the reorganization trustees to set up a reserve so that we would be protected in the event that the [1118] Treasury Department ruled out the tax loss. I then asked Mr. Polk to furnish me with his written opinion so I could use that opinion as a basis for my recommendations to the trustees, and Mr. Polk also advised me that all of us should be very careful about giving out any misstatements, as that would embarrass him when he had his dealings with the Treasury Department.

Mr. Clark: Now, may it please your Honor, may we have the date of this fixed as nearly as possible, the date of this conversation? I believe it is separable, the exact date, your Honor.

(Testimony of Charles Elsey.)

Q. (By Mr. Adams): Mr. Elsey, do you recall that you have a diary, an office diary?

A. Yes, sir.

The Court: What are you trying to find out, the date he had this——

Mr. Adams: Just the date, that is all.

The Court: How long before you got the opinion from him did you have the talk with Polk?

A. I got his opinion letter—it was either that afternoon or the following day, I think.

Q. Of the day that you had the conversation?

A. Yes, sir.

The Court: Now, does that establish it?

Mr. Adams: I don't think it establishes what we had in mind, what we were all talking about, your Honor. [1119]

Q. Mr. Elsey, the diary date of this talk with Mr. Polk was January 8, 1944, according to your best recollections? A. Yes, sir.

Q. Now, did you discuss the amount of the tax reserve with Mr. Polk? A. Yes, I did.

Q. And would you please state to the best of your recollection the time when you discussed that and what was said.

A. That discussion took place at the same meeting I had with Mr. Polk, and that the amount of the reserve should be an amount equal to what our taxes would be if the stock loss was disallowed.

Q. Now, what was your understanding at that

(Testimony of Charles Elsey.)

time as to how the taxes for 1943 had been accrued on the books of the railroad company?

A. On a consolidated basis.

Q. And when you say "a consolidated basis," do you mean with or without the parent company in the group?

A. With the parent company.

Q. Now, Mr. Elsey, do you recall the occasion on which you appeared in the reorganization court before Judge St. Sure and testified in respect of the application of the trustees for permission to set up a reserve fund for contingent tax liability?

A. Yes, sir.

Q. And that was on the 3rd of March, 1944, was it not? [1120] A. That is correct.

Q. Now, do you recall substantially the testimony that you gave before Judge St. Sure at that time? A. I do.

Q. And will you please state to the best of your recollection what testimony you gave before Judge St. Sure on that occasion?

Your Honor, before I end that question may I state that all counsel have looked for the transcript and we have not found the transcript.

Could you read the question, please?

Mr. Phleger: But we have found the very written document that he testified from, documents prepared by Mr. Matthew's associate.

Mr. Adams: I have it here in my hand.

(Testimony of Charles Elsey.)

Mr. Phleger: We have no objection to putting it in.

Mr. Adams: Well, is the same true as to other counsel?

Mr. Clark: Yes, indeed it is.

Mr. Adams: I have heretofore been admonished by counsel that I shouldn't show papers to the witness until it develops he cannot remember without them.

The Court: All right. Go ahead.

Q. (By Mr. Adams): Mr. Elsey,——

The Court: This is February 21?

Mr. Adams: This is March 3, 1944, the hearing on that petition of February 21. [1121]

The Court: Oh, yes.

Q. (By Mr. Adams): I show you a memorandum marked "Railroad Company Exhibit 914" on the depositions, and I ask you if this is the memorandum you had with you at the time you gave your testimony in court upon the hearing of that matter. A. Yes, it is.

Q. Did you testify substantially as set forth on pages 2 and following of the memorandum under the heading "Testimony"? A. Yes, sir, I did.

Mr. Adams: Any objection, counsel?

Mr. Phleger: No. We want you to stipulate——

Mr. Clark: No objection.

Mr. Phleger: We want you to stipulate, which is a fact, that the memoradum was prepared by Mr. Matthew's associate and handed to the witness and read from by him when he testified.

(Testimony of Charles Elsey.)

Mr. Adams: Well, I won't stipulate that he read from it; that is not the evidence. I will stipulate that the memorandum is one that was handed to Mr. Elsey in accordance with the standard practice between him and his counsel upon hearing of each matter, so that he would have in his hands a memorandum prior to coming to the hearing; that he studied the memoranda, that he used them in giving his testimony; that that is the case with regard to this one. Will you accept that?

Mr. Phleger: Certainly. [1122]

Mr. Adams: Very well. I offer the document, your Honor, as Defendants' Exhibit 34, being the same document heretofore marked Railroad Company Exhibit 914.

(The document referred to was received in evidence and marked Defendants' Exhibit 34.)

Mr. Adams: And I would like to read your Honor a portion of this memorandum, under the heading "Testimony." This is in the form of questions and answers:

"1. What would be the maximum Federal income and excess profits tax liability for the company if it filed a separate return for the year 1943, according to the computations of the company's accountants and tax advisers?

A. Approximately $7,000,000.

2. Please explain to the Court why it is believed no tax will be due under the consolidated

(Testimony of Charles Elsey.)

return method of reporting the income and losses of the several affiliated corporations.

A. Consolidated returns have been filed by the debtor company and its affiliated corporations for several years, as permitted by the Federal income and excess profits tax laws. During the calendar year 1943 certain members of the group have sustained very substantial losses, particularly the Western Pacific Railroad Corporation. That company [1123] sustained a very large loss when the stock of the debtor company owned by it became valueless upon confirmation of the Western Pacific reorganization plan in 1943. The aggregate losses of the affiliated corporations for the year 1943 more than offset the net income of the debtor company for the same year."

Then the next answer, or the question:

"Do you believe, however, it is prudent to establish a funded reserve to provide for the payment of any tax which might ultimately be found due?

A. Yes. I believe a funded reserve should be established for this purpose. Tax questions are seldom free from doubt. While we are confident of our conclusion in this instance, nevertheless, in view of the substantial amount here involved, the Internal Revenue Bureau may decide to litigate the matter. I think the debtor company should set aside out of 1943 earnings a sufficient amount so that it will be able to pay the highest possible tax which might conceivably be found due if the Commissioner should prevail in such litigation."

(Testimony of Charles Elsey.)

Then the next question is:

"What is the attitude of the trustees about the matter? [1124]

A. They have approved my recommendation that we establish a funded reserve of $7,100,000 out of 1943 earnings of the railroad of the debtor."

And the last question and answer relates to the investment of the monies.

Q. Now, Mr. Elsey, when you gave your testimony before Judge St. Sure that the amount of the reserve would be the amount computed as if the company were paying a separate return, was it your understanding at that time that that statement was correct? A. Yes, sir.

Q. According to your present understanding, was the statement correct?

A. No, sir, it was not.

Q. In what form would you now make the statement in order that it should be correct, in accordance with your present understanding?

A. I would state that the amount of taxes, or the amount of the reserve, rather, was based on the accrual of our taxes on the basis of a consolidated return with the Western Pacific Railroad Corporation, the reorganizaiton trustees and the affiliates.

Q. Now, when did you learn for the first time of the difference between your statement and what your present understanding of the matter is? [1125]

A. December of '48.

(Testimony of Charles Elsey.)

Mr. Phleger: I don't think he answered that earlier question at all.

The Court: It is not clear to me. I don't know what——

Mr. Adams: Let me hear the answer.

The Court: You asked him what kind of a reserve, or how he would set it up on the basis of what he now knows about it, and I don't know; I couldn't follow the answer. It didn't seem to me to be sequential to the question.

Mr. Adams: May I ask one or two more questions, then, your Honor, and see if we can clear that up?

The Court: Yes.

Q. (By Mr. Adams): Mr. Elsey, you have in mind that at the time you gave your testimony about how the amount of the reserve was fixed, you testified that it was fixed as an estimate of what the tax liability on a separate return basis would be?

A. Yes, sir.

Q. And that you thought that was a correct statement at that time? A. That is correct.

Q. And you learned since that that it was an error, or an erroneous statement?

A. Yes, sir.

Q. Now, then, as a matter of fact, the amount of that reserve authorized by the Court was $7,100,000, was it not? [1126] A. Yes, sir.

Q. And how had that amount in fact been estimated?

(Testimony of Charles Elsey.)

A. It had been accrued on a consolidated basis.

Q. So that what you have in mind, then, in telling us that your statement to the judge was erroneous is that the fact is that you had accrued on a consolidated basis, and you told the judge the filing was estimated on a separate return basis?

A. That is correct.

Q. Now, then, until recently did you have any notion that there was any substantial difference in the one figure from the other?

A. None whatever.

Q. And then recently you learned that there was some such difference between one kind of filing and the other? A. Yes, sir.

The Court: There would have been a difference in the figure?

Mr. Phleger: Not as they then thought it.

The Court: Well, the only difference would be if the stock loss wasn't allowed. It wouldn't make any difference whether it was separate or affiliated, would it?

Mr. Adams: I think I can try and answer that briefly, your Honor. Your Honor will recall that Mr. Buchanan handed in two computations, Basis 1 and Basis 2.

The Court: Oh, yes. [1127]

Mr. Adams: Basis 1 was on the separate return liability without certain credits, without them being taken into consideration.

(Testimony of Charles Elsey.)

The Court: Yes.

Mr. Adams: Now, if your Honor please, to calculate on that basis, you would get a different figure from this $7,000,000 reserve.

The Court: Yes.

Mr. Adams: Does that answer your Honor's question?

The Court: Yes.

Q. (By Mr. Adams): Now, Mr. Elsey, I would like to show you Plaintiff's Exhibit 20-B, being the annual report of the railroad company for 1943 to its stockholders.

(Document handed to witness by the clerk.)

Now, I direct your attention to the text on page 6 of your annual report under the title "Taxes." Do you have that before you? A. Yes, sir.

Q. And of course you have seen that from time to time in the course of your preparation to give your testimony here? A. I have.

Q. It was also directed to your attention upon the taking of your deposition by Mr. Clark?

A. Yes, sir.

Q. Who prepared that text under the heading "Taxes" in that [1128] annual report?

A. Mr. Engelbright.

Q. Did you review it with him? A. I did.

Q. Did you approve it? A. Yes, sir.

Q. I direct your attention to the statement contained in that text, "A consolidated tax return for

(Testimony of Charles Elsey.)

1943 can and will be filed by the holding company." Do you see that there? A. Yes, sir.

Q. Where did that text originate?

A. In my office.

Q. How did it come to you?

A. From Mr. Engelbright.

Q. What was your basis for approving that statement in the annual report that you have in your hands, Plaintiff's Exhibit 20-B?

A. In the first place, we had filed a consolidated return for a number of years. We were advised by Mr. Polk that we could take the corporation's stock loss as a deduction. I received the authority from the reorganization trustees to set up a reserve. Judge St. Sure approved it. And I assumed that in the ordinary course of events we would file a consolidated return, and it was on that basis that I approved Mr. Engelbright's statement that we can and will file a consolidated [1129] return.

Q. Mr. Elsey, approximately when was this annual report, Plaintiff's 20-B, made public?

A. In July of 1944.

Q. I asked you to bring with you some data with respect to the publication of that report, did I not, and the following reports? A. Yes, sir.

Q. And you have that with you?

A. I have.

Q. Will you please state to the Court the extent and manner in which copies of the annual reports to stockholders for the years 1943, 1944 and

(Testimony of Charles Elsey.)

1945 were distributed and otherwise made public.

A. The anual report for——

Q. May I correct my question before you go further? I will eliminate 1945 and this covers only the 1943 and 1944 reports.

A. The 1943 report, we sent a thousand copies on to Mr. Curry, and on June 28, 1944, we received a telegram from Mr. Curry that he had received the reports and that they would be released on July 3, 1944, and we retained 500 copies in our office, which we distributed out to people such as banks, brokerage houses and various statistical concerns who had requested that they be furnished with a copy of the report.

Of the 1944 report there were 5,250 copies printed and [1130] these were sent out, or the majority of them were sent out to the Central Hanover Bank and Trust Company, who were our stock transfer agents, and we kept quite a number of these reports in our possession here in San Francisco and supplied various inquiries for the same.

Q. Do you know whether or not the Central Hanover sent out the annual reports to the stockholders of record according to its transfer agent records? A. Yes, sir.

Mr. Phleger: When was that report sent out?

Q. (By Mr. Adams): Can you give the date, Mr. Elsey, as to the distribution of that report?

A. No, we haven't got the date that the transfer agent sent the reports out.

(Testimony of Charles Elsey.)

Q. Do you have anything that approximates the release date of the report? That is what we would like to have. A. No, I have not.

Mr. Clark: Do you have the date upon which it was sent to the Central Hanover Bank?

Q. (By Mr. Adams): Do you have any date there as to when it was sent to Central Hanover?

A. No, sir.

Mr. Adams: We will obtain the date for the benefit of counsel.

Mr. Phleger: It is not important. [1131]

Q. (By Mr. Adams): According to your recollection was it sometime approximately in the middle of the year? A. I did not get your question.

Q. Would it be approximately in the middle of the year, according to your best recollection?

A. Yes, sir.

Q. That is, the report for 1944 would have been issued approximately in the middle of 1945?

A. That is correct.

Mr. Clark: The report is in evidence, if it please the Court, and shows it. It has a date on it.

Mr. Adams: It is plain, then. Had we known that, we would not have bothered.

Q. Mr. Elsey, I show you two papers. One of them has been marked Interveners' Exhibit 384 upon the depositions, being a telegram from Mr. Schumacher to you of January 29, 1944, and the other is marked in the depositions Railroad Defendants' Exhibit 909, being a letter addressed to

(Testimony of Charles Elsey.)

you by Mr. Ehrman under date of January 26, 1944. I also show you, Mr. Elsey, Plaintiff's Exhibit 56 in this case, being a copy of your letter to Mr. Ehrman of January 24, 1944, and your original letter to Mr. Schumacher of the same date. Now, referring to the copy of the telegram from you to Mr. Schumacher marked Interveners' 384, is that the telegram you received from Mr. Schumacher on or about January 29, 1944, approving the [1132] recommendation you had made to him in Plaintiff's Exhibit 56? A. That is correct.

Q. And referring to the document now marked Railroad Defendants' 909, Mr. Ehrman's letter to you of January 26, 1944, is that Mr. Ehrman's response to you approving the recommendation you suggested to him as of January 24, 1944?

A. It is. [1132-A]

Mr. Adams: I will offer the two documents I have identified, your Honor, telegram from Mr. Schumacher to Mr. Elsey, and a letter from Mr. Ehrman to Mr. Elsey, as Defendant's Exhibit 35A and B.

(The telegram referred to was thereupon received in evidence and marked Defendant's Exhibit 35A, and the letter referred to was received in evidence and marked Defendant's Exhibit 35B.)

Q. (By Mr. Adams): Mr. Elsey, do you recall a visit made by Mr. Polk to San Francisco and your seeing him in October and November of 1944?

(Testimony of Charles Elsey.)

A. Yes, sir.

Q. Do you recall whether or not you had any discussion with him at that time in regard to the use of the holding company's stock loss in the returns for the year 1944?

A. I do not recall it. More than likely we did, but I can't recall any such conversation.

Q. The record in this case shows that the tentative returns for the year 1944 included a return filed by the parent holding company, which included the railroad company and affiliates for the first four months of 1944. The record shows that tentative returns were filed March 15, 1945, and it further shows that final returns were similarly filed on June 15, 1945. So far as you know, Mr. Elsey, were those returns prepared in San Francisco? A. No, sir. [1133]

Q. Where were they prepared?

A. Prepared in New York.

Q. Mr. Elsey, prior to February 11, 1947, had you ever discussed with Mr. Polk or anyone in his firm a proposal for settlement of the tax matter with the government? A. No, sir.

Q. Did you have a discussion of such a proposal on or about February 11, 1947? A. Yes, sir.

Q. And with whom did you have that discussion?

A. Mr. Coulson.

Q. Where did it take place?

A. In my office.

Q. Will you please state the substance of the

(Testimony of Charles Elsey.)

conversation you had with Col. Coulson at that time and place.

A. Col. Coulson called me at my office about nine o'clock in the morning and stated that he had just received a telephone conversation with Mr. Polk in New York. Mr. Polk had stated that——

Q. Just one minute. I am going to take the liberty of interrupting, Mr. Elsey. You just now said, Mr. Elsey, that Mr. Coulson spoke of having received a telephone call from Mr. Polk in New York. Did you mean that?

A. No, Washington.

Q. Go right ahead. [1134]

A. And, as I said before, Mr. Coulson stated that Mr. Polk thought that the time had arrived to make a compromise offer on our tax matters. That compromise matter would be to forego our 1942 taxes and taxes for the year 1943 and the first four months of 1944 would stand as is. Mr. Coulson advised me that in his opinion it was a good settlement.

Q. (By the Court): You do not mean forego the taxes; you mean forego the refund, do you not?

A. Forego the refund, yes, sir. Mr. Coulson stated that Mr. Polk was very anxious to make that offer as soon as possible. Col. Coulson and I discussed the matter as to whether or not I as the president of the company had the authority to authorize Mr Polk to make that proposal, and both of us decided that I did not.

(Testimony of Charles Elsey.)

Q. (By Mr. Adams): And then having come to that conclusion, Mr. Elsey, what did you do next in regard to this proposal for settlement?

A. We decided to call our directors, and I got into telephone conversations with our Western directors and also Mr. Haggerty in New York. I advised them of that situation as to what Mr. Polk's proposition was, and they asked me my opinion as to whether or not it was a good settlement and I said yes, and they gave me their concurrence. I tried to get Mr. Bell, one of our directors, but he was on his way to the Hawaiian Islands and I was unable to reach him. [1135]

Q. You spoke of Mr. Haggerty. Mr. Haggerty was at the time a representative of the Metropolitan Life Insurance Company on the board of the Western Pacific? A. Yes, sir.

Q. Following your discussion with the directors, was there a communication then with Mr. Polk?

A. Yes, sir.

Q. Please go ahead and tell about that.

A. I got Mr. Polk on the telephone and told him that I had received the authority from the majority of our directors and also stated to them that Mr. Polk had prepared a letter for me to sign.

Q. You say Mr. Polk had prepared a letter for you to sign?

A. No, Mr. Coulson had prepared a letter for me to sign. I read that communication to Mr. Polk and told him that he was authorized to make the

(Testimony of Charles Elsey.)

proposal and I would sign that letter and forward it to him immediately.

Mr. Adams: May I have Interveners' 10, please?

Q. Mr. Elsey, I show you Interveners' Exhibit 10 in this case and ask you if that is your file copy of the letter to Mr. Polk of February 11, 1947, that you have been speaking about in your testimony? A. Yes, sir, it is.

Q. And did you send that letter to Mr. Polk that day? A. Yes, sir. [1136]

Q. Mr. Elsey, you did learn, did you not, in July of 1946 that a stockholders' suit had been filed in New York in which a claim was stated in behalf of the holding company on account of the so-called tax savings in this matter? A. Yes, sir.

Q. Prior to that time when you heard about that, had it ever occurred to you that the holding company had any financial interest in the tax case with the government? A. No, sir.

Mr. Clark: I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Phleger: I have no objection.

Mr. Clark: I will withdraw the objection, your Honor.

The Court: You would have to be a Solomon to rule on that. I will cut it in half and allow it.

Mr. Clark: I will withdraw the objection.

The Witness: No, sir.

Q. (By Mr. Adams): Did anyone ever suggest that thought to you? A. No, sir.

(Testimony of Charles Elsey.)

Q. What was your understanding as to who would be required to pay any tax, if there were to be a tax assessed for 1943 and the first four months of 1944?

Mr. Clark: Purely hypothetical and immaterial.

Mr. Adams: I will withdraw it. I think the objection was to the fact that I may be asking a question of law. I do not [1137] intend to.

Q. Mr. Elsey, what was your understanding as to who in fact would pay any taxes for the year 1943 or the first four months of 1944 if they should be assessed?

A. Either the reorganization trustees or the reorganized company.

Q. After Mr. Polk began to work on tax questions in the spring of 1943, did you intend to supervise or direct his work? A. No, sir.

Q. Did you form any opinion with respect to the quality of his work? A. Yes.

Mr. Clark: Just a minute, your Honor. I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

Q. (By Mr. Adams): Did you rely on his advice in income and excess profits tax matters?

A. Yes, sir, very much so.

Q. Mr. Elsey, before this suit was filed out here in San Francisco, the present suit now on trial—and that filing was in October, 1946, did you have any discussion with any officer or counsel or repre-

(Testimony of Charles Elsey.)

sentative of the holding company regarding the possible institution of the suit? A. No, sir.

Q. Did any one prior to that time suggest to you that such a [1138] suit might or might not be filed? A. No, sir.

* * *

Q. (By Mr. Adams): Mr. Elsey, when was it decided to close the New York office?

A. The latter part of December, '44.

Q. Who made the decision? A. I did.

Q. When was the New York office closed?

A. April 30, 1945.

Q. What arrangements, if any, were made to take care of the employees in the office?

A. All of the employees except Mr. Curry received severance pay of 50% of their annual wage.

Q. And what provision was made at that time for Mr. Curry?

A. To cover him under our pension plan.

Q. Now it is in the record in the case that Mr. Curry was in receipt of a retainer under an arrangement set forth in a letter addressed to him by Col. Coulson in 1945—June, I believe. How and when did you first learn of the proposal to retain Mr. Curry?

A. Well, after it was decided that we were to close the New [1139] York office, I sent Mr. Droit, our secretary, on to New York with instructions to bring back to San Francisco all files and data that belonged to the railroad company. When Mr.

(Testimony of Charles Elsey.)

Droit returned from New York, he told me that Mr. Coulson had stated to him that if we took all the files back to San Francisco, why, the proposition was that they wouldn't be able to consult these files in connection with this tax matter. So it was decided to leave certain of our files in New York, and as Mr. Curry was the person that was most familiar with the files, he would be retained to assist Mr. Polk as far as the matter of our files was concerned.

Q. And that is something Mr. Droit reported to you upon his return to San Francisco?

A. That is correct.

Q. Mr. Elsey, I show you Plaintiff's Exhibit 32A (presented to witness by Clerk), which is a letter addressed to you by Mr. Coulson under date of April 21, 1945, referring to the arrangement for the retainer of Mr. Curry and referring to certain other matters as well. You received that letter in due course? A. Yes, sir.

Q. And you examined it, of course?

A. Yes, sir.

Q. Did you approve the arrangement provided for and recommended in that letter by Mr. Coulson?

A. I did. [1140]

Q. Did you consider that $3,000 a year was a reasonable amount for the purpose?

A. Yes, sir.

Mr. Adams: Now at this time, your Honor, I will take up with Mr. Elsey certain matters having

(Testimony of Charles Elsey.)

to do with our defenses, not narrative in character.

Q. Mr. Elsey, are you familiar with the matter of cut-backs and refunds on the government traffic during the war years? A. Yes, sir, I am.

Q. Can you tell me what those terms mean?

A. Well, when a railroad presents a freight bill to the government, the government pays the bill before it is audited. It takes sometimes several years before the general accounting office gets around to auditing those bills. When they are auditing those bills, they find certain errors. It may be mathematical errors, it might be the wrong rate is applied, or they may contend that that certain shipment shouldn't be entitled to land grant deductions. And when they come to that deduction, they file with the particular railroad a refund claim, and if that refund claim isn't paid very promptly the government deducts the amount that they claim from the next batch of bills that they pay this particular railroad, and those deductions are termed "cut-backs."

Q. Now can you tell me whether the amount of such refunds and cut-backs have been substantial during the war years' traffics? [1141]

* * *

Q. (By the Court): Is that right, Mr. Elsey? Were there some substantial sums involved in that?

A. Yes, sir, very much so.

Q. (By Mr. Adams): Can you give me the approximate amount of the cut-backs and refunds

(Testimony of Charles Elsey.)

which have been made up to a fairly recent date by the Western Pacific Railroad Company on account of Government traffic for the years 1941 through 1944?

Mr. Clark: I object to that on the ground it is not the best evidence, your Honor. There must be records of these things, so we have the actual figures before us.

The Court: Perhaps it is not the best evidence, but I am taking for granted counsel is going to have these accountants testify more precisely on the subject. [1147]

Mr. Adams: That is right, your Honor, and I need this testimony as a basis.

The Court: It is in the nature of preliminary testimony.

Mr. Clark: It is not limited to the period involved.

Mr. Phleger: He says 1941 to 1944.

Mr. Adams: That is right, and the accountants will have to take care of the details. I would like to get an answer to my question as a preliminary question.

The Court: I will allow it.

Q. (By Mr. Adams): Would you like to have the question read, or do you have it in mind, Mr. Elsey? A. Yes, sir.

Q. Will you please answer.

A. Approximately $2,000,000.

Q. Does that approximate figure include all the

(Testimony of Charles Elsey.)

cut-backs and refunds that may be made on account of traffic for these years? A. No, sir.

Q. What does it include?

A. That figure of approximately $2,000,000 includes only the cut-backs and refunds that have actually been audited by our accounting department. There are many cut-backs that the Government has made that we contend are wrong. The Government is still auditing our accounts for those years, and I am satisfied, of course, that there will be more of them presented to us. [1148]

Q. Does it include any figure for the account of intermediate war traffic handled by the Western Pacific during those years?

A. No, sir, none whatever.

Q. Will you explain to the Court how it comes about that you have no figure on the intermediate traffic that you handled?

A. It is the procedure that it is the delivering line that makes all the settlements, and where we are the originating carrier or the intermediate carrier, we have nothing to do as far as the settlement with the Government, and when that delivering line receives a cutback from the Government, they will reapportion that cutback to the various lines that participated in the traffic, and our accounting department is unable, when these figures of interline accounts come from the various railroads, to allocate that charge against us for any particular shipment. [1149]

* * *

(Testimony of Charles Elsey.)

Q. (By Mr. Adams): And Mr. Elsey, can you give me an estimate of the total amount of the Western Pacific cutbacks and refunds on account of Government traffic for the years I have mentioned?

Mr. Phleger: I object to that because it is perfectly obvious that the terms "cutbacks" and "refunds" have been used thus far in the testimony, when the questioning refers to claims by the Government. Just because the Government claims something does not mean that it is the fact. I assume that all the charges the railroad made, it thought it was legitimately entitled to collect.

The Court: What you are trying to elicit is what claims [1155] the Government makes and he suspects there may be more claims made by the Government because he read some place that Congress was investigating the matter and there might be a likelihood of more claims being filed. Can he say anything more than that?

Mr. Adams: This witness?

The Court: Yes.

Mr. Adams: He can tell you that in addition to these figures that he knows about, which he has gotten from his auditor's office with regard to terminal traffic handled, he knows there is going to be more, that he knows there is nothing in those figures for the account of the intermediate traffic. He knows those factors. He knows he has seen this report, and on the foundation of those various

(Testimony of Charles Elsey.)

factors that he knows, he can give me an estimate. I think your Honor will receive an estimate. It only goes to the certainty of it. If he gives you a fair basic statement as to the basic material he has considered in making his estimate, I believe you will receive it. He must be the best informed man there can be produced to ask what additional cutbacks and refunds can be fairly estimated, and that is what I am seeking to get from him.

The Court: Well, I suppose he can say on the basis of the cutback claims that the Government has made, where the Western Pacific was a delivering carrier and thus was directly chargeable with it, that he could compare that amount with the amount in similar cases, where the railroad company [1156] was only an intermediary delivering carrier, and he might on that basis give some estimate. But I don't see what basis there would be for his opinion in any report or Congressional committee, because it might not affect the kind of cases, the subject matter, of transportation involved here, with the Western Pacific.

Mr. Adams: He can answer that question, your Honor; he has read the report. The report describes the kind of transportation he is talking about.

The Court: Well, I will sustain the objection in so far as the witness is called upon to rely upon anything else except the record of his own company.

(Testimony of Charles Elsey.)

Q. (By Mr. Adams): Well, Mr. Elsey, his Honor has said that we can only look to the records of your own company in presenting figures on the aggregate amount of the cutbacks and refunds.

Do I understand your Honor correctly? I don't want to limit myself unless I am sure that I understand your Honor's approach.

The Court: Well, Mr. Elsey, on the basis of the cutbacks upon which claims were made to you by the Government, are you able to make any statement with respect to other similar transactions, with respect to additional cutback claims?

A. Well, I could only say it is a pure estimate. I couldn't [1157] give you any exact figure.

Q. Well, all I am trying to find out is, are you able to make an estimate of some kind on the basis of your own record, the records of your own company?

A. Well, I would say this, your Honor: That we know that we have paid out approximately $2,000,000, and after reviewing this Bender report and found out the sloppy manner in which the Government accounting office audited these bills, and that the committee has instructed the accounting department to recheck all of these freight bills from the very beginning, I can say to myself that to be a conservative estimate, that we would pay approximately 50 per cent more than we have already paid.

Mr. Clark: We move to strike that out, your

(Testimony of Charles Elsey.)

Honor, as being purely speculative and of no proven validity in this case whatever.

The Court: What is that additional 50 per cent you refer to? Is that another million dollars?

A. Yes, sir.

Q. And what kind of transactions would be involved in that?

A. The same type of transactions that are involved in the $2,000,000 that we have already paid.

Q. But only with respect to transportation of an intermediate character?

A. No, where we were also as a terminal carrier. Let me give you an explanation, your Honor. This report brings out the [1158] fact that each department in the General Accounting Office was allocated that they would have to review certain numbers of bills per month—a thousand, 2000 or whatever it might be. Particular groups would find out that toward the end of the month they couldn't make that quota. So what did they do but take a bunch of freight bills and stamp them "Audited," and thereby bring up their quota to the demand of the head of the department. Now, those bills are all going to be re-audited again.

The Court: Well, are the bills that you are speaking of, do they involve the same identical rates or other question as the bills upon which you have calculated the $2,000,000?

The Witness: Yes, sir.

The Court: Just additional ones, is that right?

(Testimony of Charles Elsey.)

The Witness: Yes, sir.

The Court: Now I have asked these questions, and counsel have a perfect right to make the same motions and objections.

Mr. Phleger: Well, they certainly are purely hearsay when this witness testifies that some tired clerk at the end of a month marks something "Audited"; that certainly oughtn't to bind us.

Mr. Clark: On the basis of the very report we have been discussing, your Honor; besides which, the whole thing is speculative. The whole claim hasn't been paid.

The Court: My questions were just directed to find out [1159] the basis on which the witness was going to make the estimate, that is all, rather than as to the admissibility.

Mr. Phleger: Then I move the estimate be stricken out.

The Court: Maybe Mr. Adams would like to develop that further first.

Mr. Adams: Well, I would only ask one question, which I think the witness has already said, but to make sure it is in response to a question:

Q. On the basis of the factors you have considered, Mr. Elsey, what would you say was a reasonable and conservative estimate of the additional amount of refunds and cutbacks for those particular years that will be experienced by the Western Pacific?

Mr. Clark: We object to that, may it please

(Testimony of Charles Elsey.)

your Honor, upon the grounds that it is hearsay, incompetent, irrelevant and immaterial and speculative.

The Court: Well——

Mr. Clark: And that it is of no effect in this case.

The Court: Well, you have, however, from your own accountants proffered testimony as to what the income tax would be if a separate return were filed.

Mr. Clark: Yes, right, on the basis of the figures taken.

The Court: On the basis of the figures that were used in returns that were filed. Now, you do open a door there to the presentation of this sort of thing. The defendants wouldn't be foreclosed, at any rate, from presenting evidence of other factors that might be taken into account in filing separate income tax returns that were not taken into account in the filing of the affiliated return.

Mr. Phleger: Yes, but as of the date when they could not possibly have any effect upon those separate returns, because it is an admitted fact that those years are not open. These are charges that are being made against them now.

Mr. Adams: Your Honor, there is a very ready answer to that: The insistence upon the fact that the consolidated returns are closed. Of course they are closed. They worked out. That is closed. But what we are seeking to prove is what would have happened on a separate return basis. [1161]

* * *

The Court: I will overrule the objection.

(Testimony of Charles Elsey.)

Did you hear the question?

The Witness: Yes. Do you wish me to answer it?

Q. (By Mr. Adams): Yes, please do.

A. I would say that we would pay an additional million dollars.

* * *

The Court: Well, suppose you go along a little bit farther.

Q. (By Mr. Adams): Are you familiar, Mr. Elsey, with the so-called government reparations claims on wartime traffic? A. Yes, sir.

Q. Would you state generally what you understand them to be?

A. The government has taken the position that the railroads of [1164] the country have overcharged the government on various classes of military traffic, and has filed their claim with the Interstate Commerce Commission and are asking for reparations under the Interstate Commerce Act.

Q. And that is wholly different from those refunds and cut-backs you have been speaking of?

A. Entirely.

Q. And according to your information, what is the total amount the government is asking for from the railroads generally in this proceeding?

Mr. Phleger: No, if your Honor please, I object to it upon the ground it is incompetent, irrelevant and immaterial and speculative.

The Court: I can't see what the materiality is,

(Testimony of Charles Elsey.)

what the government is asking the railroads generally.

Mr. Adams: We then proceed and take our percentage of it, your Honor. We just have to start with a figure. Mr. Phleger stated on page 914 of the transcript, I believe the page number is—I am not sure about the page number, though, but I think that is it.

Mr. Phleger: Are you sure it is me?

Mr. Adams: Yes, I am sure that the statement was made by counsel during his statement, and he referred to the fact that this amount involved in this proceeding was such and such a figure, and the witness will agree with you if you will just let [1165] him answer. I would like to have the witness answer if he can, the same question.

Mr. Phleger: You mean as a result of my newspaper reading, I am more informed about these matters?

Mr. Adams: You seem to be well informed, and the witness will give me the same answer you stated, I believe.

Mr. Phleger: Well, I have an objection which I made.

The Court: I haven't got it clear what you are talking about.

Mr. Adams: Mr. Phleger referred to the reparations proceeding on a former occasion in this court, and he named a figure at that time which I think is the same figures the witness will state.

(Testimony of Charles Elsey.)

The Court: What the government is generally claiming from the railroads?

Mr. Adams: Yes, the overall figure.

Mr. Phleger: I think that is wholly immaterial.

Mr. Adams: Well, all we can do with that, your Honor, and the simplest thing to do with it——

The Court: Well——

Mr. Adams: ——is to get the figure to start with, and then see where we go with it. It is preliminary, it is simply a foundational question.

Mr. Clark: This being a claim, your Honor, that hasn't even been established. How can that be deducted from any tax or [1166] income for tax purposes?

* * *

The Court: Well, how can the witness calculate what the Western Pacific's share of this might be? I am just curious to know how that might be done.

Mr. Adams: Well, we can ask the witness.

Q. Mr. Elsey, assuming that you had a figure for the overall amount of the reparations claims against all the railroads in the reparations cases, supposing that you have such a figure in your mind but you don't say it, now then, how would you go about figuring out what the Western Pacific's proportion of that might be?

A. Take the Western Pacific's proportion of the revenue to the total revenue of the railroads as a whole.

(Testimony of Charles Elsey.)

The Court: I know, but they might not all have been hauling military materials.

A. Well no, you couldn't say that——

Q. (By Mr. Adams): Well, don't you know as a fact, Mr. Elsey, that the Western Pacific itself hauled at least its proportion of the wartime traffic? [1167]

A. I would say we handled more.

Mr. Adams: So that, in that case, your Honor, we would make that proportion which would be conservative on the basis of that breakup.

The Court: Well, before I could rule on that, I would have to know more about these reparation claims, what they are and what is the status of them.

Mr. Phleger: Isn't it material if they don't think they are meritorious at all and they believe that they are not obligated to pay them, so that you simply have the merest speculation here now?

Mr. Adams: Well, I would like to answer his Honor's question if I may.

Mr. Phleger: There is no specific claim against this defendant at all—nothing pending.

Q. (By Mr. Adams): Is the Western Pacific a party to that proceeding? A. Yes, sir.

Mr. Adams: That is the answer to that one, your Honor.

Mr. Phleger: Well, is there any claim against them, specifically?

Mr. Adams: Now just one minute, counsel; let

(Testimony of Charles Elsey.)

me go ahead with my statement, because what a reparations proceeding is is a statutory proceeding under the Interstate Commerce Commission Act, and under the Interstate Commerce Act all of us are aware [1168] of the fact that you first have a proceeding to determine the propriety, ex post facto, of the right to what is claimed, and that is what is going on in the reparations proceeding at present. Now as against all claimants other than the government, the statute puts a very short statute of limitations upon the presentation of reparations.

The Court: Are you saying that if this thing results eventually in the assessment of additional claims against the railroad by the government, that all the railroads are going to be able to go back and open up all their income taxes in all the years gone by?

Mr. Adams: Well, let me get the first question, your Honor, which is, What is going to happen to the income? Now these are facts about this. I will ask Mr. Elsey about this.

Q. The fact is, is it not, that the reparations case involves in the main, wartime traffic?

A. Yes, sir.

Q. It involves solely wartime traffic handled for the government's account?

A. That is correct.

Mr. Adams: Now under the statute, your Honor, it is only the government that can come in at as

(Testimony of Charles Elsey.)

late a date as this and seek to recapture tariffs paid to the railroads.

The Court: I understand.

Mr. Adams: Yes. But at this late date, this very large [1169] case is hanging over all the railroads. It is known, it is well known. This is the reparations case. And I am not going to ask Mr. Elsey to give me any estimate of the amount that may come out of that. No such estimate can be made. I would just like to prove, as one of the equities before this court, that there is hanging over the head of his railroad a prospective diminution of its wartime income from governmental sources, and that, I think, is the fact. As to getting the amount, the only amount I can give is the amount of the claim, because it is the only thing known at this time.

The Court: Well, would it be any different than a claim that might have arisen during this same period by virtue of some big accident on the railroads, where the amount of the damage claim against the railroad might not be ascertained until several years afterwards?

Mr. Adams: Yes, yes, your Honor. This is a major attack upon the railroads' wartime income, on the very basis of a claim by the government that they made too large profits. So obviously it is a direct attack upon the income.

The Court: Well, suppose some twenty people got killed in a wreck and had a $2,000,000 claim

(Testimony of Charles Elsey.)

against the railroad company; that would be a direct claim upon the income, wouldn't it?

Mr. Adams: No, it is a direct attack upon the property of the railroad in some way, shape or form. This is an attack upon the income, the very thing the government taxes, and this is an [1170] equity court, and these people are in here asking that there be taken from our clients monies belonging to our clients in any ordinary concept on some theory or other that they are entitled to share in what are called "tax savings," your Honor.

The Court: Well, there is enough in the record to indicate that what your contention is, the nature of those reparations claims, and that it is impossible to estimate them, that they might be a substantial claim against the Western Pacific at some future time.

Mr. Adams: The only thing I want to add to that, so that I might have clearly before your Honor rules, is that the figure that Mr. Phleger mentioned the other day, or as he said, read out of the newspaper, the figure that I want the witness to tell me about, for the overall amount $3,000,000,000. It is very easy to laugh about something if you are not a railroad executive trying to keep it out of the red, and very easy on the part of these gentlemen (indicating) to indicate that they are seeking money from a wealthy concern, that had twice been through reorganization.

The Court: All right, Mr. Adams, you have re-

(Testimony of Charles Elsey.)

viewed this matter. What is the witness' estimate going to be as to what he thinks, if such a huge sum were recoverable by the government against all of the railroads? What would the amount be as to the Western Pacific?

Q. (By Mr. Adams): What would the Western Pacific's part be [1171] if the government should succeed in collecting that huge sum in reparations? A. Four tenths of one per cent.

Q. And that per cent is, I take it, Mr. Elsey, the Western Pacific's per cent of the revenues of the Class 1 rails? A. Yes, sir.

The Court: What does that amount to? Has somebody figured it out already?

Mr. Adams: $12,000,000—4 x 3, 12.

The Court: Now you have sufficient in the record to show what the nature of this evidence is and the nature of your claim. Now for the time being, I will hold, so that your record may be clear, that that is too remote and not reasonably connected with the tax claim, and you can again take that up when the case is finally submitted.

Mr. MacKinnon: Are you striking? I don't know what your Honor is "holding." You say you "hold." The record will either show that you strike or that the evidence is in.

The Court: Well, the evidence is in and I am holding it as immaterial.

Mr. MacKinnon: Well, you are still permitting it to stay?

(Testimony of Charles Elsey.)

The Court: Well, it will stay whether or not I strike it out; it will be there physically.

Mr. MacKinnon: Well, I am trying to get the purport of your Honor's ruling. [1172]

Mr. Phleger: In order that we may have a record, I move at this time that it be stricken.

The Court: All right, I will grant the motion to strike, and that is without prejudice to your rights to further present that question on the submission of the case. [1173]

* * *

Mr. Adams: Now may I also ask counsel for a stipulation based on the record, which we have all examined, that the monies used in the payment of the Federal income and excess profits taxes for the year 1942 were monies taken out of the funds of the Western Pacific Railroad Company while in reorganization [1174] directly cleared through the Chase Bank and paid to the Collector, that that applies to all four installments that were paid covering that year's taxes? Those monies never went through the treasury or bank deposits of the plaintiff corporation, and the plaintiff corporation did not pay any part of those sums.

Mr. Clark: I think that is correct, except Mr. Curry did have some part in the payment to the collectors. Is that not correct?

Mr. Adams: That is correct. Mr. Curry in New York handled the bank drafts that were transmitted in payment of those installments of tax.

(Testimony of Charles Elsey.)

Mr. Phleger: We will so stipulate, and we will ask you to stipulate that the monies which made up those funds were out of current earnings of the properties.

Mr. Adams: I will ask Mr. Elsey that. Nobody has asked me that question before, counsel.

Mr. Phleger: Well, the '43 reserve, as shown by the testimony yesterday, came out of '43 earnings, and I would assume that is correct.

Mr. Adams: You mean the reserves set up.

Mr. Phleger: The '43 taxes came out specifically from 1943 income.

Mr. Adams: Let's ask Mr. Elsey. I have never been asked that question. [1175]

CHARLES ELSEY

resumed.

Direct Examination
(Continued)

By Mr. Adams:

Q. Mr. Elsey, do you know whether the funds that were used in the payment of the 1942 taxes were taken from the earnings of the property while it was in the hands of the trustees during the year 1942? A. Yes, sir.

Q. And what is the answer?

A. Yes, sir, they were.

Mr. Adams: Then we have a stipulation covering all the facts we have recited?

Mr. Phleger: Yes, sir.

(Testimony of Charles Elsey.)

Mr. Clark: That is correct.

Q. (By Mr. Adams): Now, Mr. Elsey, I would like to refer to the Sacramento Northern Railway, which is, as the record here shows, and was during the period of reorganization, a subsidiary of the Western Pacific Railroad Company. That is the fact, is it not? A. Yes, sir.

Q. Now, this railroad company, the Western Pacific Railroad Company, as the record shows, owned substantially all of the bonds of the Sacramento Northern Railway, is that right?

A. That is correct.

Q. Now I will ask you to state whether there was any indebtedness other than this bonded debt that was owing from the [1176] Sacramento Northern to the Western Pacific in the year 1943; and when I say "Western Pacific" I mean the Western Pacific Railroad Company.

A. That is correct, there was.

Q. Now, in what manner was this additional indebtedness evidenced in the accounts of the Western Pacific Railroad Company?

A. By notes receivable and advances in open account.

Q. And do you have with you a statement of the total amount of the indebtedness of the Sacramento Northern to the Western Pacific Railroad Company which was represented by the notes and advances on open account as of the end of the year 1943? A. Yes, sir.

(Testimony of Charles Elsey.)

Q. And will you please state those amounts for the notes and for the open account advances and the total.

A. The notes amounted to $4,524,744.38. Open account advances amounted to $4,949,356.42, or a total of $9,474,100.80.

Q. How did this indebtedness arise?

A. Principally to take care of the operating deficits of the Sacramento Northern.

Q. Have you been familiar with the operation of the Sacramento Northern Railway and with the financial results of those operations during the entire period in which that Sacramento Northern has been a Western Pacific Railroad subsidiary?

A. I have.

Q. Will you please state whether, in your opinion, this [1177] Sacramento Northern Railway indebtedness to the Western Pacific Railroad Company—and by that I refer to the indebtedness on the notes and the open accounts—was, in your opinion, collectible, that is, whether it was reasonable to expect in 1943 that it would be paid?

Mr. Phleger: We now object to that question——

Mr. Clark: Upon the ground that it calls for the conclusion of this witness, may it please your Honor, on a legal matter. The evidence is pointed toward the use of that as a bad debt, which is purely a matter of law.

Mr. Adams: The purpose of the inquiry, your Honor, is this: We will follow with the account-

ing evidence with regard to the availability of a partial bad debt upon this particular indebtedness during the year 1943. This witness is the man best informed in view of all his history, as to the fact with regard to the value of those receivables, and I am asking him.

The Court: Well, you are asking what his opinion is.

Mr. Adams: I am asking him whether it was collectible. Of course, that is a matter of opinion.

The Court: No, you asked him if in his opinion it was collectible.

Mr. Adams: Yes, your Honor, and for the purposes of the tax law, that is precisely that, a defensible opinion which is material to the question of a partial write-down. The Treasury Department looks at the matter concerning which they wish to find out whether or not, in fact, writing down an asset of this sort may be appropriate. So they ask just the question I now asked Mr. Elsey.

The Court: Well, you mean that if there was an issue between the taxpayer and the Internal Revenue Department as to what debt could be charged off as worthless, whether the debt could be charged off as worthless, that the opinion of the taxpayer is considered as to its worthlessness, of sufficient weight as to be considered on the question of the right to deduct a bad debt?

Mr. Adams: No, your Honor, I do not mean

(Testimony of Charles Elsey.)

that the Treasury Department is bound by the opinion of the taxpayer; but I do mean that the Treasury Department inquires of the opinion of the taxpayer, because certainly the Treasury Department is entitled to have that information, and it does so.

The Court: Well, does it do so in cases mostly questioning the debt, though?

Mr. Adams: Well, it is a very natural thing for the Treasury Department to question as large a deduction as the one here in question.

The Court: Well, as I understand the regulations of the Treasury Department, those regulations covering the matter of such deductions, they have to be definitely ascertained to be worthless; they have to be charged off on the books, and all the requirements of the regulations with respect to bad debts have to be complied with.

Mr. Adams: Not in this case, your Honor.

The Court: And that would be irrespective of what the opinion of anyone was as to whether it was worthless.

Mr. Adams: Your Honor, in the first place, has reference to the matter of charge-off of a debt as worthless, as to which there are other regulations such as those to which you have just referred. There are other regulations and rulings that apply to the writing down of an indebtedness. What is called a partial write-off. We are now speaking of such a write-off, and in that case, however, as in the case to which your Honor refers——

(Testimony of Charles Elsey.)

The Court: You mean the matter of depreciation of accounts receivable as to book value?

Mr. Adams: That is correct, your Honor; the regulations are to this effect, substantially: The rules with regard to an indebtedness which is not wholly worthless—the taxpayer is privileged to select the year in which he may take a partial write-down upon an indebtedness, the value of which does not entirely disappear. The Treasury Department insists that he justify the partial write-down that he takes, and the Treasury Department in the nature of things goes to the taxpayer and says, "What is your view of the opinion? What do you know about this?" and if he is not able to give such an opinion, of course, the Treasury Department is not going to allow it. [1180] It won't be bound by his opinion, but they will require it as important.

The Court: Did the company write off all or any part of the indebtedness of the Sacramento Northern?

Mr. Adams: No.

Mr. Clark: No, sir, it did not.

Mr. Adams: May I answer your Honor's question? Surely this is another instance of the fact—let me put it this way: Your Honor will bear in mind consolidated returns were filed. Now, a partial write-off of an inter-company indebtedness was not a deduction under consolidated return accounting. That is because the transaction was inter-company, and inter-company transactions are

(Testimony of Charles Elsey.)

eliminated when you file consolidated returns. Now, then, we are attacking this problem on the basis of what would have taken place had separate returns been filed, and so we say, your Honor—and this is one of the equities that we bring to the Court—that had that been the case, this matter would have been investigated, the question I have asked Mr. Elsey would have been asked, and if Mr. Elsey answers it in the affirmative and tells me what would have been in his judgment an appropriate figure for write-down, that would have taken place.

It is all hypothetical, as your Honor stated yesterday, but it is based on the essential hypothesis that in order to determine what tax saving, so-called, this company realized [1181] out of these consolidated returns on the basis of a comparison between that and what it would have paid on a separate return basis, it is proper for us to bring forward evidence showing that a deduction could have been taken on a separate return basis which was not in fact taken on a consolidated return basis.

The Court: I understand you said the railroad company owned bonds of the Sacramento Northern. Did it own the stock, too?

Q. (By Mr. Adams): It owned all the stock, did it not, Mr. Elsey? A. Yes, sir.

The Court: Wasn't it the same kind of intercompany transaction that would justify setting

(Testimony of Charles Elsey.)

that up on the affiliated return as between the Western Pacific Railroad Corporation, the holding corporation, and the Western Pacific Railroad Company?

Mr. Adams: No, your Honor. The stock loss was under the law and the regulations a deduction in a consolidated return. Section 23(g)(4) so provided, whereas it is definitely clear under the regulations and the law that the partial write-down of an inter-company indebtedness was not a deduction in the consolidated return but was merely an inter-company transaction that would be disregarded.

The Court: If it had been a total loss in that year, then wouldn't the railroad company have been entitled, or could it [1182] only have set off the loss of the stock of the Sacramento Northern Railroad Company as against the earnings of the Sacramento Northern Railway in the affiliated return?

Mr. Adams: Your Honor, 23(g)(4) applied only to the worthlessness of stock, and in this case I can ask Mr. Elsey the question immediately——

Q. The amount of stock that the Western Pacific Company held, that is, all the outstanding stock of the Sacramento Northern, was approximately $1,000,000, was it not?

A. That is correct.

Q. And then the Western Pacific also had this approximately nine and a half million dollars of notes and open account indebtedness?

A. That is correct.

(Testimony of Charles Elsey.)

Q. And it also had on top of that some millions of bonds of the Sacramento Northern?

A. In excess of five million.

The Court: When the Supreme Court declared the stock of the Western Pacific Corporation worthless, didn't that hold, or impliedly wasn't the effect of that that the stock of the railroad company, the Sacramento Northern, was also worthless?

Mr. Adams: No, your Honor. The Sacramento Northern was not in a Section 77 proceeding. It has never been reorganized.

The Court: As a separate concern?

Mr. Adams: As a separate concern, and in the proceeding of [1183] the Western Pacific Railroad Company the question at issue was, What securities should be issued in the reorganization of that company? And it was in the course of that matter and in consideration of all the matters bearing upon that matter that the Western Pacific Railroad Company was reorganized.

The Court: Was Mr. Elsey the operating head of the Sacramento Northern as well as the railroad company, or was that a separate position?

Q. (By Mr. Adams): That was a separate position, was it not, Mr. Elsey?

A. Separate, yes. I had no official position with the Sacramento Northern.

Q. Mr. Mitchell was the president of the Sacramento Northern Company at that time?

A. Yes, sir, Mr. Harry A. Mitchell.

(Testimony of Charles Elsey.)

Q. And Mr. Mitchell was at the same time one of the officers of the Western Pacific Railroad Company? A. Yes, sir.

Q. What was his office in the Western Pacific?

A. Vice president and general manager.

The Court: You in consequence of your position with the Western Pacific and its ownership of the Sacramento Northern were required to keep yourself closely informed of the Sacramento Northern, were you not? A. Very much so. [1184]

Q. (By Mr. Adams): And particularly with regard to the Western Pacific's investment in the Sacramento Northern?

A. Taking care of its entire financial situation.

Q. And the entire Sacramento Northern system was operated as a part of one railroad system?

A. Yes.

The Court: I do not know how much weight is to be attached to this sort of speculative testimony, but I think in view of the foundation that has been laid, the witness should be permitted to answer that question.

Mr. Phleger: May I make these two statements, one of them bearing upon the speculative character of this: In the first place, I do not agree with counsel's statement of what the regulations are. The general regulations governing the write-off of a partial bad debt are very similar to those of a total debt. The debt has to become bad partially

(Testimony of Charles Elsey.)

during the period in which it is taken. The question is not even framed on that basis, but this is already in the record and uncontradicted. This defendant company accrued taxes during the entire year 1943 in the amount of $7,000,000, closed its books for that year, set up the reserve, reversed the entries; they made no partial tax deduction. They did that at a time that they did not know or had not decided that they would use the plaintiff's stock loss, and so it must be assumed that if they were going to pay $7,000,000 in taxes, that they would have utilized any [1185] offset that they had. And I will make the second observation, and your Honor pointed toward it, if they were going to file separate returns, or even under consolidated returns, the Sacramento Northern stock, if it was worthless, could have been written off, and I do not see how you can take a partial bad debt of the securities of a company and still have its stock worth anything, and they did not attempt to write off the stock of the company, which they could have done under a consolidated return. Now, we have been charged with afterthoughts many times, but this is the most afterthought I have ever heard of. It is in the pure realm of speculation. The record also shows that in the last eight months of 1944, when they could have filed any kind of return that they wanted to, they filed the returns and paid taxes of four or five million dollars. They did not take this loss then.

Mr. Clark: On a consolidated basis, your Honor.

(Testimony of Charles Elsey.)

Mr. Phleger: They could have filed either on a consolidated or a separate basis.

Mr. Clark: They filed on a consolidated basis with the company as a parent.

Mr. Phleger: But they had an option to file on a consolidated basis. They were entitled to take that loss. They did not do it. They paid millions of dollars of taxes. They paid taxes in 1945 and 1946.

The Court: The trouble with that argument is in allowing [1186] this testimony in, I am only allowing it in in connection with the testimony of your accountant, in which he estimated what the tax would have been had a separate return been filed.

Mr. Phleger: But on the basis of the material known at the time, not years afterwards.

The Court: Maybe the question could be reframed. I think the witness should be permitted to give his opinion as to the definitely ascertainable loss during the taxable year of the indebtedness owned by the Sacramento Northern to the Western Pacific Railroad Company, and that that answer may be admissible for what it may be worth in connection with the issue raised by the testimony offered by the plaintiff concerning the matter of what the tax would have been had a separate return been filed by the railroad company for the years in question. You asked the question a little differently from that.

(Testimony of Charles Elsey.)

Mr. Adams: Your Honor, what I asked was a preliminary question. If I may draw it to your Honor's attention you will see it was preliminary. My question was preliminary, and was then to lead to a question substantially as your Honor has said, but I think the preliminary questions should perhaps be asked. The preliminary question was, "Please state whether or not in your opinion this Sacramento Northern Railway indebtedness to the Western Pacific, namely, the open accounts and notes, was collectible, that is, whether it was reasonable to expect that in 1943 it would be paid?" That is just preliminary, and I think the witness may perhaps appropriately answer that [1187] question and then come to the question of how much.

The Court: I think the objection to that question is good, Mr. Adams, but I think a question along the lines that I suggested would go to the fact as to whether or not any part of it was definitely, in the opinion of the witness, uncollectible during that time.

Mr. Adams: I do not want to labor this with your Honor because we have a common objective in mind, but it would seem to me it was a question of fact and a fair question to ask the witness: Was the whole amount collectible, and then if he says "No" to that question, then I will ask him the other. Now, if your Honor does not think that that is the right way to do it—it seemed to me it was appropriate.

(Testimony of Charles Elsey.)

The Court: Of course, the provisions of the statute you are talking about haven't got anything to do with whether or not the whole of the debt is collectible or not. It is whether or not it is definitely determinable during the taxable year that the debt or any part thereof is worthless and uncollectible.

Mr. Levy: Would your Honor like to hear that section?

Mr. Adams: If I might proceed.

The Court: I have had cases under it. I think I am sufficiently familiar with that, and I would allow you to ask the witness questions along that line. That is the only thing that is material under that section, in my opinion, whether or not [1188] this witness from his experience and knowledge and contact with the situation is able to state whether any part of this debt was definitely determined to be worthless and could have been written off during the taxable year.

Mr. Adams: May I again, to save my record, ask the question and then perhaps I might make an offer of proof?

The Court: Very well.

Q. (By Mr. Adams): Mr. Elsey, referring to the indebtedness of the Sacramento Northern to the Western Pacific Railroad Company on notes and open account during the year 1943, to what extent, if at all, was there a definite ascertainable amount by which that indebtedness in your opinion could be written down as uncollectible?

(Testimony of Charles Elsey.)

Mr. Phleger: I object to that. It is not the question that was suggested. The question as suggested was what portion, if any, of that debt was ascertained to be collectible in the year 1943.

The Court: In the opinion of the witness. I think it covers exactly what you want, and then you save yourself from the objection as to the form of the question.

Mr. Adams: Your Honor, I do not want to press this. We have studied this material. We do not accept adverse counsel's statement of just what the rules are. We believe the rule to be on a partial indebtedness that the question is the extent to which the debt is uncollectible at that time, and I so [1189] phrased my question because that is our theory of our defense, and we believe we are correct about that, and we can satisfy your Honor when the time comes to debate the regulations, and I would like to ask the question in that form with your Honor's permission. Of course, if we are on the wrong ground it would be our failure to meet the proper view of the law.

The Court: Will you answer it.

(Question read.)

Mr. Phleger: I object to that on the ground it calls for the conclusion of the witness on an immaterial matter.

The Court: Overruled.

A. I would say that 90 per cent of it was uncollectible.

(Testimony of Charles Elsey.)

Mr. Phleger: I move that that be stricken out as not responsive.

Q. (By Mr. Adams): In my question, Mr. Elsey——

Mr. Phleger: I would like a ruling.

The Court: Let it go out and reframe that.

Mr. Adams: I would suggest that the answer is perfectly responsive. I asked him an amount and, it is true, he gives me a percentage, but a percentage is an amount. That is the only objection to the question that it is not responsive.

Mr. Phleger: No, it is not.

The Court: Mr. Elsey, in your opinion how much of the indebtedness owing the railroad company by the Sacramento Northern Railroad Company in that year could you, in your [1190] opinion, have written off the books as being a loss because of its uncollectibility?

A. I would say 90 per cent of it.

The Court: Now you may have an objection to my question, too.

Mr. Phleger: No, that is all right.

Q. (By Mr. Adams): Mr. Elsey, in answering his Honor's question you were referring, were you not, to the indebtedness of the Sacramento Northern upon the open account and the notes?

A. Yes, sir.

Q. Mr. Elsey, in connection with your answer to his Honor's question did you bear in mind that certain repayments had been made by the Sacramento Northern to the Western Pacific in 1942,

(Testimony of Charles Elsey.)

1943 and 1944 and 1945? A. Yes, sir.

Q. Do you have with you a notation of the amount of those repayments? A. Yes, sir.

Q. Will you please state them to the Court?

Mr. Phleger: Do I take it, if it please your Honor, that these are payments on what was then the balance of the open account or the notes? I do not understand the word "repayments."

Mr. Adams: Mr. Elsey can answer those questions in due course, but let us get along with this. I am trying to lay the [1191] facts before the Court and before counsel.

The Court: Go ahead.

A. In 1942 the Sacramento Northern paid to the Western Pacific on account of notes and advances $22,000; 1943, $103,000; 1944, $170,000; 1945, $100,000, a total of $595,000. [1191-A]

Q. Now during those years did the Sacramento Northern pay to the Western Pacific the interest on its bonded debts? A. No, sir.

Q. And you considered, in giving your answer, the fact that these repayments had been made during those years? A. Yes, sir.

Mr. Adams: Now in another aspect of our defense, your Honor, I have asked Mr. Elsey to bring some information to Court which he has, with regard to the conversion of income bonds of the reorganized railroad company. Part of the financial structure of the reorganized company, after it was reorganized, was income bonds convertible into common stock. The sole purpose that I have in making

(Testimony of Charles Elsey.)

this offer is as a part of our defenses of estoppel and laches, to show the change of position which occurred between the time of the transactions themselves and the time that the lawsuit was brought. And I make that explanation so that counsel may know the purpose of this offer.

Q. Now, Mr. Elsey, what was the total amount of income bonds actually issued under the plan of reorganization by the reorganized company?

A. $21,219,000.

Q. These bonds had a conversion privilege, did they not? A. They did.

Q. What was the nature of the privilege?

A. 20 shares of common stock for each thousand dollars face [1192] amount of 4½% income bonds.

Q. To what extent have any of these bonds been converted into common stock from the time of issuance until July, 1946? You have that figure?

Mr. Clark: Well, I object to that question.

A. No.

Mr. Clark: Upon the ground it is incompetent, irrelevant and immaterial. Apparently, your Honor, the conversion was on the part of bondholders or creditors of the defendant company who chose to become stockholders. There was no showing as to their reasons for so choosing. I fail to see how that can possibly constitute a change of position on the part of the defendant company which is necessary to the establishment of the defense of laches.

(Testimony of Charles Elsey.)

Mr. Phleger: Well, not only that, until he shows, or rather I think the record already shows, that one of the interests, the largest one, converted theirs—the James interests, who knew all about this controversy, and furthermore, how could any estoppel arise when the records and the annual reports show that these matters had been reserved? Isn't that a question of law in this case?

The Court: Well, that seems to me, though, a question of the legal effect of the facts. You may be entirely right in your argument. I am not prepared to rule on that. But the fact itself cannot, or probably is not, subject to dispute. It is mainly as to how much of the bonds would be converted. Now as to what the effect of that is, as a legal question, we could probably reserve ruling on that, couldn't we?

Mr. Phleger: Well, it is also a factual question, too, isn't it, as to what the motives would be?

The Court: I assume there wouldn't be any controversy as to how much the bonds were, how many were converted.

Mr. Phleger: No.

Mr. Clark: We have no quarrel with that.

The Court: As to that extent, it would be harmless, anyhow, even if it goes in evidence.

Mr. Clark: We have no quarrel with that; it is simply the effects of it that is material.

The Court: I will overrule the objection.

Q. (By Mr. Adams): Mr. Elsey, do you have that figure to the middle of 1946?

(Testimony of Charles Elsey.)

A. The end of 1946?

Q. No, the middle of 1946.

The Court: You are referring to the date the suit was filed in New York?

Mr. Adams: That is the beginning of the New York action, yes.

Q. My recollection is, Mr. Elsey, that we don't have that figure.

A. I think I have.

Q. You do? That's splendid; then we can have it now. [1194]

A. The amount of the bonds converted to the end of 1946 was $4,489,300.

Q. Now do you have it to the middle of 1946?

A. No, I have not.

Mr. Adams: May we at a later date, your Honor, supply that figure without recalling the witness, and counsel may have an opportunity to check it?

The Court: Yes.

Mr. Adams: I have no further questions, your Honor.

Cross-Examination

By Mr. Phleger:

Q. Have any of those convertible bonds been converted since 1946?

A. Yes, there is $3,000 converted, face value, converted in April, '47.

Q. That is the last?

A. That is the last.

Q. Now how much of the bonds that were con-

(Testimony of Charles Elsey.)

verted of the $4,489,000 that you have just told us about, belong to the James interests?

A. $3,707,800.

Q. The James interests are represented by Mr. Coulson, are they not?

A. What is that?

Mr. Adams: Your Honor, may I make an objection to the question? That is my sole purpose. It is wholly immaterial who [1195] made the conversion as long as the conversion was made prior to the notice of the existence of this claim.

The Court: Well, of course that is the same—I can rule on that the same as I ruled on the other objection. The fact itself is there, and you cannot use a legal conclusion from that.

Mr. Phleger: Well, I even meet the challenge of counsel because I show that almost all of these bonds belonged to the very man that conceived the method of saving taxes. So that there couldn't have been any misleading of him.

Mr. Adams: Well, there certainly could be a misleading of anyone in the non-assertion of a claim, your Honor; that is a point of my position.

Mr. Phleger: Well, you will stipulate that Mr. Coulson represents the James interests, won't you?

Mr. Adams: Mr. Coulson will be here and testify, and of course it is the fact and has been an advertised and patent fact since prior to the institution of this reorganization in 1935.

The Court: All right, on the same ground I will

(Testimony of Charles Elsey.)

overrule the objection as I did of plaintiff's counsel. I will overrule the objection.

Q. (By Mr. Phleger): Now, Mr. Elsey, how much of the $9,474,100.80 owed by the Sacramento Northern to the Western Pacific Railway was collectible on December 31, 1942?

Mr. Adams: May I object to the question, your Honor, and [1196] state my reason? The law with regard to partial write-offs is definitely to the effect that even though a partial write-off would have been justified in prior years, the taxpayer does not have to take it. He can take the partial write-off. This is as distinct from the total write-off. He can take a partial write-off of an indebtedness even though in prior years such a partial write-off would have been appropriate. Now upon that ground I object to the question.

The Court: I will overrule the objection.

A. In December of '42 we paid, the Sacramento Northern paid the Western Pacific, $222,000.

The Court: No, he wants to know how much of that 90% that you spoke about could have been written off as uncollectible on December 31, 1942. Is that right?

A. I would say the same amount.

Q. (By Mr. Phleger): Now what were the best operating years of the Sacramento Northern in the last ten years? A. During the war period.

Q. What years?

A. I would say '43 to '45.

(Testimony of Charles Elsey.)

Q. It had operating profits in each of those years, did it not? A. No, I don't think so.

Q. What years did it have profits in?

A. I couldn't tell you offhand.

Q. It had a profit in 1943, didn't it? [1197]

A. I think it did, yes.

Q. Now the Sacramento Northern is an integral part of the Western Pacific system, is it not?

A. Yes, sir.

Q. And its continued ownership was provided for in the reorganization plan, was it not?

A. No.

Mr. Adams: Well, the plan speaks for itself.

Mr. Phleger: Well, I have read it.

Q. As a matter of fact, the plan provides that the earnings of the Sacramento Northern shall be consolidated with those of the Western Pacific Railway, and in order to determine certain earnings for the purpose of paying on income bonds——

Mr. MacKinnon: That is objected to on the ground the plan speaks for itself.

A. Yes.

Mr. Phleger: Well, the witness has already answered it "yes."

Mr. MacKinnon: It doesn't make any difference, the objection is made.

The Court: I see no harm in that question; if that is a correct statement, counsel. Overruled.

Q. (By Mr. Phleger): The answer is "yes"?

A. Yes.

(Testimony of Charles Elsey.)

Q. The Western Pacific at all times controlled the Sacramento [1198] Northern?

A. Yes, sir.

Q. And it determined itself, did it not, the time and amounts of these payments that you referred to? A. Yes, sir.

Q. When you wanted a payment, you told them to pay you? A. Absolutely.

Q. What was the purpose of these advances that were made over the years?

A. Both for the operating deficits and for capital expenditures.

Q. To keep the road running? A. Yes, sir.

Q. When you made those advances, did you do so with the expectation of collecting them?

A. That all depended on what the future held out as far as traffic was concerned.

Q. Well, you advanced them to keep it running?

A. That is right.

Q. Not with the idea of collecting them again, except as subsequent events might turn out?

A. That is correct. [1199]

* * *

Q. Will you explain to the court just what a cutback and a refund is? You said you paid them. Does that mean you paid out monies in cash?

A. You would on a refund, but on a cutback it has already been deducted by the government.

Q. In other words, it is a book transaction?

A. They just charge your account. That is it.

(Testimony of Charles Elsey.)

Q. So that when you said you had paid it, it is subject to that qualification?

A. That is correct.

Q. How much of these were cutbacks and how much were refunds?

A. I couldn't tell you. The vast majority of them were cutbacks.

Q. The vast majority were cutbacks. Now when you paid these charges in 1942, '43 and '44, you thought the charges were proper charges against the government, didn't you?

A. That is correct.

Q. And when they cut back on you or required a refund, did you change your mind?

A. That was dependable on what the circumstances brought out, [1200] and also the decisions of the United States Supreme Court.

Q. Well, none of these matters have been litigated, have they? A. Yes, sir.

Q. How much of the payments that you have made on cutbacks were pursuant to court order or adjudication? A. I couldn't say.

Q. You haven't any idea?

A. Not at all. It has been quite a number of cases rendered by the Supreme Court on various commodities, but it would take a vast amount of accounting work to go through that.

Q. So far as you know, that has never been done? A. No, sir, not that I know of.

Q. So that that figure isn't available?

A. No, sir.

(Testimony of Charles Elsey.)

Q. Now have you abandoned, or did you abandon, in behalf of the railroad all hope of collecting these amounts that had been charged against you by cutbacks? A. No, sir.

Q. You still think they are due you?

A. No, no, not all of them, of course; the proposition is this: at the beginning of the war, for security reasons, the government did not comply with all of the tariff provisions. That is particularly true on export traffic. And under export tariffs, in order to secure the export rate, which is always lower than the domestic rate, the shipment would have to move out on a [1201] commercial vessel. It was later decided, after a conference between the military people and the railroads as a whole, that we would grant them not only the export rate, but also the land grant deduction on all shipments, whether it moved on government vessels or whether it moved on commercial vessels. And these cutbacks make up a large portion of that class of traffic. And in order to secure that—not only the export rate but the land grant deduction—the government had got to support with what we call an "export certificate," showing that the shipment did actually move out of a Pacific Coast harbor.

Q. Well, now, I understood you to testify that no compilation has been made as yet as to how much of these cutbacks are ultimately justified and how many you still dispute? A. No.

Q. Now with respect to the payments, the cut-

(Testimony of Charles Elsey.)

backs that you thought were justified, how did you treat them income tax-wise?

A. I couldn't tell you.

Q. You didn't direct that they be deducted from the taxes paid during the years in which they were actually paid out?

A. That is a matter that would be handled between our accounting department and our tax counsel.

Q. And you have no knowledge?

A. No, sir, I have none.

Q. Mr. Elsey, was the Sacramento Northern debts collectible in full as of December 31, 1941?

A. No, sir.

Q. How much of it was uncollectible then?

A. I couldn't tell you.

Q. More than 90%?

A. The percentage, as far as any particular date was concerned, would be—the controlling factor there in that matter would be as to how long the war was to last.

Q. Well, now, I am asking you to estimate how much of that Sacramento Northern debt was collectible on the last day of 1941.

A. I couldn't tell you.

Q. You have no judgment on that, although you have on '42 and '43?

A. Yes, because the war was in effect, and as far as the end of '41 was concerned, why, we were only in the war for a little more than a month, and

(Testimony of Charles Elsey.)

we had no idea at all as to what amount of war traffic the Sacramento Northern was handling.

Q. Well, then, your judgment would be that more, a greater part of it, would be uncollectible at the end of '41 than at the end of '42 or '43, isn't that so? A. I would say so, yes.

Q. It was less collectible, then? A. Yes.

Q. As a matter of fact, it was more collectible in 1943 than for any year in the ten previous years, wasn't it? A. I would say so, yes. [1203]

Mr. Phleger: That is all.

Cross-Examination
(Interveners)

By Mr. Clark:

Q. Mr. Elsey, prior to the time you testified before Judge St. Sure on March 3 of 1944, in support of the tax reserve, had there been inquiries made of the company by any persons respecting the reversal of the 1943 tax accruals?

A. You mean people outside of our organization?

Q. Yes, sir. A. Not that I recall.

Q. In order to refresh your recollection on that subject, let me show you a telegram marked "Railroad Defendant's Exhibit 910" on deposition, addressed to you as president of the company, by Shelley Pierce, financial editor, Journal of Commerce, on January 28, 1944, and after examining that, Mr. Elsey, I will ask you whether or not

(Testimony of Charles Elsey.)

during January of '44 the company was in receipt of inquiries from the press and members of the public concerning the reason for the reversal of the tax accruals which had been accrued during '43 on a consolidated basis. (Handing to witness.)

Mr. MacKinnon: I object to it on the ground it is irrelevant and immaterial to any issue in the action. [1204]

* * *

Mr. Clark: May I have the question read back?

The Court: Well, I think the witness heard it, Mr. Clark. Did you hear the question?

The Witness: Yes.

Q. (By Mr. Clark): Well, Mr. Elsey, is your recollection now [1205] refreshed that the company did receive such inquiries?

A. That is correct, they did receive them after we issued our reports for December of '43 for the year '43. That was given out to the press on either January 25 or January 26, as I recall it.

Q. I see. And is the telegram I have shown you one of those inquiries? A. Yes, sir.

Q. By the way, do you remember approximately when it was that the books of the company were closed for the year 1943?

A. I would say about the 18th of January, somewheres in that vicinity.

Q. Now, Mr. Elsey, let me show you a photostatic copy of the telegram addressed to Shelley Pierce, financial editor, Journal of Commerce, New York, dated January 28, 1944, and signed "Charles

(Testimony of Charles Elsey.)

Elsey" which has been marked Interveners' Exhibit 325 on deposition (handing to witness). I will ask you whether you recollect sending that telegram.

A. Well, there is no question but what that telegram was sent by my office.

Q. All right. Now, directing your attention, Mr. Elsey, to the portion of the text of this telegram within the words "quote" and "unquote," will you state whether or not that was a prepared statement which had been decided upon so far as answering any such inquiries was concerned?

Mr. MacKinnon: May I have a continuing objection to all this testimony on the ground it is irrelevant and immaterial?

The Court: I don't *what* what this is about.

Mr. MacKinnon: This is the same subject matter that you ruled on before.

The Court: Well, all that the witness has testified to, so far as that is concerned, is that his recollection was refreshed, and they did receive inquiries as to why there was this reversal of the item. That is all the testimony there is. I don't see why that required any further elucidation, unless this is a new subject matter. I don't know whether it is or not.

Mr. Clark: Well, may it please your Honor, on direct examination Mr. Adams asked Mr. Elsey, and the purpose is obvious, whether or not——

The Court: You don't have to argue the matter,

(Testimony of Charles Elsey.)

because I don't know what it is you are trying to bring out.

Mr. Clark: Very well, will you please answer the question?

A. No, it was not a cut and dried proposition.

Q. (By Mr. Clark): It was not a prepared statement? A. No, sir.

Q. And I refer to the language in the telegram between the words "quote" and "unquote"?

A. That is correct.

Mr. Clark: May it please your Honor, we will offer this telegram, or rather the copy of it, in evidence as Interveners' [1207] Exhibit next in order.

Mr. MacKinnon: I object to it on the ground it is irrelevant and immaterial to any issue in the action.

The Court: Let me see it. I cannot rule on this without knowing what it is.

(Document handed to court through clerk.)

Mr. Clark: Your Honor will observe there is no mention of the stock loss, and this series of correspondence bears directly upon the defense of laches, and particularly Mr. Adams' eliciting of this witness that all inquiries were answered with full and complete data, and particularly his reason for going into the testimony concerning stock loss before Judge St. Sure, and your Honor will find particularly with respect to the Sacramento Northern set off, as bearing upon laches, that this period is particularly critical. Now I propose to

(Testimony of Charles Elsey.)

show, may it please your Honor, that during this time, the only statement given by the company to the public which would have been the answer to any inquiry the stockholders may have made, would have been that which is included in that telegram, which assigns the reason for the tax saving to be a reduction in capitalization of the company; namely, the defendant, instead of the stock loss. It bears directly on laches, and it is directly responsive to Mr. Adams' direct examination. I also propose to show who approved that language, and the employees were instructed to give no other information, and that was suggested to Mr. Schumacher in New [1208] York, that he make no further comments than the quoted language.

The Court: What was the point of all that?

Mr. Clark: Simply to show that during this period of time, may it please your Honor, so far as inquiries addressed to the company were concerned, they were not making public this very thing which is before your Honor, namely, the use of the holding corporation's stock loss, which bears upon their present defense of laches. They claim we should have asserted some claim at this time, and with respect to the Sacramento Northern situation, it is certainly pertinent, because there is a date in this period upon which that turns. The proof consists of two other documents and about three questions, your Honor.

The Court: What is the basis of the objection, so I can get it clear?

(Testimony of Charles Elsey.)

Mr. MacKinnon: It is completely irrelevant and immaterial to any issue in the action. The accrual of the tax reserve was an accrual made in the normal and natural way, application made to to the reorganization court, Judge St. Sure passed upon it, the reserve was passed on, and with respect to the specific document that you have before you, if we are going into this, we have got a newspaper article by Shelley Pierce, which we will offer, where he comments on this very stock loss. I say these things are completely irrelevant and immaterial to the issue before you.

Mr. Clark: All later in time, your Honor. All publicity on this matter, your Honor, was subsequent to the hearing on the [1209] tax reserves.

The Court: So was this, wasn't it?

Mr. Clark: Oh, no, the hearing on the tax reserve was March 3; this was January. The purpose of this is to establish that up until the testimony before Judge St. Sure on the tax [1209A] reserve, there was a deliberate effort on the part of the company to keep quiet the use of the stock loss, which bears upon any defense of laches, and this establishes it.

Mr. Adams: I do not rise to make an objection, but to indicate that, of course, Mr. Clark's statement of his own arguments is, I take it, a statement of argument and that is all. If I were to follow him closely, I might have some differences with him about his own statement of facts.

The Court: You have asserted the defense of laches?

(Testimony of Charles Elsey.)

Mr. Adams: I have.

The Court: You did go into that somewhat with this witness, although not in particular detail, and, of course, this might be—I am unable to evaluate it at the moment, but it may have some relevancy to the question of laches which I am unable to determine at the moment.

Mr. Clark: May it please the Court, the direct question was asked by Mr. Adams on his direct examination unrelated to any event at all whether any information requested by any party to the reorganization proceeding was given as promptly and as fully as possible.

Mr. MacKinnon: What page, please?

Mr. Clark: I do not know the page. I took it down as it was given. I checked it this morning; it is in the transcript. Would you like me to get it?

Mr. MacKinnon: Yes, I would like to see it. I certainly [1210] remember no such testimony.

Mr. Clark: I certainly remember it and made a note of it. Page 1092, your Honor, line 6:

"Q. During this trusteeship, what was your practice with respect to furnishing information when it was requested by parties to the reorganization proceeding?

"A. We always furnished any information that was requested just as promptly and just as fully as we possibly could to them."

Mr. MacKinnon: Your Honor——

Mr. Clark: Just a minute, please. Now, Mr.

(Testimony of Charles Elsey.)

Matthew made a point of introducing, may it please your Honor, the intervention of the holding corporation in the reorganization proceeding for the purpose of protecting itself under the plan. The argument will be made that the plaintiff corporation was a party to the proceeding and should have come in and asserted its claim, and so forth, and I propose to show to your Honor, that during this particular time, upon the approval of Mr. Coulson, the only information which was being given out by the company did not mention any use of the plaintiff corporation's stock loss, so that any person who was not an officer of both the company and the corporation, that is, any disinterested person or the interveners, if you will, could not have gotten this information. That is the point of it.

The Court: They could have gotten it in the reorganization [1211] proceeding, couldn't they?

Mr. Clark: They could not up to that time.

The Court: Not up to that time but they could at that time.

Mr. Clark: Not at that time, your Honor. This is January, 1944.

The Court: They could have at the time the petition was filed.

Mr. Clark: The petition said nothing about the use of a stock loss, your Honor. You mean the petition for a reserve?

The Court: Yes.

Mr. Clark: It says nothing about the use of

(Testimony of Charles Elsey.)

this stock loss. It simply talks generally about federal taxes, and I have something to show your Honor on that, too.

Mr. MacKinnon: Let me make one response on this. This is the reference that counsel says has to do with the general inquiry by Mr. Adams. Mr. Adams asked him this question:

"Q. During this trusteeship what was your practice with respect to furnishing information when it was requested by the parties to the reorganization proceeding?"

Shelley Pierce was not a party to the reorganization proceedings and never purported to be a party to the reorganization proceeding, and the response made by Mr. Elsey to the question asked, and the question asked was designed to elicit information with respect to parties, namely, whether or not information was furnished the plaintiff when they requested it—— [1212]

Mr. Clark: We will follow this up with a general showing.

Mr. MacKinnon: Permit me to continue, will you, please? What they are attempting to do here is to distort the picture. This reserve and the accruals were handled under Judge St. Sure. Now they pick up an isolated document and they say, "This is what was said." I can show to your Honor a newspaper article by Shelley Pierce wherein he made specific reference to this stock loss. That is the field we are going into if this field is opened up.

(Testimony of Charles Elsey.)

I do not see its relevancy or materiality to the issue to be determined in this action, and I do not see how it in any wise bears upon any laches.

Mr. Clark: There must be something to it or counsel would not resist so strenuously.

The Court: Oh, I do not know about that. Lawyers usually resist anything the other fellow offers.

Mr. MacKinnon: It is just one more of these asides.

The Court: I cannot see what the president of the company said in a telegram to some newspaper man and what he published has any particular bearing upon the legal rights of the parties or these defenses.

Mr. Clark: Perhaps, your Honor, it will be of some aid if you examine the other two exhibits which I intend to offer in this connection.

The Court: One is a telegram to Mr. Schumacher from Mr. Elsey——

Mr. Clark: One is Interveners' 246 and the other is [1213] Interveners' 324, in which the identical language appears.

The Court: Well, I do not see the bearing on this matter as to what kind of releases were given the press or the public on this matter. What has that got to do with the legal issue?

Mr. Clark: It certainly has to do, your Honor, with the defense of laches which is being urged here.

(Testimony of Charles Elsey.)

The Court: I do not see how it has any bearing on that. Do you mean to say that somebody gets some right because some newspaper publishes something? Some information is given the newspapers?

Mr. Clark: If it please the Court, the defense of laches rests on knowledge or the facts which should have put people upon notice. Laches has been urged against these interveners.

The Court: I have my own suspicions as to why these statements were given to the press. Maybe they are justified or not. It probably has something to do with the activities of the Stock Exchange. But what has that to do with the rights that are involved here?

Mr. Clark: May it please the Court, suppose I offer them for identification. I have made my offer of proof. The record shows the purpose of them.

The Court: Let the three documents be marked for identification.

Mr. Clark: Being first a telegram from Elsey to Shelley Pierce, dated January 28, 1944, marked on deposition Interveners' [1214] Exhibit 325, as Interveners' Exhibit next in order.

The Clerk: Shall I mark these as one exhibit?

Mr. Clark: Yes, 18A, B and C. Next, a telegram from Charles Elsey to T. M. Schumacher, dated January 28, 1944, Interveners' Exhibit 246 on deposition; and nextly, a memorandum dated January 25, 1944, signed Charles Elsey in typing, being Interveners' Exhibit 324 on deposition.

(Testimony of Charles Elsey.)

(The documents referred to were thereupon marked Interveners' Exhibits 18A, B and C, respectively, for identification.)

Mr. Clark: May I have Plaintiff's Exhibit 53, please?

The Court: I think before you proceed we might take a brief recess.

Mr. Clark: Very well, your Honor.

(Recess.)

Q. (By Mr. Clark): Now, Mr. Elsey, with respect to the January 11, 1944, opinion, which is Plaintiff's Exhibit 54 in this case, was there an arrangement that that opinion would not be effective until cleared by Mr. Coulson from New York?

Mr. Adams: The witness is entitled to see the paper if he wishes it in that connection.

Q. (By Mr. Clark): You have in mind the opinion I am talking about, have you not, Mr. Elsey? A. You mean Mr. Polk's opinion?

Q. The opinion dated January 11, 1944, which you requested. A. Oh, yes, yes. [1215]

Q. Concerning these tax matters?

A. Yes, sir.

Q. You have that in mind? A. Yes, sir.

Q. My question was whether or not there was an arrangement that that opinion, although left with you by Mr. Polk, would not be effective until released by Mr. Coulson from New York?

A. No, not Mr. Coulson. Mr. Polk stated that

(Testimony of Charles Elsey.)

he wanted that matter gone over with his associates.

Q. Let me show you in that connection a photostatic copy of a telegram from you to Mr. Coulson dated January 15, 1944, Interveners' Exhibit 346 on deposition, and see if that refreshes your recollection about that matter.

A. That is correct.

Mr. Clark: We will offer this telegram in evidence, your Honor, as Interveners' Exhibit next in order.

Mr. MacKinnon: That is objected to as irrelevant and immaterial. If he wants to put in the full record, it comes out to the same question we had a minute ago. The record shows that Mr. Polk was out in California at the time the opinion was requested, that he wrote a telegram to New York requesting a checking of figures that he was releasing in connection with the opinion. There is a telegram. They have seen it. They take an isolated telegram, they say, "We want to offer this." I think, your Honor, I do not care whether all this goes in; if [1215-A] you want the complete record here, that is o.k. But let us understand that we are putting in the complete record rather than these isolated telegrams on which they are going to ask you to draw inferences and make implications. I say the telegram is completely irrelevant and immaterial to the issue before your Honor.

The Court: Counsel, all that is before the Court is this: The witness stated in answer to a question

(Testimony of Charles Elsey.)

of counsel that he had a certain view concerning the release of this opinion.

Mr. MacKinnon: That is right.

The Court: Then counsel showed him some telegram, which I have not seen yet and do not know anything about, and asked him if that refreshed his recollection about it. The witness said it did. Now, I do not know what is in the telegram.

Mr. MacKinnon: And now he offers it.

The Court: I do not know whether it is of any importance. Why don't you ask him the question, his recollection having been refreshed by whatever you have shown him, what does he now state?

Q. (By Mr. Clark): Your recollection now having been refreshed, Mr. Elsey, will you please tell us whether there was such an arrangement as I call your attention to? A. Yes.

Q. Can you tell us approximately when it was that Colonel Coulson released the opinion by notification to you? A. I couldn't say.

Q. Again let me show you the telegram to which I just called your attention. A. Yes.

Q. What was the approximate date? [1217]

A. The date of this telegram was January 15.

Q. Was that the date upon which the opinion was released? A. I could not say.

Q. Was it after this date of January 15, 1944?

A. Yes.

Q. Very well. In that regard, just so the record may be clear about it, let me show you another

(Testimony of Charles Elsey.)

telegram, Interveners' 71 on deposition, and see if you can tell us the date upon which you received the release of the opinion from Mr. Coulson.

A. Yes, but I did not receive the revised opinion until after the date of January 15.

Q. Am I correct in stating that as of approximately January 15, 1944, Mr. Coulson did release the opinion? A. Yes.

Q. Very well. Now, was it after that, Mr. Elsey, that the books for the year 1943 of the railroad company were closed? A. Yes, sir.

Q. I hand you a memorandum dated January 8, 1944, which has been received as Plaintiff's Exhibit 53 in this case, and I will ask you to examine it commencing with the last paragraph on the first page.

Mr. Adams: Of course, the witness is privileged to examine the whole memorandum, Mr. Clark.

Mr. Clark: No doubt about it, your Honor.

The Witness: What is under this? [1218]

Mr. Clark: Suppose I read it, your Honor? It is in evidence anyway.

The Court: What question are you going to put? Let us have a question.

Mr. Clark: I am going to ask him about a reserve fund that is mentioned in this memorandum, and I would like to call your Honor's attention, as well as the witness', to the portion of the memorandum on which I am going to examine him. Apparently there is a label over some of the language on the exhibit.

(Testimony of Charles Elsey.)

Mr. MacKinnon:. Will you state whose memorandum that is?

Mr. Clark: Mr. Polk's memorandum of January 8, 1944, in which he refers to conferences had with Mr. Elsey, Mr. Engelbright, Mr. DeGraff, Mr. Glaster, et cetera.

Mr. Adams: Did you speak of that as a conference, Mr. Clark?

Mr. Clark: Conferences, I said.

"There has been accrued on the operating company's books through November a reserve for Federal tax liability of approximately $7,500,000. Since there will be no tax liability if this operating loss deduction on a consolidated return basis is allowed, the suggestion was made that the books of account be adjusted so as to reflect at December 31 no accrual for Federal tax liability on the part of [1219] the operating company for 1943. After considerable discussion it was decided tentatively to set up a reserve for road improvement in an amount approximating the $7,500,000 figure. This action is to be taken upon order of the court after appropriate application for same."

Q. Mr. Elsey, at any conference which you attended on January 8, 1944, or at any time during January respecting these tax matters, did you ever hear any suggestion that a reserve for road improvement be set up in the amount of $7,500,000?

Mr. MacKinnon: I object to it on the ground it is irrelevant and immaterial to any issue in the action.

(Testimony of Charles Elsey.)

Mr. Clark: It bears directly upon the setting up of this reserve.

Mr. MacKinnon: It has no bearing upon it whatever. It is completely extraneous to the issue.

The Court: What is the importance of this, Mr. Clark, in the cross-examination of this witness?

Mr. Clark: I propose to show, if it please your Honor, that he has testified as to the setting up of the reserve and the reason for it, and on the same subject that I offered the releases to the public, which offer your Honor refused, namely, bearing in mind the effort at this time to keep attention from this tax matter on the part of those who were handling it, I propose to show—and the memorandum so states in effect—that there [1220] was discussed the labeling of this reserve, not as one for Federal taxes, but as a reserve for road improvement. And I also propose to show that there was even submitted to Mr. Elsey a petition to be filed in the court which labeled this reserve fund a reserve for taxes, and some language along the line of road improvement, post-war modernization, and so forth, and I further propose to show that when that petition was submitted to Mr. Elsey he refused to sign it because, in his testimony given on deposition, he refused to appear in support of anything that was not correct before Judge St. Sure.

Mr. Adams: Now, counsel, if you are going to attempt to state testimony, I suggest that the whole of the testimony be stated. Certainly if Mr. Elsey

(Testimony of Charles Elsey.)

is to be asked about this, that characterization of his testimony is not to stand alone and he should be asked.

Mr. Clark: The testimony on the deposition, your Honor, was this, in line with the offer that I am making——

Mr. Adams: I ask you to read the whole of it, on that subject.

Mr. Clark: I will read this part of it on page 280 commencing at line 2:

"When this letter and its attachments came from Mr. Matthew, did you discuss them with Mr. Engelbright"——

Mr. Adams: You haven't got the letter and the attachments before his Honor. [1221]

Mr. Clark: I have them right here. I will hand them up to your Honor.

Mr. Adams: Your Honor, it seems to me that this is an attempt to argue a matter that has not yet been offered before your Honor.

Mr. Clark: I thought I was asked to read the testimony, your Honor.

Mr. Adams: Not at all. I said if you are going to make a statement about the testimony, the whole testimony should be read, and I take it you are not going to do that. The question before your Honor, I take it, relates to a memorandum prepared by Mr. Polk from which counsel was asking questions of the witness. I suggest that if we are going to go forward with the production of evidence in this

case, that it be done in the regular way and not by an attempt of counsel in advance to state or read portions of testimony taken upon deposition.

Mr. MacKinnon: I object to it, your Honor, on the ground it is irrelevant and immaterial to any issue in the action. This is just a little bit more of interveners' implications and inferences. If they want to lay the full record before your Honor, let them lay the full record there, but it has nothing to do with the record before you.

Mr. Clark: They are not implications or inferences. They are facts demonstrated by documents and are, in Mr. MacKinnon's words, the current record of what the parties did at the time. Our point is it bears absolutely upon the claim made by these people that up to this time this matter was given the utmost publicity, and therefore, they argue, ergo the interveners or someone should have come in on behalf of this plaintiff corporation and, in one instance, file a claim in bankruptcy, and in the other, start some kind of action or what not. It bears directly upon these technical defenses. I have made my offer of proof, your Honor, and I will take a ruling on it.

The Court: I like to allow anything that is reasonably relevant to the matter, but I do not quite see the point of this.

Mr. Clark: Here is a memorandum, your Honor, made by Mr. Polk concerning these tax transactions, in which he refers to a discussion about setting up a tax reserve in the amount of $7,500,000.

(Testimony of Charles Elsey.)

The Court: There was a tax reserve that was set up, wasn't there?

Mr. Clark: Yes; then he says that is discussed about labeling the $7,500,000 reserve as a reserve for road improvement, not taxes. Now, what is the purpose of that except to keep publicity from the fact that these tax savings are due to this stock loss? There can be no other reason for it. Why should they discuss, if it please the Court, some label such as reserve for road improvement for what ultimately became a tax reserve fund? I propose to show that this witness, although the memorandum by Mr. Polk says that conferences were [1223] had with Mr. Elsey and others, this witness was never present at any conference where there was any such discussion, and when a petition was presented to him labeled "Post-War Modernization" or what not, he refused to go for it.

The Court: Mr. Clark, I understand that, but the fact of the matter is there was a tax reserve set up. They did file returns on this basis. They did take the stock loss. Now, what do the motives with respect to publicity and that sort of thing have to do with this?

Mr. Clark: This bears on a period prior to the setting up of reserves.

The Court: I have my own suspicions as to the nature of these releases and the reason perhaps for not saying too much on the subject, but just covering whatever was necessary. It seems to me,

(Testimony of Charles Elsey.)

at any rate, that that has no particular bearing upon the dispute. What they talked about with respect to labeling this entry does not seem to me to have any bearing upon it. They did take this stock loss as a deduction. They did set up a reserve for taxes in the event they were unsuccessful in establishing it. What has this business about what they said to the public got to do with it? I do not think it has bearing either on the plaintiff's case or on the matter of any special defense either.

Mr. Clark: Very well, your Honor. I will offer for identification—— [1224]

The Court: I would not hold that anyone was bound by what the newspapers put in or what any of these people said about the newspapers.

Mr. Clark: I will offer for identification, your Honor, the documents I passed up to you as Interveners' next exhibit for identification, being a letter addressed to Mr. Elsey under date of February 8, 1944, signed Allen P. Matthew, as Interveners' Exhibit 445-A, -B on deposition, the title being "Reserve Fund for Contingent Tax Liability and for Post-War Modernization and Improvement," and also the form of petition attached thereto and described as Interveners' Exhibit 445-C to -G upon deposition and entitled "Petition for Authority to Establish a Reserve Fund for Contingent Tax Liability and for Post-War Modernization and Improvement.".

(The documents referred to were marked Interveners' Exhibit 19 for Identification.)

(Testimony of Charles Elsey.)

Mr. Clark: And in connection with that also I will offer, may it please your Honor, the following testimony by this witness and take a ruling on it. At page 280, line 2, of Mr. Elsey's deposition. I am making an offer of proof.

Mr. Adams: I understand, your Honor, but the witness is here. I believe he should first put the question to the witness and get your Honor's ruling on it.

Mr. Clark: I am making an offer of proof because I understand his Honor is going to sustain an objection to this [1225] line of testimony. That is my reason for marking them for identification. I am perfectly willing to take a ruling on it without further argument.

Mr. Adams: Why is it necessary to read that into the record?

Mr. Clark: I will answer as to my offer to prove, this: Were Mr. Elsey asked why he rejected the petition which has just been marked for identification, he would testify that he knew nothing about the post-war modernization program, and the petition was not satisfactory to him, and that he was not going before Judge St. Sure on any kind of petition except just exactly what it was supposed to be.

Mr. Adams: Of course, your Honor will understand under your Honor's ruling the witness is now on the stand and is not in a position to testify in regard to that matter because of your Honor's rul-

(Testimony of Charles Elsey.)

ing; that Mr. Clark is now reading into evidence testimony, and he read it fairly——

Mr. Clark: I am making an offer of proof and intend to take a ruling on it, which I suspect will be adverse.

The Court: I will overrule the offer of proof, that is, hold that it is not material on the ground that this subject matter is material neither to the plaintiff's nor the interveners' case nor the defense of laches.

Mr. Clark: Yes, your Honor.

Q. Mr. Elsey, referring to these cut-backs you testified to [1226] on your direct examination as having amounted, I think, to date to some two million dollars—is that right?

A. That is correct.

Q. Does that figure include any cut-backs or refunds arising from export shipments?

A. Oh, yes, yes.

Q. Can you tell us approximately what proportion of your approximation of $2,000,000 as having already been deducted by the Government or paid arises from the cut-backs or refunds on export shipments? A. No.

Mr. Phleger: May I point out that the witness has already testified that no calculation or computation was made with respect to this particular matter. He stated that he did not do it.

Mr. Adams: I do not understand counsel's statement. It is rather broad and not very clear to me.

(Testimony of Charles Elsey.)

The Court: The witness has answered the question. He said "No."

Mr. Clark: He can't do it.

Q. Mr. Elsey, I will show you an original letter addressed to Mr. James K. Polk, care of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York, dated October 20, 1944, on the letterhead of the Western Pacific Railroad Company and signed by Mr. DeGraff, General Auditor, being Exhibit No. 82 on [1227] deposition, and I will direct your attention particularly to the paragraph commencing at the bottom of page 2, starting, "There is another situation between the railroads and the Government" over to the next page.

Now we will offer this letter in evidence, your Honor. It treats of these cut-backs at the current time.

The Court: For what purpose is it offered?

Mr. Clark: I want to offer it before I examine him on it.

Mr. MacKinnon: I object on the ground it is incompetent, irrelevant and immaterial.

Mr. Clark: I don't need it in evidence.

Q. Let me ask you this, Mr. Elsey: Now, as to any cut-backs or refunds arising from export shipments, am I correct in stating that for the period up to April 1, 1944, the amount of $500,000 in those claims had been determined and settled by refunding $150,000?

A. What is it you want me——

Q. Is that a correct statement?

(Testimony of Charles Elsey.)

A. I don't know. That isn't my letter.

Q. Well, it is the letter of Mr. DeGraff, the general auditor of the company, is it not?

A. Ask Mr. DeGraff; don't ask me.

Q. Well, do you know anything about the subject at all?

A. Not in detail, no. That is an accounting department [1228] matter.

Q. You testified on your direct examination to having known that Mr. Curry was retained by Whitman, Ransom, Coulson & Goetz to do certain work in connection with these tax matters?

A. Yes.

Q. Do you also know, Mr. Elsey, that Mr. Curry's retainer was terminated sometime during the fall of 1948? A. That is correct.

Mr. Adams: Well, the record shows just what the facts are, does it not, Mr. Clark?

Mr. Clark: Well, I haven't the date in mind right now. It was sometime during the fall of '48, and it was to continue until the end of '48.

Mr. Adams: That is right.

Q. (By Mr. Clark): Did Mr. Coulson consult you before terminating Mr. Curry's retainer?

A. No, sir.

Mr. Clark: That is all, your Honor.

Mr. Adams: Your Honor, I have just one or two questions. We could finish, I think.

(Testimony of Charles Elsey.)

Redirect Examination

By Mr. Adams:

Q. Now, Mr. Elsey, in regard to the cut-backs and refunds, Mr. Phleger in one of his questions to you on that subject referred to the matter being involved in book entries, and with counsel's permission I will ask a leading [1229] question at this point: Is if the fact that the way a cut-back operates is that the Comptroller General deducts out of a bill payable to the railroad company the amount of a refund claim that he has previously sent to the railroad company and which refund claim has not been paid by the railroad company?

A. That is correct.

Q. So that there is in that way a reduction in the amount received by the railroad company finally on the transaction to which the cut-back refers?

A. Yes.

Q. Now——

The Court: That is a continuing accounting and bookkeeping procedure, I take it?

Q. (By Mr. Adams): Is that right, Mr. Elsey?

A. That is correct.

Q. Now, you were asked also upon cross-examination whether or not the amount of cut-backs and refunds on war traffic was still in dispute between the company and the office of the Comptroller General? A. That is correct.

Q. Now, in answering that question did you have reference to the approximate $2,000,000 of

(Testimony of Charles Elsey.)

cut-backs that you know about definitely, as well as to figures in addition to that?

Mr. Phleger: Well, I object to that as a leading question.

Mr. Adams: It is leading. [1230]

Mr. Phleger: And improper redirect examination.

Mr. Adams: The question was raised as to the amounts in dispute, and I want to find out whether the $2,000,000 figure includes disputed amounts or whether the disputes relate to the additional claims outside of the $2,000,000 figure. I don't think that I have led the witness to any answer, and I am interested in finding out.

Mr. Phleger: Well, he has testified that he hasn't made any computations and that none had been, no segregation made.

Mr. Adams: It may be the witness will answer my question in the negative. I don't know the answer. I would like to ask the question.

The Court: See if you cannot ask it in such a form that it isn't leading, Mr. Adams.

Q. (By Mr. Adams): You were asked, Mr. Mr. Elsey, upon your cross-examination questions in respect of disputes still going on between the railroad company and the Government?

A. Yes.

Q. Regarding these cut-backs and refunds?

A. Yes.

Q. Now, can you tell me whether or not such

(Testimony of Charles Elsey.)

disputes are going on as to that portion of the cut-backs and refunds which have been definitely ascertained by the railroad company?

A. The cut-backs that I mentioned in the approximate figure of $2,000,000 are cut-backs that we have agreed to. The [1231] Government has also made cut-backs in addition to this $2,000,000 that we don't go along with; and those matters are still under correspondence.

Mr. Adams: I have no further questions, your Honor.

Recross-Examination

By Mr. Phleger:

Q. What were the years? You have referred to $2,000,000. What years were those cut-backs for?

A. In what year the shipment was handled?

Q. Yes. A. I haven't got the least idea.

Mr. Phleger: That is all.

Mr. Clark: Ask him to segregate it.

Mr. Phleger: No, I don't want him to segregate it. That is all. [1232]

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Vol. IV

TRANSCRIPT OF RECORD

(Pages 1363 to 1796)

Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DuP. BAYARD, RECEIVER, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN AND J. S. FARLEE & CO., INC., PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 150—PETITION FOR CERTIORARI FILED JUNE 23, 1952
No. 160—PETITION FOR CERTIORARI FILED JUNE 26, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAIROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Transcript of Record
In Five Volumes

Volume IV
(Pages 1363 to 1796)

**Appeals from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL GRADY

called on behalf of the defendants; sworn.

The Clerk: State your name to the Court, please.

The witness: My name is Paul Grady, G-r-a-d-y.

Direct Examination

By Mr. Adams:

Q. Where do you reside, Mr. Grady?

A. I reside in Greenwich, Connecticut.

Q. And you have your office in New York?

A. That is correct.

Q. What is your profession?

A. I am a certified public acountant.

Q. Are you now associated with Price, Waterhouse & Company? A. I am.

Q. In what capacity?

A. I am a partner of the firm.

Q. In how many States, Mr. Grady, do you hold a certificate as a certified public accountant?

A. Eleven States, including the State of California. [1233]

Q. Did you study acountancy in college?

A. I did.

Q. And where?

A. At the University of Illinois.

Q. When did you graduate?

A. I graduated in 1923.

Q. With what degree?

A. With a degree of Bachelor of Science.

Q. What was your first association as an accountant?

(Testimony of Paul Grady.)

A. Almost immediately after graduation from the University of Illinois I became a member of the staff of Arthur Anderson & Company in Chicago.

Q. How long did you remain with Arthur Anderson & Company?

A. Approximately nineteen years.

Q. And at that time, a part of that time, you were a partner in that firm?

A. I was a partner the last ten years of my association with the firm.

Q. While you were with Arthur Anderson & Company did you specialize in any particular field of accounting work?

A. I specialized in public utility accounting, although that was not exclusively my type of work.

Q. And were you in charge of the public utility work for Arthur Anderson & Company?

A. I was in charge of the public utility work in the New York [1234] office of Arthur Anderson & Company for a period of five years. Subsequently I was in charge of the public utility work for the entire firm for a period of approximately three years.

Q. When did you leave Arthur Anderson & Company? A. The early part of 1942.

Q. And what was your next association?

A. I left Arthur Anderson & Company to go with the United States Navy Department at the request of Secretary Forrestal, for the purpose of assisting in the organization and determination of

(Testimony of Paul Grady.)

the policies of the cost inspection service of the Navy Department, that being the auditing organization of the Navy that was set up during the wartime period to audit procurement contracts.

Q. And would you describe briefly the work you did for the Navy.

A. Well, during that period my technical position was executive assistant in the Secretary's office, and I was assigned to the Cost Inspection Service in the Bureau of Supplies and Accounts. I assisted in setting up the policies in the preparation of the audit manual covering the procedures by which contracts were to be audited, and assisted in setting up the form of organization and in obtaining competent accounting personnel to fill the key spots in the organization. The organization had approximately 6000 employees after it was fully in operation.

Q. When, Mr. Grady, did you become associated with Price, [1235] Waterhouse & Company?

A. I became associated with Price, Waterhouse & Company in May of 1943, after the completion of my full-time assignment with the Navy Department.

Q. Now, would you describe, please, in general the fields in which you worked as an accountant.

A. During the period of something over a quarter of a century I have had experience in public utilities, railroads, manufacturing, general merchandise and financial type of business enterprises. I have also had considerable experience with Government corporation type of activities, as represented

(Testimony of Paul Grady.)

by the Reconstruction Finance Corporation, Federal Deposit Insurance, Rubber Reserve and Rubber Development, to name some of them. [1236]

Q. In respect of those governmental agencies, you have been engaged in work for the government of an accounting nature?

A. That is correct, accounting and auditing.

Q. Have you recently been connected with the commission on the organization of the executive branch of the United States Government?

A. I have.

Q. That is the commission sometimes known as the Hoover Commission? A. That is correct.

Q. What work have you done for that commission?

A. I was given the responsibility for making the survey of the lending agencies of the government for the purpose of preparing factual reports as well as a report on recommendations to the commission for the commission's consideration in arriving at their own recommendations to Congress.

Q. Have you recently made studies for the national military establishment?

A. I have been a member of a committee of five which has undertaken a rather comprehensive survey of the accounting—and by that I mean not only accounting in the sense of records but also in the broader sense of accounting control and budgetary procedures—of the national military establishment for the purpose of arriving at specific

(Testimony of Paul Grady.)

recommendations for the Secretary of Defense, and I might add that our report was likewise used [1237] by the task force covering the area of the Department of Defense for the Hoover Commission.

Q. Of what professional societies are you a member?

A. I am a member of the New York State Society of Certified Public Accountants; the Illinois Society of Certified Public Accountants; and the American Institute of Accountants. The latter is the national professional organization of certified public accountants.

Q. Have you been a member of some of the committees of the American Institute of Accountants?

A. Yes, I have been a member of quite a few of the committees.

Q. And you have been a chairman of some of those committees? A. Yes, sir.

Q. Would you name some of the committees of which you have been chairman?

A. I was chairman of the American Institute committee on Public Utilities, in 1939 and 1940. I was also chairman of the committee on Auditing Procedure, which is one of the two principal technical committees of the Institute, during the four years that just ended last fall.

Q. You have done some writing on accounting questions?

A. Yes, I have written a fairly numerous amount of articles.

(Testimony of Paul Grady.)

Q. Could you give me a brief description of the nature of your publications?

A. Most of them deal with—— [1238]

The Court: Mr. Adams, is this witness going to testify to the same subject matter that the accountant testified for the plaintiff?

Mr. Adams: No, your Honor.

The Witness: Most of them deal with accounting, auditing and financial subjects, and they have been published for the most part in professional type of publications—I mean of the American Institute of Accounting or the American Accounting Association, which is the national organization of accounting instructors.

Q. Have you had any accounting experience with the railroad industry?

A. Yes, I have had accounting experience with the railroad industry.

Q. When did that begin?

A. Well, it began in the early 1920's, in the early days of my auditing experience. The principal amount of it during that period related to interurban electric railways, which at that time were quite commonly owned in affiliation with public utility groups. I have likewise had some experience in steam railroads. Would you like me to describe it or is that a part of the question?

Q. Would you please give a general description of your accounting experience in the railroad industry, adding anything you had in mind to supplement what you have already said.

(Testimony of Paul Grady.)

A. I have made the purchase investigations of the Alton Eastern [1239] Railway, the Litchfield and Madison, Illinois Terminal. I have supervised special studies of the accounts of the Illinois Central Railroad. I have recently been engaged in the rate case proceedings for the Canadian Pacific Railroad in Canada. I have likewise been consulted from time to time in connection with accounting and auditing matters for railroad clients handled by my firm, which includes the New York Central Railroad, Missouri Pacific, Frisco, Kansas City and Southern, Chicago, Rock Island and Pacific.

Q. Mr. Grady, in your accounting work have you had occasion to consider accounting problems of affiliated companies? A. Yes, sir.

Q. Would you say that your work in that connection has been a substantial part of your accounting experience?

A. Yes, it has been a substantial part.

Q. Could you give me roughly an estimate of what part of your work has been with the problems of affiliated companies?

A. I should judge that most of my accounting and auditing experience has been related to groups of more than one company, that is, a group containing more than one company in the corporate structure, to the extent of perhaps more than 50 per cent of my total time.

Q. When did your work involving affiliated groups begin?

(Testimony of Paul Grady.)

A. That began in the very early days of my experience.

Q. Has it continued up to the present time.

A. Yes, sir.

Q. In connection with your work on groups of affiliated corporations, have you had occasion to consider the tax problem of these groups?

A. From an auditing and accounting viewpoint, Mr. Adams, yes.

Q. In that connection have you had occasion to consider the allocation of taxes among group numbers under consolidated returns?

A. Yes, that is one of the problems with which I would deal.

Q. How does that matter come to your attention in your work?

A. In the examination of the tax accounts—by that I mean the tax accrual accounts, which are the liability accounts, and the tax provisions, which are expense accounts—it is necessary in the examination of any group of companies for the independent accountant to determine three things:

First, that the liabilities for federal income taxes for all years which may be open are reasonably provided for;

Second, that the tax provisions for the particular year for which income statements are being given are reasonable provisions in relation to the taxes owed to the government on account of the operations for those years;

(Testimony of Paul Grady.)

And thirdly, that the allocations within the group, between affiliated companies, are on some reasonable basis. The latter point is, of course, particularly important where the accountant is asked to give his opinion with respect to the financial [1241] statements of individual companies.

Q. Are you familiar, Mr. Grady, with the customary business practice for allocating taxes under consolidated returns?

Mr. Phleger: May it please the Court, I am going to object at this time as it is perfectly evident what the course of subsequent questions will be. I object to this whole line of testimony. I take it that what counsel is trying to do now is to prove, if there be such, some general practice of allocating the taxes between companies joining in a consolidated return, and I submit that the testimony is irelevant, incompetent and immaterial. I have previously urged that the practice of those companies themselves is not admissible. How any general custom, if there be such, would be admissible is wholly beyond me. It is not even shown that the custom was known to the parties. We have a situation here which counsel on the other side has said is unique, and it seems to me that this testimony therefore is utterly irrelevant, incompetent and immaterial. If the witness proposes to testify as to what the law is, then it is also not admissible.

Mr. Adams: Are you finished?

Mr. Phleger: Yes.

(Testimony of Paul Grady.)

Mr. Adams: First, responding to the last statement that Mr. Phleger made, we do not have any purpose, your Honor, to ask the witness to testify with regard to the law, of course. The law is for your Honor to determine, and no testimony from this witness is adducible on the subject of what the law is. Our purpose in producing this witness to give testimony with regard to the business practice, is that only, and I think counsel has fairly stated that he anticipates that is our purpose, and it is our purpose. We propose to draw to your Honor's attention, as a material factor, a business factor as a fact that your Honor may consider. We expect to show that under the established business practice for the allocation of taxes, the taxes are allocated among the members of the group without making any payment such as the plaintiff demands here. And in my opening statement to the court, I said we expected to adduce proof of the practice of business as one of the elements in our defense. Of course we are not bound by plaintiff's theory—your Honor has referred to that. We expect to show that the only recognition given in business practice, at the most, is recognition to a particular company that joins in a consolidated return, which will put it in a position not less favorable than it would have been on a separate return basis. In this case the corporation would have been in no different position, the plaintiff, on a separate return basis.

(Testimony of Paul Grady.)

Now we have called Mr. Grady to produce testimony with regard to business practice and not with regard to any question of law. That is clearly so. Now your Honor, we think this evidence does bear directly on the fundamental issue, whether the plaintiff has a claim. The claim, it is admitted, is [1243] predicated upon a position it was of no consequence whatever to the plaintiff corporation, whether or not a separate or a consolidated return was filed.

And so in bringing to your Honor's attention a business practice, just as long ago business practices were brought before Lord Mansfield, we believe we are bringing to your Honor's attention a matter of significance and materiality that your Honor would wish to consider in determining the issues that this particular case presents for your Honor's determination. And it will be our position that in many a consolidated return situation, there are the possibility of claims such as are here presented, but the fact is otherwise. So that in any defense of the matter before your Honor, though this is defined by plaintiff in his definition as a special consideration, will require necessarily consideration of the effect such a decision might have upon an established business practice of not paying loss companies for tax advantage of their losses.

May I say further, in our own theory of the case, the ultimate question before your Honor is whether or not a loss company is entitled to be paid for the tax advantage its loss brings to the group. We do

(Testimony of Paul Grady.)

not agree with plaintiff's view that the plaintiff's own case presents such a special situation, that a special rule can be made for it, different from the rule generally obtaining in business practice.

Then, your Honor, we think this evidence is also material [1244] in refuting the interveners' position; counsel for the interveners, my friend, Mr. Levy, the other day made a somewhat elaborate and to me, quite clear, statement of his position. If I may take the privilege of paraphrasing it briefly, as I understand it, it was that in view of the relation between the members of the affiliated group, the tax transactions had to be conducted fairly, and there was a suggestion made that fairness required that payment be made to the loss company. Now we think the best evidence of fairness, or at least material evidence of fairness, may be found in the fact we seek to prove, that American business has never found occasion to make payment for the use of losses included in consolidated returns. We will argue that this equity court will not impose a rule contrary to the standards of the business community which, in our judgment, is in fact predicated upon the notion that the plaintiff corporation had a position to exact or coerce a payment, though its own joiner in the return was wholly immaterial to itself. [1245]

And then, if your Honor please, there is one other fact that this matter of business practice is material to: Both of our adversaries have gone to

(Testimony of Paul Grady.)

great pains to point out that th e persons who handled the transactions had positions both with the plaintiff corporation and with the court's trustees. And it is contended that by reason of this, your Honor is entitled to review what was done at that time. Now, it is well established that in any case of a review of that sort, assuming that in this case this is an appropriate case for a review of that sort, the review cannot be made on the basis of hindsight. It must be based upon a perception of the conditions as of the time the transactions took place. And it will be our position that the officers and directors of the corporation at that time were fully justified in handling this transaction, if they followed what we seek to prove, namely, the established procedures customarily used in the business field.

I have stated at some length the reasons why we seek to introduce into the record of this case and to bring before your Honor not a question of law, but a question of fact, as of course the matter of business practice is. And those are my purposes in producing Mr. Grady and conducting this examination.

I might say further, just directing your Honor's attention to an allegation in the complaint in intervention, page 20 at the bottom, referring to the tax transactions here in [1246] issue, "Said transactions were in violation of recognized and good accounting practice." Now, that is another issue.

(Testimony of Paul Grady.)

It is not an issue directly responsive to the question of—well, I think it is. So far as it says that they are in violation of recognized and good accounting practice, I would submit, your Honor, that proof of what the practice of independent industry was with regard to this matter would be responsive to this allegation. That is an adidtional ground to those I have heretofore stated, on the basis of which we submit, your Honor, that the evidence sought to be adduced with regard to the business practice in this very matter is material and relevant to the issues in this case.

* * *

Mr. Adams: May I just add one minor remark? Counsel in stating an objection referred to the fact that the practice or custom that I seek to adduce at this time has not been shown to be known to the parties. I do not think that is material, but if it is material, we have evidence by which we can connect it up.

Mr. Levy: Your Honor, there is just a question or two to Mr. Adams, to clarify my own understanding of what the function of this witness is. Is the witness produced to [1247] testify as to business practice, accounting practice, or both?

Mr. Adams: The witness is produced to testify to the practice, custom and usage of business. I am not at all clear whether I shall ask him any questions about accounting practice, but he is of course experienced in that, and I would not have the slight-

(Testimony of Paul Grady.)

est objection to his being asked by any counsel on accounting practice, regardless of whether or not I opened that subject with him. [1248]

* * *

The Court: I am not discussing this matter with you on the theory that I think the plaintiff is entitled to recover in the case. I just don't see the point of what any affiliated company has done in the past as a matter of practice in these returns, because they have all been decisions that have been made by the parent company, and when the parent company decided that it was proper to file affiliated returns, it filed them, and of course there is no dispute about the fact that the parent company filed the affiliated returns whenever it decided it was [1253] proper to do so. What we have in this case is not concerned with that. It is a question whether under these circumstances, according to what I have heard so far, the parent company did decide to file this affiliated return in this case under the circumstances, whether it was the decision and action, in fact, under the particular circumstances that we have here of the parent company, No. 1; if it was not, then was there any liability or right that accrued to the parent company by virtue of what was done? I do not see that what this witness can say as to the practice of allocating taxes in this kind of return would have any particular bearing upon the matter. I think I could answer the question for him. And I do not see that it

(Testimony of Paul Grady.)

would add anything to it. I would think that probably you could not put your finger on a case in the United States where there was an affiliated return filed where anybody ever allocated any taxes between the companies. Why should they? There would not be any purpose to it.

Mr. Adams: Your Honor, I think from that standpoint the investigation we have made and the experience of Mr. Grady would aid your Honor because there is a standard practice of allocating taxes, and there was twenty years ago an investigation by the Federal Trade Commission that we ourselves as counsel expect to draw to your Honor's attention under which the Federal Trade Commission investigated the practices of holding companies with respect to intercompany transactions in Federal income tax [1254] and certain practices of the holding companies, literally the practice of lifting up computed taxes from subsidiaries, were found to be wrong, and the holding company act was passed, and now we have certain legal limitations and rules of the Securities and Exchange Commission with regard to that. But those are matters which are mentioned in response to your Honor's thought that the holding companies managed all of this as if it were their own. Of course, as long as there is no other interest—if there is a hundred per cent ownership, and no equity ownership in the subsidiary, the problem does not arise any way because it makes no difference what the parent com-

(Testimony of Paul Grady.)

pany does with its own. But the problem immediately arises where in the chain of corporations there are minority interests, as very frequently there are; then the question of right comes up and your Honor has before him in this case a question of right. It is not a question of what a parent company has power to do. I am sure your Honor is never going to grant a judgment on the basis that the parent corporation had the power to hold up the court.

The Court: I am inclined to agree with you on that, but what flowed from what was done in this case?. What right flowed from what happened in this case, if any?

Mr. Adams: Your Honor is going to look to see if this plaintiff corporation has a right. We think it would assist your Honor's consideration of that matter to have before your [1255] Honor certain facts, and we do think—this is our own view of the matter and our own case that we are seeking to put in—that the general business practice is a material fact, for the reason that, as we see it, if there is a general business practice that is followed, then immediately the burden is upon the other side to show why under the particular circumstances a departure should be made from the general business practice. I have said this before, and I do not want to tax your Honor's patience too much, but we do regard this as a part of our case.

The Court: The question would never arise under the general business practice, because I do

(Testimony of Paul Grady.)

not think you would ever have any litigation. Absent the kind of situation that you have here between companies that were free agents to agree with one another to file this type of return. Here you have a situation where a third party, a new party, is getting the benefit of this tax situation. Now, maybe it is right it should. I am not attempting to decide that question. I can see that that is a difficult one upon which you gentlemen have given me much to think about. But the problem that is presented by it is entirely different from what might happen in the ordinary business relationship of parent and subsidiary companies, where you have not the interposition of reorganization proceedings and all that they entail. [1256]

* * *

The Court: I think there is not a fair comparison there [1263] with admiralty because it is pretty much of a different type of jurisdiction. But frankly, Mr. Adams, I cannot see that business practices are competent by way of evidence in the case unless it is necessary to make use of them in order to properly interpret a contract, something that the parties have agreed to that presents a problem which needs explanation because of uncertainty or ambiguity as to the meaning of what the parties have agreed to do. Resort can always be had, then, under the old-time rule of Lord Coke (somebody else cited some other lawyer, so I will cite one, too): "You show me what the parties

(Testimony of Paul Grady.)

have done under the contract, and I will tell you what they meant by their contract."

You can, evidentially speaking, of course, produce this type of evidence in situations of that kind, but all that kind of evidence, it seems to me, would do in a case like this might be to lead the court into error, just as much to your disadvantage as it might be to your advantage if you win the case, because a reviewing court might well say the judge was influenced by what other people did at other times where the disputes were not judicially determined. They may say he should not have done that. He was listening to rumor; he was listening to what they did in the stock exchange, what the railroad companies did between one another as a matter of practice. That had an effect on his mind which it should not have had. He should have only listened to the relevant evidence in [1264] the case. I think you may call my attention by way of argument, with wide latitude, to any precedents of any kind, experiences, in an argumentative way, in support of the reason and justice of your side of the case, but I think that this type of evidence would produce error if the Court were to admit it. I think there was only one question before the Court at the time, but I think the colloquy has established fully the nature of the testimony that the witness is to give, and I think the proper holding would be to say that that is immaterial and incompetent and should be excluded.

(Testimony of Paul Grady.)

Mr. Adams: I would like in that connection, your Honor, at this time to make an offer of proof so that we can have a clear record of what it is that we are offering, and possibly your Honor may think, as I go through this, that the ruling that your Honor has made is not covered. I would also like, before I make my offer of proof, to direct the Court's attention to the fact that this objection came upon the following question:

"Are you familiar with the customary business practice for allocating taxes owing under consolidated returns?"

I think I am entitled to an answer to that question. The objection then would be to the question, "What is the practice?"

The Court: Of course, you agreed with Mr. Phleger as the argument proceeded, and I took it for granted we were not [1265] proceeding on too technical a basis. You agreed with Mr. Phleger as to the nature of the evidence that the witness was going to testify to.

Mr. Adams: There is no doubt about that. My point is this: In order to qualify my witness I think I should have an answer to this question. It does not produce any testimony as to what the practice is.

The Court: All right. You may answer it.

Q. (By Mr. Adams): Mr. Grady, are you familiar with the customary business practice for allocating taxes owing under consolidated returns?

(Testimony of Paul Grady.)

Mr. Phleger: This assumes that there is a custom. [1266]

The Court: Well, if there be such customs, are you familiar with them?

The Witness: Yes, sir.

The Court: All right.

Mr. Adams: Of course there is no doubt there is a customary business practice, and I am surprised that counsel makes such a suggestion. Then my next question is, after this one: What is that practice. And I understand counsel states an objection to that.

Mr. Phleger: Right:

Mr. Adams: And the Court ruled that the objection is sustained?

The Court: Right.

Mr. Adams: Now then, your Honor, I should like to ask Mr. Grady three or four more preliminary questions, which will develop the fact that in addition to speaking from his own experience, he has made a special study. And I think I am entitled to develop that fact. And then an objection may be made.

The Court: Well, is there any further objection, or any objection to the further qualification of the witness?

Mr. Phleger: No, but I would point out that if this is a general custom known to everyone, why does he have to make a special study?

Mr. Adams: I see no reason for these interpolated arguments.

(Testimony of Paul Grady.)

Mr. Phleger: Well, that was indirect response to the Court. [1267]

Mr. Adams: I am frequently advised by Mr. Phleger in advance of hearing the question what his point is about something he anticipates I am going to s:

The question is, your Honor, those are the questions: In connection with this litigation, were you asked to make an investigation to supplement your own information as to the general practice of allocating taxes under consolidated returns.

The Court: Well, Mr. Adams, do you feel that this long colloquy and argument we have had doesn't sufficiently describe the nature of the testimony of the witness?

Mr. Adams: No, your Honor, not at all.

The Court: And what you would have to show is such that you would have to make a further elaborate statement?

Mr. Adams: No, that is not my purpose at all; I have to put on my proof for the record, and this is simply a preliminary matter of proof, that a study was made. I am sure I am entitled to do that. And then there may be objections, your Honor. I have got to establish first that a study has been made. Now nothing objectionable results from that. But if I am not able to show that, I haven't shown what my witness would say, the entire basis of his qualifications to answer these questions, and of his investigation. I am not going to

(Testimony of Paul Grady.)

ask any questions as to what the practice was.

The Court: Well, there is a popular misconception amongst lawyers on this idea of making an offer of proof. It doesn't [1268] add anything to the record in the case. The only purpose of an offer of proof—or at least when I used to make them myself—was to get the judge to know about the thing that I wanted to get in anyhow, thinking that might make some difference. But if the question is objectionable and there is a good objection to it, there is no need for making an offer of proof. In any case, there is certainly no misunderstanding as to any of the lawyers here as to what we are talking about.

Mr. MacKinnon: Well, under the federal rules, there is a definite procedure to be followed now, and I think it is rule 43.

The Court: Well, what is that?

Mr. Adams: But your Honor, I am not even seeking to make an offer of proof, I want to ask some preliminary questions of the witness, just as I did before.

The Court: Very well.

Q. (By Mr. Adams): In connection with this litigation, were you asked to make an investigation to supplement your own information as to the general practice of allocating taxes and under consolidated returns? A. Yes.

Q. Was it left to you to determine in what field the investigation should be made? A. Yes.

(Testimony of Paul Grady.)

Q. What fields did you select? [1269]

A. I selected the public utility field, the steam railroad field and the general field of industrial practice.

Q. And why did you select these fields?

A. Because I thought they perhaps constituted the major segments of industry in which large scale or more than, multiple, corporate enterprises existed.

Q. And when did you begin this investigation?

A. In June of 1948.

Q. And when was the investigation completed?

A. Approximately February 1, 1949.

Q. Did you have some assistance in conducting it?

A. Yes, I had numerous assistants from my own organization.

Q. And was it conducted under your supervision and direction? A. Yes, sir.

Q. Will you describe the investigation you made in the public utility field, without stating anything about the results? A. We examined——

Mr. Phleger: Well, if your Honor please, it is perfectly obvious that this witness made a very extensive examination, and I don't think——

Mr. Adams: Well, why not hear about the results?

Mr. Phleger: Why hear about it?

The Court: Well, the witness has answered, and the record may show that he made an extensive and

(Testimony of Paul Grady.)

thorough examination of the organization, with the organization he had at his command, [1270] and the assistants and so forth concerning this matter you want to interrogate him about. So you needn't go into detail on that, I don't think. [1271]

* * *

The Court: If you think it is necessary after all this discussion, after all the discussion we have had during the last half hour, all that was elicited—if you think that nevertheless you have to particularize on the very matter we have agreed to, as the subject matter of the testimony, why, I cannot agree with you on it but if you want to make an offer of proof and take up that time in doing it, why I will allow you to do so.

Mr. Adams: Your Honor, I do feel that it is incumbent upon me in the pursuance of my responsibilities to make an offer of [1272] proof, and not for the purpose of rearguing any matter, but so that I may have my record. And it is for that purpose that I now make this offer of proof, to prove:

"That the witness, Paul Grady, reviewed or directed the review of reports filed with the Securities and Exchange Commission for the years 1942 to 1947, inclusive, of the 52 registered public utility holding company systems which are listed in the June 30, 1947, report of the Public Utilities Division of the Securities and Exchange Commission; that 52 holding company systems included 824 individual companies; the total consolidated assets of

(Testimony of Paul Grady.)

which amounted to approximately $15,350,000,000; that the review was carried out to determine, wherever possible, whether consolidated or separate Federal income tax returns were filed and, in the case of the companies filing consolidated returns, to ascertain any information shown regarding the income tax reductions resulting from consolidated returns and the method of allocation among affiliated companies of such reductions; that in the case of 20 of the systems it could not be determined what types of income tax returns were filed; that 3 of the systems filed separate returns; that 29 filed consolidated returns." [1273]

* * *

Mr. Adams: If your Honor please, with the consent of all counsel, the offer of proof which I started to read may be copied into the transcript without the necessity of reading it before your Honor.

The Court: Very well.

"That there were only five exceptions to Rule U-45 by the 29 systems which filed consolidated returns during the six year period; that two of these exceptions were granted to Consolidated Electric and Gas Company (a Subholding company of Central Public Utility Corporation), and one each to Cities Service Company, Ogden Corporation and United Public Utilities Corporation; that in four of these cases, the exceptions from the rule were requested and granted in order that particular subsidiary companies would not be in a less favorable

(Testimony of Paul Grady.)

position than they would have been had they not been a party to a consolidated income tax return; that in the case of one of the exceptions granted to Consolidated [1274] Electric and Gas Company, the holding company was permitted to distribute the consolidated tax in such a manner as to collect from the subsidiary companies the amount of tax reductions attributable to specific investment losses incurred by the parent in the disposition of securities of former subsidiaries; that the Securities and Exchange Commission justified this exception, in part, on the grounds that 100% of the common stocks of the subsidiaries was owned by the parent company and therefore the parent would be in no different position than if the amounts had been paid as extra dividends; that the exceptions are fully described in Securities and Exchange Commission releases Nos. 4444, 4806, 5535, 5904 and 6375; that the review identified income tax reductions resulting from the filing of consolidated returns by registered public utility holding companies in an amount not less than $72,000,000.00; and that many of these deductions totaling many millions of dollars were attributable to unusual and extraordinary types of tax deductions.

Class I Railroads

Defendants offer to prove:

That the witness, Paul Grady, reviewed or directed the review of stockholders' reports and the

(Testimony of Paul Grady.)

annual reports filed with the Interstate Commerce Commission for the [1275] years 1942 to 1947, inclusive, of all Class I railroads having more than four thousand miles of track for the purpose of ascertaining any information shown relating to the practices followed in allocating consolidated Federal income tax among members of an affiliated group; that inasmuch as these reports did not show any information on the subject, the witness interviewed or directed the interview of officials of 22 Class I railroads for the purpose of ascertaining the practice followed in the allocation of income taxes among affiliated companies during the periods for which consolidated income tax returns were filed; that the total revenues in 1946 of the aforesaid 22 railroads were two-thirds of the total revenues of all Class I steam railroads for that year; that in the cases of 20 of the 22 railroad systems, tax reductions from consolidated returns were allocated pro rata to companies having taxable net income; that two of the systems allocated such tax reductions to the parent company up to the point of offsetting the parent company's tax and any further tax reductions were allocated pro rata to subsidiary companies having taxable net income; that none of the 22 Class I railroad companies followed a practice of making payments to companies having taxable net losses, except in recognition of "carry-back" or "carry-forward" circumstances and [1276] then only to the extent necessary to put the particular

(Testimony of Paul Grady.)

company in a position not less favorable than it would have occupied on a separate return basis.

General Industrial and Commercial Companies

Defendants offer to prove:

That the witness, Paul Grady, in order to ascertain, where possible, the practice of allocating taxes followed by industrial companies, made or directed a review of the Forms 10-K and stockholders' reports filed with the New York Stock Exchange during the years 1942 to 1947, inclusive, by the companies included in the Dow-Jones list of industrials; that the reports of these thirty companies did not disclose any information relating to consolidated income tax allocation; that Price, Waterhouse & Co. audits one-third of the companies included in the list; that none of these companies follows the practice of making payments to companies having taxable net losses, except in recognition of "carry-back" or "carry-forward" provisions in order that the companies would not be in a less favorable position as a result of participation in consolidated returns; that the witness requested the Price, Waterhouse offices in the United States to report to him cases in which any of their client companies filing consolidated tax returns had allocated income tax reductions on bases other than [1277] pro rata (in relation to net taxable income or to separately computed taxes) to companies having taxable net income; that four cases were reported to him in

(Testimony of Paul Grady.)

which taxable net incomes amounts equal to taxes computed on an individual return basis; that in effect the parent companies thus retained the entire tax reductions arising from consolidated returns; that in three of the four cases 100% of the securities, both debt and stock, of the subsidiaries were owned by the parent; that in all of these cases, the amounts collected from subsidiaries did not exceed the consolidated income taxes and no payments were made to companies having taxable net losses except in recognition of "carry-back" and "carry-forward" circumstances.

General

And finally that the studies and inquiries made of public utility holding company systems, general industrial companies and Class I railroads demonstrate the practice followed by business enterprises in the allocation among affiliated companies of the income tax reductions arising from the filing of consolidated returns; that the customary practice in all three fields is to allocate the consolidated tax reductions pro rata among the companies having taxable net incomes; that such pro rata allocations have been accomplished by two principal methods: first, in relation to the taxable net incomes of those companies having such net incomes and, second, in relation to the computed taxes of each company if paid on a separate return basis; that in carrying out the second method it is sometimes necessary to make

(Testimony of Paul Grady.)

payments to companies in recognition of the effect of "carry-back" and "carry-forward" provisions of the income tax laws and regulations; that the reviews and inquiries disclosed a few exceptions to the foregoing general practice of pro rata allocation of income tax reductions arising from consolidated returns; that such exceptions may be grouped into two general categories; first, because of exceptional circumstances payments have been made to certain companies in order that they will not be adversely affected due to participation in consolidated income tax returns and, second, parent companies have in a few cases taken more than their pro rata share of the consolidated tax reductions; that in most of the latter type of cases the parent companies owned all of the senior securities of the subsidiaries as well as 100% of the voting stock; that the reviews and inquiries did not disclose any case in which payments had been made to a member of an affiliated group merely because such member had produced a taxable loss, thereby reducing the consolidated income tax which otherwise would have been payable." [1279]

Mr. Adams: No further questions of Mr. Grady. He is here for cross-examination if counsel desire to examine him.

The Court: Is there anything in this offer of proof that goes beyond the general compass of the subject matter that we have discussed, that you feel you should have before the Court, or is it the detail

(Testimony of Paul Grady.)

of the investigation and statement of the witness concerning the practices he finds to have existed as a result of his investigation?

Mr. Adams: I think that is a fair characterization of it, your Honor; it is wholly related to the matter of business practice, the studies made, and the practice as found, and the details.

Mr. Phleger: Now I don't know whether, the offering having been demed to be made, it is necessary for me to interpose an objection. If it is, I do, upon the grounds previously stated, and upon the further ground that an investigation of the offer indicates that it is not expert testimony about a custom, but the result of an inquiry and investigation summarized.

Mr. Clark: We join in that objection, your Honor.

The Court: Well, we may consider then that the offer of proof was made as a part of the proceedings upon the objection as made by your opponent, Mr. Adams, and that the ruling made is that the offer of proof, the proof offered, is held to be inadmissible as being incompetent, irrelevant and immaterial.

Mr. Adams: Yes, your Honor. [1280]

The Court: So your record will thus be clear.

Mr. Adams: Yes, your Honor, and I think counsel's later statement is correct. But so that I may have my record, I also offer at this time to prove upon the basis of the testimony of the wit-

(Testimony of Paul Grady.)

ness as to his own qualifications, that the witness is prepared to state what the practice is. And in that connection, he is prepared to state with regard to the practice, that with very minor exceptions within his personal knowledge, the practice was the practice of allocating taxes and that only among members of the group, and of not paying anything to a loss company for the tax advantage this loss brings to the consolidated group. I offer that in addition to the offer made on the basis of the studies.

Mr. Phleger: Well, this is an additional offer now?

Mr. Adams: That is right, upon the basis——

Mr. Phleger: Well, I make the same objection.

The Court: Same ruling in that regard. [1281]

* * *

Mr. Phleger: We have no cross-examination.

The Court: In other words, it would not be necessary for this witness to return for the purpose of being cross-examined on the subject matter of the offer of proof.

Mr. Phleger: No.

Mr. Clark: I think not, your Honor.

The Court: Very well.

(Witness excused.) [1282]

* * *

Mr. Adams: May I call Mr. Polk?

JAMES K. POLK

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court, please? A. James K. Polk.

Direct Examination

By Mr. Adams:

Q. Mr. Polk, will you please state your business and business address?

A. I am an attorney at law, member of the firm of Whitman, Ransom, Coulson and Goetz, with offices at 40 Wall Street, New York.

Q. What legal training have you had, Mr. Polk?

A. I am a graduate of the Georgetown Law School, 1925, LL.B., and in '26, LL.M., and had about ten years' experience in the office of the Chief Counsel, Bureau of Internal Revenue. Do you want that experience in detail?

Q. Well, I think if you could give it, generally describe it, I would like to have that.

A. Well, I served in the review division, the interpretative division, and the appeals division in the Washington office of the Chief Counsel. In about 1932, I went to New York as the Chief Counsel's representative in that area, and was representative there until 1935, when I resigned and went with Whitman, Ransom, Coulson and Goetz on

(Testimony of James K. Polk.)

their staff. In 1938 I was admitted to partnership, and have been a partner in charge of the federal [1284] tax matters that Whitman, Ransom, Coulson and Goetz handle.

Q. Now, have you had some accounting training?

A. Yes, I am a graduate of Pace and Pace, and I have kept myself as current as possible in accounting matters. A great deal of tax work that I have done over my period of work with the government —and with Whitman, Ransom, Coulson and Goetz —has been intimately associated with accounting matters.

Q. You spoke of Pace and Pace. What is that?

A. That is an accounting school.

Q. In Washington, D. C.?

A. Yes, I think their name is now changed to Benjamin Franklin Institute or something of that sort.

Q. In what courts have you been admitted to practice?

A. Admitted to practice in the courts of the District of Columbia and the State of New York, the United States Courts, District and Circuit Courts of Appeal, in New York, and the District Court of Columbia, the Supreme Court of the United States, the Court of Claims, the United States Tax Court.

Q. Have you specialized in any field of law?

A. Oh, I have specialized in federal tax law from 1920.

(Testimony of James K. Polk.)

will agree, that the order of confirmation of the plan was made and entered October 11, 1943.

Q. Now when you arrived at your decision to recommend the use of the stock loss in the federal tax returns, did you discuss that matter at or about that time with anyone?

A. Well, I discussed it in New York with Col. Coulson before leaving for San Francisco. I left——

Q. Now before you pass to the leaving, then would you tell us so far as you can recollect it, what was the discussion you had with Col. Coulson in New York on that occasion?

A. Well, I reviewed with Col. Coulson the general principles of worthless stock, told him I thought that this stock had become worthless by act of the operation of law, and that it could be claimed as a deduction under the provisions of Section 23(g) 4 of the Internal Revenue Code. The colonel didn't think the deduction had too much prospect of allowance, but in any event, I told him I was going to recommend that it be claimed in the return for the year 1943.

Q. And this was shortly before you made another trip to San Francisco?

A. Yes, I left very early in January, the 4th or something like that, for San Francisco.

Mr. Adams: I shall not finish with the witness today, your Honor, but I can go further. Whatever your Honor's convenience [1299] may indicate is most desirable.

(Testimony of James K. Polk.)

The Court: I think you might go ahead a little further.

Mr. Adams: Very well.

Q. Now then, do you recall the date or approximate date when you arrived in San Francisco, in January, 1944?

A. I am afraid I can't. I know it was in the early part of January, but I have been here about fifteen times, and I have trouble keeping the dates straight.

Q. There is a paper in the record in this case, and various other things that we lawyers know who are in this lawsuit, indicating the date to be January 8, 1944. A. Yes.

Q. Now you did, while you were in San Francisco, prepare an opinion advising with regard to the use of the stock loss in the consolidated return?

A. I did.

Q. Who suggested that you render a written opinion?

A. I discussed the matter with Mr. Elsey and told him of my recommendation, and it was at his request that it was reduced to writing.

Mr. Adams: And I will ask that Plaintiff's Exhibit 54 be shown to the witness. (Document handed to the witness by the clerk.)

Q. Mr. Polk, referring to Plaintiff's 54, is this the finally delivered opinion that was written in response to Mr. Elsey's [1300] request?

A. Yes.

(Testimony of James K. Polk.)

Q. And could you describe briefly your experience in that field? You have already spoken of your time in the Bureau. Subsequent to that time?

A. Well, after leaving the Bureau, and with Whitman, Ransom, Coulson and Goetz, I have been in charge of federal tax matters [1285] of their clients. Approximately 50 per cent of my time has been continuously devoted to public utility tax problems. That involves not only the review of tax problems as they arise, but the giving of advice in connection with the preparation and filing of returns, and with the handling of contests, of asserted deficiencies or claims for refund.

Q. Now do you seek to keep yourself conversant with developments in the tax field as they come along? A. I do.

Q. And what do you do with that object in view?

A. Well, I read all the releases of Commerce Clearing House in the federal tax field and of other tax publications, and I keep posted on legislative matters as the various revenue acts go through. That is since the original act went through Congress in 1921, and all the acts up to the present act. I have followed them through their legislative history. I have also been a member of the committee on taxes, and then the successor section of taxation of the American Bar Association from its organization, and I have been chariman of the committees in that section of taxation or counsel member to the present time. [1286]

(Testimony of James K. Polk.)

Q. You recall, of course, that there came a time when the firm of Whitman, Ransom, Coulson & Goetz was employed by the reorganization trustees in the Western Pacific Railroad reorganization?

A. Yes, sir.

Q. When and by whom were you advised that the firm had been employed?

A. About April 1, 1943. I was advised by my partner, Colonel Coulson, that we had been retained to advise in the preparation of the Federal tax return for 1942 and generally in tax matters.

Q. What work did you understand you were to be called upon to perform.

A. The usual work of tax counsel, that is, to supervise and advise in connection with the preparation of the return and filing thereof, and the giving of advice on tax matters as they were brought to me or I found them.

Q. In speaking of the usual employment and purpose of employment of tax counsel, what did you perceive to be that purpose in this case?

A. Well, it is my understanding of the function of tax counsel to advise in respect of the facts in any situation, the statutes, and the Bureau regulations and such matters to see that the lowest tax is paid to the Federal Government. I assumed that that was my function in connection with the Western Pacific situation. [1287]

Q. At that time had you known of the pendency of the Western Pacific reorganization?

(Testimony of James K. Polk.)

A. Yes.

Q. Did you learn of the decision of the United States Supreme Court in that reorganization?

A. Yes, I knew about it, within a day or so after it was issued.

Q. The date of record shown here being March 15, 1943. Did you know at that time what interests, if any, your firm represented in the reorganization?

A. They represented the Arthur Curtis James interests.

Q. When you undertook this work as tax attorney for the reorganization trustees, what did you then do.

A. Well, I knew nothing of the facts and background, and so my first step was to acquaint myself with what had happened, as fully as I could, in prior years. I phoned the corporation office, talked with Mr. Curry, asked him for the prior year files, and went back to the date of reorganization. He told me to get in touch with Mr. Nicodemus, who would send them over to his office. I did get in touch with Mr. Nicodemus and went to his office within the next couple of days and briefly discussed the fact that I was going to look into those papers with him and talk over some other matters that were entirely unrelated to the Western Pacific situation, and took the papers to my office and started a survey of the tax history of the group.

Q. And that was the source you just described from which you [1288] obtained the material to work with?

A. Yes.

(Testimony of James K. Polk.)

Q. What if anything did you learn from your study of the background material with respect to the Federal tax history of the plaintiff corporation?

A. Well, I learned that from the time of the organization of the plaintiff corporation, from 1918 through 1941, consolidated returns had been filed, and from approximately 1930 to 1941 in the consolidated returns had been shown losses and no tax liability; that the operating company had had income in 1940 and 1941, but that the parent company continued to have losses and had had losses over the span of years certainly from 1930 to date. That is my recollection. I made desk notes of my review of the tax handling, the way the Bureau had closed the cases, as I went along; they were subsequently typed and went into the file.

Q. Did you make any arrangement in the spring of 1943 with respect to the employment of any person in connection with this tax work?

A. Yes, I did.

Q. What did you do in that regard?

A. I had found out that the returns for several prior years had been prepared by a Miss Valouch under the direction of Mr. Curry in the corporation office in New York.

Mr. Phleger: Just a moment. I ask that that be stricken [1289] out on the ground it is hearsay.

Mr. Clark: It is the conclusion of the witness, your Honor, under the direction of Mr. Curry.

(Testimony of James K. Polk.)

The Court: It does call for hearsay. I will sustain the objection.

Q. (By Mr. Adams): Go ahead, Mr. Polk.

A. I was told by Mr. Curry that the returns had been prepared in his office by Miss Valouch, and I was not satisfied that a return reporting approximately $10,000,000 of taxable income should be prepared with only the single work of one person acquainted with taxes. So I suggested to Colonel Coulson that outside independent tax accountants' services should be secured. He agreed with me, and upon my recommendation I discussed with Mr. Frank Reilly the possibility of his doing this type of work. It was agreeable to him, and, accordingly, we arranged a conference in Colonel Coulson's office, at which were present Mr. Reilly, Mr. Nicodemus, Colonel Coulson and myself, and arrangements were made to have Mr. Reilly work with Miss Valouch in the preparation of the returns.

Q. What prior associations, if any, had you had with Mr. Reilly in tax work?

A. I had known Mr. Reilly since about 1937. He was tax accountant in the employ of the Consolidated Edison Company, and from 1940 on I had placed in his hands the preparation of the excess profits tax returns of the Consolidated Edison system and had [1290] worked with him in a review of the Bureau regulations and statutes, and I was entirely satisfied as to his qualifications as a tax accountant.

(Testimony of James K. Polk.)

Q. Mr. Polk, did you make any arrangements with respect to the manner in which the work would be handled? A. Yes.

Q. What were they?

A. The arrangements were that the return would be prepared at the corporation office at 37 Wall Street. The office there had just been in receipt of a large amount of unrelated papers, that is, they were not combined for tax purposes, from the West Coast, reflecting the balance sheet and the operations of the various companies on the West Coast, and they had to be reviewed, intercompany eliminations taken care of, and otherwise put into form for inclusion in the Federal tax return. I arranged that this work would be done by Miss Valouch and Mr. Reilly, who reported to me as they went along each tax problem as they encountered it, and the return was prepared over a period of six weeks, during which time they consulted with me and I advised in connection with the various income, deduction, and invested capital items.

Q. Did you prepare the 1942 Federal tax returns? A. Oh, no.

Q. Who did prepare them?

A. They were prepared, as I have described, by Mr. Reilly [1291] and Miss Valouch and whatever other help they had in the office over there. I do not know who typed the returns or the schedules.

Q. Did you do any of the accounting work in the preparation of the returns?

(Testimony of James K. Polk.)

A. None at all.

Q. What advice, if any, did you give with respect to the types of returns that should be filed?

A. In the course of the work, in connection with the preparation of the return, Mr. Reilly made the customary calculations on both consolidated and separate bases to determine which produced the least tax liability. These computations showed, as I recall it, that there was net tax advantage in the consolidated return reporting of approximately $1,500,000, and accordingly the returns were prepared that way.

Q. In that connection did you give advice as to the selection of the type of return to be filed under the circumstances?

A. I do not recall giving any specific advice. It was quite apparent which way produced the least tax liability.

The Court: You were not going to tell them to file one that cost a million and a half, obviously?

A. Certainly not.

Q. (By Mr. Adams): The record here shows, Mr. Polk, that the final returns for the year 1942 were filed May 15, 1943. Did you render any reports with respect to such returns? [1292]

A. Yes.

Q. Will you please state what you did.

A. It was arranged, I think, as to time by Mr. Curry or his office that a conference would be had in Mr. Nicodemus' office, and such a conference was

(Testimony of James K. Polk.)

had on May 18, 1943, and I took to that conference the desk notes which Mr. Reilly had prepared in the course of his work in the construction of the return schedules, and so forth, and there was a general discussion and explanation of the manner in which each item had been handled, I particularly remember, that three major items were covered. They involved the consolidated return, the advantage over the separate return, which was apparent on the calculations, the change-over, which was recommended from retirement to depreciation basis in respect of the road accounts, and the possibility of a deduction for tax purposes arising out of the stock loss. There was also a recommendation that further work be done to back up the figures used in the returns since we had taken at face value figures that had been sent on from the West Coast, but without any analysis to see if they were proper or not.

Q. Did either Mr. Nicodemus or Mr. Curry inform you during the course of that conference on May 18 that they did not understand what you were discussing with them? A. Oh, no.

Q. There is in the record here a letter dated May 20, 1943, [1293] addressed by you to Mr. Curry, plaintiff's Exhibit 50. I ask that that be handed to the witness.

Now, Mr. Polk, referring to Plaintiff's Exhibit 50, did you write that letter at your own initiation?

A. Well, in the course of, or toward the conclu-

(Testimony of James K. Polk.)

sion of our conference in Mr. Nicodemus' office, it was suggested that the matters discussed be reduced to writing, and this letter was then prepared in response to that request for a written summary of the observations.

Q. What is the next thing you did in connection with the Federal tax work for the reorganization trustees?

A. The next thing was not until about the 1st of June, when I received a telegram and a phone call from Mr. Schumacher, who was in San Francisco. He stated that he had been going over with the company officials the letter of May 20, and that he wanted me to undertake the work recommended in that letter.

Q. Did you go directly to San Francisco?

A. No, I did not. I went first to Washington and I spent two days there with Mr. Reilly reviewing with the Bureau of Internal Revenue valuation division officials the Bureau requirements under Treasury MM-58 for the depreciation matter, and then entrained for San Francisco, and on the way I received a telegram from Mr. Schumacher asking me to meet him in Denver.

Q. Did you meet Mr. Schumacher there?

A. I did. [1294]

Q. Who was present at the conference with Mr. Schumacher in Denver?

A. Mr. Schumacher, of course; Miss Valonch, who had been out on the West Coast and was re-

(Testimony of James K. Polk.)

turning East with him; Mr. Reilly, Mrs. Polk and myself.

Q. The conference was held in the office car, was it not, of Mr. Schumacher?

A. They called it a business car.

Q. A business car? A. Yes.

Q. What was the subject matter of that conference?

A. Mr. Schumacher discussed the matters that were in that letter of May 20. He had a copy with him. And then he told me that it had been agreed that we should go ahead with the work recommended to be done in the letter in connection particularly with depreciation and that Mr. Elsey would provide me with whatever help was necessary. We discussed, as I recall it, a number of the physical properties of the road because we were to engage upon asset mortality study in order to complete this depreciation change-over.

Q. Did you next proceed to San Francisco?

A. I did.

Q. When did you first meet Mr. Charles Elsey?

A. The day I arrived there.

Q. And that was about when? [1295]

A. The 12th or 15th of June.

Q. 1943? A. That is right.

Q. What was the nature of your activities in San Francisco on that trip?

A. Well, there were two principal objectives on that trip. They were to assemble back-up material,

(Testimony of James K. Polk.)

particularly in support of the invested capital computations in the 1942 tax returns, and, second, to assemble enough information to know what election to make under Treasury MM-58.

Q. That had to do with change-over from retirement to depreciation accounting?

A. That is right.

Q. What discussions, if any, did you have in San Francisco in June, 1943, with respect to the subject matter of your letter of May 20, 1943, Plaintiff's Exhibit 50?

A. That was the letter which Mr. Elsey had when I met him for the first time in his office and the subject matter was generally discussed. There was some review of the stock loss situation, but that had not matured, and the principal discussion concerned the depreciation and the invested capital and other items.

Q. Did you also have discussions with other officers of the Western Pacific Railroad Company aside from Mr. Elsey at that time? [1296]

A. I did.

Q. With whom, please?

A. I had discussions with Mr. DeGraff, general auditor, Mr. Russell, his assistant, with Mr. Englebright, who was Mr. Elsey's assistant, Mr. Droit, the secretary of the company, Mr. Phillips, the chief engineer, Mr. Wyche, a statistical assistant to Mr. Englebright, Mr. Gloster, who is Mr. Phillips' assistant, and there may have been others, Mr. Gosney for one.

(Testimony of James K. Polk.)

Q. You were working on tax matters as counsel for a period of some days in the Western Pacific offices on that occasion? A. Yes, I was.

Q. Did you during the course of that visit also meet the trustees' counsel, Mr. Matthew, and discuss the tax matters with him? A. I did.

Q. At the time of such conferences what conclusion, if any, had you reached with respect of the advice ultimately given in connection with the taking of the stock loss?

A. I had not reached any conclusion different from that expressed in the letter of May 20. It was my judgment that the stock loss had not matured at that time for tax purposes.

Q. When was it that you decided to recommend the use of the stock loss in the Federal tax returns?

A. It was in the latter part of December, 1943.

Q. What, if anything, had meanwhile occurred on the basis of which you reached a decision to recommend use of the stock loss in the returns?

A. Well, the steps had been taken between the time of the entry of the order of approval of the plan that were required before the order of confirmation could be entered. The votes of security holders had been taken, and the entry of the order of confirmation and the expiration of the statutory period for appeal therefrom, and no appeal having been filed, it was in my judgment the determining factor, the identifiable event fixing the 1943 loss.

Mr. Adams: This record shows, I think counsel

(Testimony of James K. Polk.)

Q. And now there has been some point made in the case of the fact that the signature of Whitman, Ransom, Coulson and Goetz to this opinion is the signature in the handwriting of Col. Coulson. Do you recognize it to be such?

A. No, I know it is not my handwriting.

Q. Well, we have agreed that it is Col. Coulson's signature—or the lawyers have. Now in connection with that matter, do you have any recollection with regard to how it came about that the opinion finally delivered emanated from the New York office of your office—strike that; it is not accurate. —emanated from your office which was in New York. A. Yes.

Q. Well, please state your recollection in that regard.

A. Well, when it was requested that the opinion be prepared in writing and delivered at any early date to Mr. Elsey, I started to draft an opinion letter. I found that I did not have sufficient information in San Francisco. For one thing, I was under the impression that the stock of the operating company had been transfered on December 31. Mr. Droit told me that it had not been, or he would know about it; he was secretary of the company. Another thing, I wasn't entirely sure how much of the losses of the operating company had been availed of in prior consolidated return years; the sum of such losses would reduce the basis of [1301] the stock in the hands of the parent company, and

(Testimony of James K. Polk.)

reduce the loss that is allowable upon the worthlessness of its stock. So I prepared a draft of letter and sent it airmail to New York for check of the facts by my office there. I am sure that I discussed the matter over the telephone with Mr. Noneman, and Col. Coulson.

Q. Who was Mr. Noneman?

A. Mr. Noneman is a partner who specializes in federal tax matters, along with me, under my direction.

Q. Thank you. That is all of that letter.

Now while you were in San Francisco in January, 1944, did you have any discussions with respect to the adjustment of the book tax accruals for the year 1943? A. I did.

Q. And with whom did you have such discussions, and what was said?

A. The discussions were at several different conferences, but I talked the matter over with Mr. Elsey, Mr. DeGraff, Mr. Russell, Mr. Englebright; Mr. DeGraff was the general auditor, and the accounts, of course, were kept under his direction.

Q. And what is your best recollection as to what was said in those discussions on that subject matter of the adjustment of the book accruals for taxes?

A. Well, the adjustment for the book accruals was not particularly involved. All that had to be done there was to wipe out [1302] the amount accrued at the date the entry was passed, and credit operating revenues, since they had been charged in setting up the liability.

(Testimony of James K. Polk.)

Q. Is that what you would call a "reversal"?

A. That reversed the piecemeal entries that had been made over the eleven months. I do not believe the December entry had been posted.

Q. Now was any decision made at that time, when you were in San Francisco in January, 1944, with respect of the reversal of the tax accruals for '43?

A. Yes, it was decided that the proper thing to do would be to reverse the tax accruals for 1943.

Q. And who made that decision?

A. That decision was made by Mr. Elsey and Mr. DeGraff.

Q. Now do you know who prepared the 1943 tax returns? I am referring, of course, to the tax returns of the plaintiff corporation, being consolidated returns embracing the subsidiaries.

A. They were prepared in substantially the same manner in which the 1942 returns had been prepared. The draft material was forwarded from the West Coast to the New York office at 37 Wall Street, and there Miss Valouch, Mr. Reilly, Mr. Curry and whatever staff he had (of typists, and so forth) prepared the return. I was consulted as the work went along on the questions that arose.

Q. And would you say that your last statement was in answer to [1303] the question, "What work you did in connection with the preparation of those returns"?

A. I think so, with one addition; I know that

(Testimony of James K. Polk.)

it was at my advice that an additional extension of time was obtained, so that the depreciation election could be completed with the Commissioner of Internal Revenue before the actual filing of the return.

Q. Now during the preparation of the 1943 returns, do you recall any discussions you had either with Mr. Curry, Miss Valoüch, or Mr. Reilly on that subject?

A. I cannot recall individual discussions. I know that there were discussions over the span that each return was being prepared.

Q. Now did you see and approve the 1943 federal tax returns before they were filed?

A. Well, I know I saw the returns, but I don't think that I approved them. I was consulted and the returns were prepared, and the tax accountants prepared the returns. I did not assume responsibility for the figures in them, or to approve them.

Q. Now when did you learn that the stock of the debtor company had been transferred by the plaintiff corporation to the reorganization committee?

A. Shortly after it happened, April 30, 1944.

Q. How did you learn of that fact?

A. In discussion with my partners.

Q. Now what effect, if any, did the transfer of that stock have [1304] on the federal tax work that you were doing for the trustees?

A. Well, it terminated the affiliated relationship

(Testimony of James K. Polk.)

which had theretofore existed between the parent corporation and the operating company and its affiliates.

Q. And did you discuss that subject with Col. Coulson?

A. Oh, yes, I discussed that over a considerable period before the transfer of the stock.

Q. And please state the discussion you had with Col. Coulson with regard to the effect on your federal tax work of that transfer of stock to the reorganization committee.

A. Well, I pointed out that the minute the stock was transferred and the affiliation was terminated, the availability of the stock loss carry-over into 1944 was also terminated; and the longer the affiliation could be kept in existence, the more use could be had of the stock loss carry-over.

Q. And what statement, if any, did Col. Coulson make to you in response to the views you expressed to him on that subject?

A. He said the termination of the bankruptcy proceedings was of paramount interest, and it could not be held open to take advantage of the tax loss.

Q. Now, Mr. Polk, when did you decide to recommend the type of federal tax return that should be filed for the year 1944?

A. Well, I knew the type of tax return that would be filed for 1944, insofar as the parent corporation and its affiliates, inclusion up to April 30, as soon as I knew the date of April 30. [1305]

(Testimony of James K. Polk.)

I mean, it is quite obvious that there would be no tax liability on such a return. As to the type of return which would be filed for the company and its affiliates for the remaining eight months of 1944, I could not determine that until after the income items for the entire year had been assembled, and alternative calculations could be made on separate and consolidated return bases, to see which produced the least tax liability.

Q. Now, Mr. Polk, do you know who prepared the 1944 tax returns, both the tentative returns that were filed March 15, 1945, and the final returns that were filed June 15, 1945?

A. I don't recall who prepared the tentative returns that were filed, but the final returns were prepared by Miss Valouch and Mr. Reilly, Mr. Curry was there, and I think in my own office.

Q. The record shows he came to your office on or about, early in June, 1945.

A. I mean the return, I think, was prepared in my own office.

Q. Now what work, if any, did you do in connection with the preparation of those returns for the year 1944?

A. My work was the same as for the previous or preceding years. As the various questions arose in the course of the preparation of the returns, I was consulted and advice was given. [1306]

* * *

Q. (By Mr. Adams): The record shows, Mr. Polk, in this case, that a claim for refund on ac-

(Testimony of James K. Polk.)

count of the taxes paid for 1942 was filed by the Western Pacific Railroad Corporation on or about March 9, 1945. What, if anything, did you have to do with the filing of the refund claim?

A. I had the refund claim drafted by one of the men in our staff, in our office, and gave it to Miss Valouch who, I believe, took it into Mr. Curry's office and had him sign it and file it with the Collector of Internal Revenue where the taxes were paid.

Q. Now bearing in mind the date, March 9, 1945, and the fact which is of record here that the New York office of the Western Pacific Railroad Corporation and Company was not closed until the end of that year, would that affect in any way your recollection as to the location at which these papers were submitted and filed, or this paper, rather?

A. No, I do not know where the physical signing of the claim for refund was done. I know that it was filed at the Collector's office in New York.

Q. Now do you recall when the Commissioner of Internal Revenue conducted the field examination of the federal tax returns for '42, '43, and the first four months of '44?

A. Those field examinations took place over a period of time in the spring of 1944 until about June of 1946. They were not carried on as a continuous activity, and the first—you just asked when. Do you want me to go ahead?

(Testimony of James K. Polk.)

Q. Yes, I think if you will give a general description it would help us along.

A. The internal revenue agent Leahy, of the agent's office in New York, came into my office, I think, the spring of 1944, and said that he had the 1942 return for audit and the '40 and '41 as well. I told him that a loss was going to be claimed in the 1943 which would have a carry-back effect into 1942, and he probably should audit '43 at the same time that he audited '42 and prior years. He agreed to that, but asked questions concerning the nature of certain deductions that appeared on the face of the returns for '42 and prior years and asked for analyses of reserves and matters of that sort. These were secured over a period of time and furnished him. They were secured from Mr. DeGraff in San Francisco. The audit did not become active until the latter part of 1945, and he concluded his examination and discussed with me his findings, proposed recommendations, sometime around June of '46.

Q. Well now, when, if you recall, did the matter of the stock [1308] loss first become a subject of discussion between you and the agent?

A. Well, as I just stated, I told him that the loss was going to be claimed in the 1943 return. He was aware of the nature of the claim from the beginning, but I did not discuss the loss with him until, oh, approximately six months before he completed his audit. In the meanwhile I had been en-

(Testimony of James K. Polk.)

gaged in assembling evidence and material, legal research, in support of the claim of deduction.

Q. Now I show you two documents, one marked Interveners' 90 for identification and entitled "Date of worthlessness of the Western Pacific Railroad Company's capital stock" prepared by Benjamin Graham, 52 Wall Street, New York 5, New York, April 18, 1946, which is a document beginning with a transmittal from Mr. Graham to your firm of April 25, 1946; and a report of Mr. Graham, 48 pages in length, with appendices. And I also show you the document identified as Interveners' Exhibit 90 for identification which is a report on "Worthlessness of Western Pacific Railroad Company capital stock in 1943," submitted to James K. Polk, Esq., Whitman, Ransom, Coulson and Goetz, 40 Wall Street, New York, dated April 12, 1946; which is also an extended document of 84 pages, and exhibits. (Handing to witness.)

I will ask you to state, please, Mr. Polk, what, if any, connection these exhibits I have just handed to you had to do with your presentation of the matter before the Commissioner of Internal [1309] Revenue's agent in New York.

Mr. Clark: We object to it on the ground it is incompetent, irrelevant and immaterial, your Honor; the tax matter is settled, the matter of the stock loss so far as this action is concerned, is fixed. Nothing further remains to discuss about it.

Mr. Adams: It is offered, your Honor, as a part of the work record of this witness, that is to say,

(Testimony of James K. Polk.)

his account of what he did. There has been an assertion here that the defendant took over the stock loss. We account for the participation of each witness who participated in this transaction. We have given the account of Mr. Ehrman and Mr. Elsey. Now I am presenting the account of the lawyer. It has to do with that. These reports themselves have to do with studies on the date of loss, as to which there is a controversy, since plaintiff's counsel keeps insisting that the date of loss was the date of the Supreme Court decision. We do not offer these reports as proving anything to the contrary, but as reports presented to the Commissioner of Internal Revenue in which the whole subject was exhaustively examined. It has to do with that.

Mr. Phleger: Your Honor, we have no objection to the statement of fact that the reports were made, but these are lengthy documents and we do not think the record should be extended. We have not expended the money to have them printed or photostated. [1310]

Mr. Adams: They were admitted on discovery and merely marked for identification after being examined.

Mr. MacKinnon: At this stage of the game I do not think they were offered in evidence. An objection was made to interrogating the witness as to what connection these reports had.

Mr. Phleger: Counsel said he intended to offer them.

(Testimony of James K. Polk.)

Mr. MacKinnon: The objection is clearly improper.

Mr. Phleger: We have no objection.

Mr. Clark: We object on the ground they are incompetent, irrelevant and immaterial.

The Court: If I understand the question correctly, and knowing lawyers and tax experts, he might talk for hours in answer to that question as to what connection these reports had with his work. All you are trying to show is he investigated the matter, secured other help, got other reports, as a tax man would do, and made his representations and arguments to the tax board. Is that about it? I mean to the Commissioner's office?

Mr. Adams: That is a fair statement, yes, your Honor. I am accounting for the work Mr. Polk did. This is a part of it.

The Court: Is anybody attacking his work?

Mr. Phleger: It was very satisfactory.

The Court: I do not see any necessity for this examination.

Mr. Clark: That is our point, your Honor.

The Court: I will assume, unless counsel indicates to the contrary, that the witness devoted himself effectively and [1311] efficiently and over a long period of time with the aid of assistants to presenting this tax matter to the Commissioner's office. Unless counsel indicate to the contrary, I will assume that that is so.

(Testimony of James K. Polk.)

Mr. Adams: There seems to be no demur, your Honor.

The Court: No.

Mr. Adams: Without asking the witness to give any detail of the work, I will ask him to sketch in the times during which that work was done, very briefly.

The Court: All right.

Q. (By Mr. Adams): Do you recall the approximate time when the field examiner concluded his work in connection with his examination of the returns for 1942, 1943 and the first four months of 1944?

A. Along toward the end of May, 1946.

Q. Were you informed of his proposed recommendation?

A. Yes, he informed me of his proposed recommendation.

Q. What was his proposed recommendation?

A. His proposed recommendation was that the loss be allowed as a 1940 loss, is the year in which the District Court had entered its order of approval in the bankruptcy proceeding.

Q. And I take it that had the loss finally been allowed for the year 1940, it would not have served any substantial advantage as a deduction in respect of the later war years?

A. There is some doubt about whether it could have had any effect [1312] in the year, 1942. It would have had no effect in any subsequent year,

(Testimony of James K. Polk.)

and the government would not have recognized any effect in 1942, the question there being, if you want me to sketch it, whether the net loss carry-over should be computed under the law applicable to the year to which the loss is carried or from which the loss originated.

Q. As I understand, the effect of your answer as to the year 1943 and following, if it had been finally determined that the loss took place in 1940, then it would not have operated in any wise as a deduction for 1943 and subsequent years?

A. That is correct.

Q. Following your learning of the proposed recommendation of the field examiner, what was your next step?

A. My next step was to take the matter up with the Office of Internal Revenue Agent in charge to whom the report would be addressed, and my first step in that direction was to get the required powers of attorney on file.

Q. What relation does having powers of attorney have to do with your checking the matter up with the Internal Revenue agent in charge?

A. Well, an investigating internal revenue agent can discuss a matter with anybody, whether he has a power of attorney or not, because he is merely examining for facts; but the conference requirements of the Bureau are that when conferences are to be held, powers of attorney must be filed by an authorized [1313] representative.

(Testimony of James K. Polk.)

Q. And did the internal revenue agent in charge afford you a hearing?

A. He did. I had an informal rather than a scheduled conference under Bureau procedure with Mr. Krigbaum, Internal Revenue agent in charge, and his assistant. [1313A]

Q. What was the subject matter of the hearing?

A. Just before the field man had completed his report, I addressed a letter to Mr. Krigbaum in which I outlined the facts concerning the taxpayer's claim for deduction, but without argument, and I appeared before Mr. Krigbaum and refreshed his recollection concerning the factual statement and argued that the loss was properly a 1943 loss and not a 1940 loss. Mr. Krigbaum stated that he was not at all sure that the agent might not be right in his proposed recommendation, and I then suggested that the matter be referred to Washington for an advisory ruling, and Mr. Krigbaum said that he would refer it there if I could find out if they considered the type of matter that they would give an advisory ruling on.

Q. Did you then confer with the office of the Commissioner of Internal Revenue in Washington?

A. I did. I talked with Mr. Nichols, Mr. Gayton, and others, and they stated they would be glad to give an advisory ruling if Mr. Krigbaum's office requested it.

Q. What was the next thing you did?

A. Well, I told Mr. Krigbaum of that and Mr.

(Testimony of James K. Polk.)

Krigbaum then forwarded the case to Washington. This took some little span of time.

Q. Did you have any conference with the office of the Commissioner of Internal Revenue in Washington after the advisory ruling had been requested by the Internal Revenue agent in [1314] charge?

A. After I found out the case had reached Washington I talked with Mr. Nichols, who was head of the post-audit review section, having the New York area, and reviewed with Mr. Nichols the facts in the case and the contention of the taxpayer that this was the 1943 deduction. Mr. Nichols then told me that he would refer the case in the usual course to his office force for consideration and preparation of an advisory ruling, and he promised me that in the event there was any disagreement with the positions of the taxpayer, that they would afford me a formal hearing.

Q. Following that did you learn of any action that the office of the Commissioner in Washington had taken?

A. The next thing I learned about the case was when I returned from San Francisco in December.

Q. December, 1946?

A. 1946. Mr. Herskowitz of the Internal Revenue agent's office called me up and said that they had received an advisory ruling stating that it was the opinion in Washington that the revenue agent's recommendation should be sustained.

Q. What did you do next, Mr. Polk?

(Testimony of James K. Polk.)

A. I went down to Washington to find out about it because I had been promised a hearing in the event an adverse ruling were to be given, and I found out that the ruling had originally been drafted in favor of the taxpayer's contention, but it had [1315] been changed in the front office without knowledge that the conference had been promised and had not been afforded me. So they agreed that if the matter were resubmitted to them, they would afford me a hearing.

Q. And were you in fact afforded a hearing?

A. I was.

Q. Was that a formal hearing?

A. That was a formal hearing.

Q. And when was it held?

A. On February 11, 1947.

Q. And where?

A. In the office of Mr. Edingfield, Technical Advisor to the Commissioner of Income Tax.

Q. That is in the Treasury office in Washington?

A. In Washington, yes.

Q. Who was in the hearing?

A. Mr. Edingfield presided, and Mr. Nichols, and some man whose name I cannot remember from the Securities Valuation Section, were present representing the Government; Mr. Noneman, Mr. Whiteside and I represented the taxpayer.

Q. And Mr. Whiteside is a professor in the University of Cornell law school and an associate from time to time of your firm?

(Testimony of James K. Polk.)

A. That is right.

Q. Will you please tell us what took place at the conference. [1316]

A. Well, I first reviewed the facts in considerable detail, both as to the origin of the loss, the basis, then I discussed what I thought were the applicable cases which sustained the taxpayer's contention that the deduction was a 1943 deduction. I discussed at some length the Haskins & Sells, Bretey and Graham reports, which established that the stock had value or was evidence that the stock had value, up to certainly April of 1943, when the preferred stock was delisted. I then urged that the Bureau should allow the deduction as a 1943 deduction. Mr. Edingfield at that point stated that he thought that there was considerable merit to the taxpayer's contention, but that the interests of the Government might best be protected by litigating the matter. I told Mr. Edingfield I thought this was a case that was particularly subject to administrative settlement, rather than litigation. Mr. Edingfield suggested—

The Court: Mr. Adams, I don't like to interrupt, but while this case is important and you should have all reasonable time to present it on both sides, there are other litigants that are entitled to be heard in these courts and are waiting to be heard, and I just cannot see what purpose is served by these long discussions as to what took place in a conference in Washington over subject matter,

(Testimony of James K. Polk.)

when the results are before the Court, and it doesn't seem to serve any useful purpose.

Mr. Adams: Your Honor, I am responsible for this; may I try and shorten that up in that case? I appreciate your [1317] Honor's suggestion.

Q. Mr. Polk, you have just come to the question of settlement. Now, at that conference, will you state what proposal of settlement was discussed, and tell us briefly about that. That is what we have to account here for.

A. Well, Mr. Edingfield asked what sort of a settlement could I suggest, and I said, "Well, the case might be settled by leaving the returns as filed, stand, unchanged." He asked me if I would put it in writing, and I told him I would get authorization and put it in writing.

Q. And you spoke of Professor Whiteside, and I did also. It is a fact, is it not, that Professor Whiteside worked with Colonel Coulson throughout the reorganization of the Western Pacific, or the latter part of that period?

A. Yes, I had Mr. Whiteside present to be sure that I accurately stated facts regarding the reorganization.

Q. Now, at this time, the time of this conference that you had in Washington, where was Colonel Coulson?

A. He was in San Francisco.

Q. Did you discuss the submission of the proposal of settlement with him?

(Testimony of James K. Polk.)

A. I immediately phoned him in San Francisco and told him of this development which had taken place.

Q. And did you receive a telephone call from San Francisco in respect of the proposal of settlement? And please state what [1318] that was, briefly, and whether or not through that telephone call you received authorization to go ahead.

A. I did, two or three hours later, receive a telephone call from San Francisco. I was advised by Colonel Coulson and Mr. Elsey that the directors had been canvassed and that I was authorized to submit the written offer of settlement, which I read over the telephone to them.

Q. Now, was anything said during either of these telephone calls as to the advisability or inadvisability of informing the plaintiff corporation about the offer of settlement?

A. Nothing was said.

Q. Did you thereupon file the offer of settlement with the Commissioner?

A. I did, the same afternoon.

Q. And that document is in the record.

I think all counsel will agree that a copy of it appears as a part of Plaintiff's Exhibit 68, being a document dated February 11, 1947?

Mr. Phleger: It is so agreed.

Q. (By Mr. Adams): Now, when, if at any time, did you learn that the proposal of settlement had been referred by the Commissioner of Internal

(Testimony of James K. Polk.)

Revenue to the Internal Revenue agent in charge in New York? A. Approximately March 19.

Q. And when with respect to that date did you notify the plaintiff [1319] corporation of the submission of the proposal of settlement?

A. I think the letter to Mr. Curry was dated April 2.

Mr. Adams: And may the record show, by consent of counsel, that the letter is Plaintiff's Exhibit 68?

Mr. Phleger: Agreed.

Q. (By Mr. Adams): Did you thereafter discuss the matter with representatives of the plaintiff corporation? A. I did.

Q. What was the occasion, if any, for the delay in notifying the plaintiff corporation of the submission of the proposal of settlement?

A. Well, it was my first impression that the taxes which had been paid, and which would be paid, being the dollars of the company, that my responsibility was to them and not to the corporation. But I knew of the pending litigation, and after giving the matter consideration, I came to the conclusion that they should be notified. And when I came to that conclusion, I notified them.

Q. Now, had anybody at any time requested you to refrain from advising the plaintiff of the submission of the proposal of the settlement to the Bureau? A. No, sir.

Q. Did any representative of the plaintiff ever

(Testimony of James K. Polk.)

tell you that they thought the proposed settlement was disadvantageous as regards settlement with the Government? [1320]

A. I don't think I understand the question.

Q. Did any representative of the plaintiff corporation ever tell you that they did not believe the proposed settlement was a good one?

A. No, they did not.

Q. Now, Mr. Polk, what did you perceive your functions to be as tax counsel engaged in this work?

A. I thought my function was to advise concerning Federal tax matters in such a way as to produce the least tax liability for the group.

Q. Now, do you recall the commencement of the stockholders' action in New York, which we call the Van Kirk action, in the middle of the year 1946?

A. I was aware of it shortly after it was filed.

Q. Shortly after it was filed, did you examine the bill of complaint in that lawsuit?

A. I did not examine the bill of complaint, although certain portions of it were brought to my attention, and I did examine them with Mr. Shaw.

Q. Now, after you found out about that lawsuit in which there were controversies between the parties as to who was to get the so-called tax savings, did you believe that there was any possible conflict as far as your representation of the group was concerned?

(Testimony of James K. Polk.)

A. No, I believed my employment was to obtain the least tax [1321] liability possible under the facts and the Bureau of Internal Revenue laws and regulations.

Q. And did you believe it was any function of yours to give advice to any member of the group with respect to possible claims, one against the other? A. No.

Q. Now, did you have any other further knowledge with respect to the Van Kirk claim than what is set forth in the bill of complaint? A. No.

Q. Have you ever heard, or had you ever heard of such a claim prior to the time you learned about it through that complaint? A. I had not.

Q. Now, I hand you a copy of a letter identified as Plaintiff's Exhibit 7 upon the depositions, being a letter of September 27, 1946, addressed to your firm by Mr. Curry as president of the plaintiff corporation, together with a copy of your letter of October 4, 1946, addressed by you to Mr. Curry as such president, being Plaintiff's Exhibit 8-B.

And I ask that 8-A be handed up, please. And I will offer 8-A. It is a letter of October 5, 1946, from Mr. Curry as president of the corporation, to Mr. Nicodemus and Mr. Osborn, enclosing 8-B, which is a copy of Mr. Polk's letter to Mr. Curry. I shall offer these documents in evidence, your Honor; the letter of September 27, 1946, from Mr. Curry to the firm [1322] reads:

(Testimony of James K. Polk.)

"In order to protect any equitable interests that the Western Pacific Railroad Corporation may have in the reserves set up by the Western Pacific Railroad Company on account of tax deductions, as well as any refunds of tax payments arising from claims filed with the corporation, we propose to file a bill of complaint in the District Court of the United States for the Northern District of California, Southern Division, asking that these reserves and refunds, if any, be impounded, pending an accounting and an equitable determination, to ascertain what, if any, interests the corporation may have therein.

Appreciating that your firm has acted as tax counsel for both the company and the corporation in the filing of consolidated tax returns and in the proceedings now pending before the Internal Revenue Department, we would, of course, not wish to take any steps which would in any way prejudice the claims made in these returns. We would therefore appreciate your advise on this, and would be glad to have any suggestions you may make for the full protection of the interests of the corporation therein. [1323]

I would be glad to arrange a conference between your Mr. Polk and our counsel to discuss the matter further.

Yours very truly,

President."

(Testimony of James K. Polk.)

Plaintiff's 8-A is a letter of transmittal from Mr. Curry to Mr. Nicodemus, and Mr. Osborn, dated October 5, 1946, transmitting a copy of Mr. Polk's reply to the letter I have just read, and Plaintiff's 8-B is Mr. Polk's reply, addressed to Mr. Curry, President of the Western Pacific Railroad Corporation, October 4, 1946:

"Dear Sir:

This refers to your letter of September 27, 1946, addressed to this firm. The undersigned has been acting as tax counsel in connection with pending tax questions arising under the Federal consolidated returns made by the Western Pacific group for the period ended April 30, 1944, and prior open years.

In presenting the issues as to these tax matters to the Treasury Department, it will be necessary to develop the facts fully, and the Treasury Department is clearly entitled to any relevant information. There would therefore seem to be no reason why any development of facts in a [1324] separate litigation instituted by your company in the United States District Court in California would present necessary embarrassment in connection with the tax questions."

The Clerk: No. 37.

Mr. Adams: I offer the three documents as Defendants' Exhibits 37-A, -B and -C.

(Letter, September 27, 1946, Curry to Whitman, Ransom, Coulson & Goetz; October 5,

(Testimony of James K. Polk.)

1946, Curry to Nicodemus & Osborn, and October 4, 1946, Polk to Curry, were received in evidence and marked Defendants' Exhibits 37-A, -B and -C.)

Q. (By Mr. Adams): Now, Mr. Polk, with respect to the proposal of settlement that had been submitted on February 11, 1947, in Washington, when did you learn that that proposal had been communicated to the Revenue Agent in charge in New York?

A. That was approximately March 19, as I stated, 1947.

Q. And thereafter, with respect to that proposal of settlement, when did you learn that the Internal Revenue Agent in charge in New York had acted upon it?

A. That is sometime around the middle of June, 1947.

Q. Did you advise the plaintiff and the defendant in this suit—that is, the Western Pacific Railroad Corporation and the Western Pacific Railroad Company—of the action taken by the Internal Revenue Agent in charge? A. I did.

Q. And was that action favorable to the proposal?

A. It was; it contained a recommendation for a settlement of the case in accordance with the proposal.

Q. Approximately when did you learn of that case? Can you fix the time approximately?

(Testimony of James K. Polk.)

A. It is around June 15 of 1947.

Q. Was it in the same month that you notified the plaintiff and the defendant?

A. Yes, immediately thereafter.

Q. Tell the Court—you spoke of that as favorable action—what it came to; that is to say, was the action of the Internal Revenue Agent in Charge final or was it an intermediate step that went forward?

A. That was an intermediate step. The case had then to go to post-audit review in Washington for final action.

Q. Did you thereafter learn of the final action being taken on the proposal? A. I did.

Mr. Adams: Your Honor, that final action is exemplified by the papers attached to the stipulation on file in this court.

The Court: Yes.

Mr. Adams: Your Honor will recall the first of the letters from the Commissioner was dated August 13, 1946.

Q. When, if you recall, Mr. Polk, did you learn of the Commissioner's action on August 13, 1946?

A. August 14.

Mr. Phleger: You mean 1947.

Mr. Adams: I do.

The Witness: August 14, 1947.

Q. (By Mr. Adams): Now, Mr. Polk, prior to the discussion which you had at the office of the Commissioner of Internal Revenue on February

(Testimony of James K. Polk.)

11, 1947, had there been any prior discussion on your part with respect to any possible settlement?

A. No, sir.

Mr. Adams: I have no further questions.

Cross-Examination

By Mr. Phleger:

Q. Mr. Polk, are you tax counsel for the defendant? A. I am.

Q. You and your firm? A. That is right.

Q. When did you cease to be tax counsel for the plaintiff?

Mr. MacKinnon: Your Honor, we submit——

Mr. Phleger: Now——

Mr. MacKinnon: I can make an objection. I certainly can do that. I object to the question on the ground that it calls for a conclusion of law. Your Honor will determine the question. He was representing the affiliated group. He is now asking when he ceased to be counsel for the plaintiff corporation. His only representation was as a representative of the [1327] affiliated group. That is a question of law for your Honor to determine.

The Court: I will overrule the objection.

The Witness: Well, I do not recall any questions on Federal taxes being asked me after the 1945 return was filed. There have been questions asked me on State taxes. Mr. Curry sent such a question to my office within the last six months.

Mr. Phleger: Will you read the question again, Mr. Reporter.

(Testimony of James K. Polk.)

Mr. Adams: I submit it is responsive, your Honor.

Mr. Phleger: I do not think so.

Q. Are you still tax counsel for the plaintiff?

A. I still am, as far as I know, for the years covered by the powers of attorney which are on file with the Government.

Q. Do you still consider yourself tax counsel for the plaintiff with respect to all the matters that are in controversy here?

Mr. Adams: If your Honor please——

Mr. Phleger: Just a minute now.

Mr. Adams: I can make an objection.

Mr. Phleger: I object to objections which are suggestionized in their form.

Mr. Adams: That is a sound objection, but it is made before the objection has been heard.

Mr. Phleger: It applies to the last objection.

Mr. MacKinnon: I do not think there was anything suggestive [1328] in the form of my objection. I have a right to state the basis of my objection in any objection I make.

Mr. Adams: May I hear the question to which I was about to make an objection?

(Question read.)

Mr. Adams: I object, your Honor, upon the score of calling for a conclusion of law and its immateriality as to any issue involved in this case, it appearing on the facts before your Honor who

(Testimony of James K. Polk.)

are the parties and who are their representatives.

The Court: I should think a lawyer should be able to say whether he represents a client or not. I do not think that calls for any conclusion of law. I will overrule the objection.

The Witness: I have not been called upon at all by the plaintiffs, as I have stated, with the one exception that I mentioned, oh, for two years.

Mr. Phleger: I submit that is not responsive. Mr. Reporter, will you read the question.

The Court: I think that the subject of the inquiry is not whether the corporation has made any legal inquiries of you for information, but whether or not there is any relationship now in existence of a contractual or other nature in which you are employed by the corporation.

A. I know of no contractual relationship by which I am now [1329] retained by the corporation.

Mr. Phleger: I will narrow the breadth of that.

Q. Are you the plaintiff's attorney?

A. I—I do not think so.

Q. When did you cease to be the plaintiff's attorney?

A. Well, when they ceased asking for advice or coming to me. There was no written contract or annual retainer at any time. I acted on requests for information or on work to be done as it was given to me, and when they stopped giving me the work, I assumed that I stopped acting as their attorney.

Q. Well, when was that date?

(Testimony of James K. Polk.)

A. My recollection, I have told you, except for this one matter Mr. Curry referred to me, I do not think I have had anything to do for the corporation for two years.

Q. That date would be what in 1945—or 1947?

A. 1947.

Q. Can you fix the date?

A. I cannot.

Q. As a matter of fact, all of these negotiations for settlement with the Government that you related were all conducted in the name of the plaintiff corporation, were they not?

A. Oh, that is correct.

Q. By yourself as attorney in fact?

A. Under power of attorney.

Q. Yes. [1330] A. Right.

Q. And in its name?

A. And in the name of the common parent corporation, yes.

Q. That is the plaintiff corporation?

A. Right.

Q. Did you have a power of attorney from anyone else?

Mr. Adams: You mean in relation to the matter now in controversy?

Mr. Phleger: Correct.

A. Yes, I had powers of attorney from the other members of the affiliated group.

Q. But you conducted all the negotiations in

(Testimony of James K. Polk.)

the name of the plaintiff corporation under the power of attorney which you have testified you prepared and submitted to Mr. Curry for signature, is that correct? A. That is correct.

Q. I think you testified that you made the offer in behalf of the plaintiff corporation and the affiliated corporations in February of 1947, and that you notified the plaintiff corporation for the first time sometime in April, is that correct?

A. That is correct.

Q. Where was Mr. Curry's office during all this time?

A. I think it was in our office at 40 Wall Street.

Q. Well, you know it was, don't you?

A. Yes. [1331]

Q. How far from your office?

A. Oh, it was six or eight offices removed. I can't tell you how far.

Q. 50 or 60 feet? 40 or 50 feet?

A. Well, probably.

Q. 40 or 50 feet away from your office. Now, did you keep Mr. Curry currently advised of these other matters that you have testified to, the writing of the first Krigbaum letter, the second Krigbaum letter, and the Nunan letter?

Mr. Adams: Could you give the witness an identification of something that you have names for and he has not been——

The Court: He may be able to place them without taking a lot of time to refer to the exhibits. If the witness needs them he may have them.

(Testimony of James K. Polk.)

Mr. Adams: It is just a question of identification.

The Court: Do you know what Mr. Phleger is referring to?

A. I can find out very quickly. The first Krigbaum letter——

Q. (By Mr. Phleger): ——is the general explanation.

A. That is the May 25 or thereabouts letter?

Q. Yes.

A. And the second Krigbaum letter——

Q. The first Krigbaum letter is May 31, 1946; the second Krigbaum letter is a year later, May 19, 1947. Did you advise Mr. Curry of the sending of those letters at or about that time or [1332] at all? A. No.

Q. Did you advise Mr. Curry about the sending of the Nunan letter at or about its time?

A. Is that the February 11 letter?

Q. Correct.

A. I advised him of the sending of that letter on April 2, 1947.

Q. Now, you stated in your direct testimony that you had to have the power of attorney in order to deal with Krigbaum, didn't you?

A. I did.

Q. Have you in mind that you did not get the power of attorney until a month after you wrote the first Krigbaum letter?

A. The letter was addressed to Mr. Krigbaum

(Testimony of James K. Polk.)

but was delivered to Mr. Leahy. Mr. Leahy used it in the recital of facts, in the report that he had in the course of preparation. It had to be addressed to his chief, and not to the Revenue Agent.

Q. You wrote that letter and signed it in the name of the plaintiff corporation before you had the power of attorney, didn't you? A. I did.

Q. I will direct your attention to the 1942 return. When did you decide to file a consolidated return for the year 1942?

Mr. MacKinnon: I object to the form of the question. He [1333] said, "When did you decide." There is no evidence that the witness did make the decision.

Mr. Phleger: Well, he can answer it. It is a proper question.

Mr. MacKinnon: I do not think it is proper. That is why I objected to it.

The Court: I will overrule the objection.

A. Well, sometime between April 1 and May 15, 1943, the calculations were made which showed the advisability of the consolidated return, the advantage of the consolidated return over the separate return, and advice was given at that time, of course, to file on the basis which reflected the lower tax.

Q. (By Mr. Phleger): And you place that time as what time in 1942?

A. I cannot place the time by day.

Q. No.

A. I know that it was along toward the latter

(Testimony of James K. Polk.)

part of the work that was done in the preparation of the return, because the calculations could not be made until some progress had been made in converting back figures to tax figures.

Q. And Reilly made those figures, did he, for you? A. He did.

Q. Have you got the figures?

A. I do not know. They were summarized in the letter of May 20, but I do not believe that the actual calculations have been located. [1334]

Q. When in 1943 did you first begin to take an interest in the tax affairs of the plaintiff corporation and its affiliated corporations?

A. I received a memorandum of inquiry from Colonel Coulson sometime around the 15th of March, 1943, in which he stated that he understood that the returns were being prepared by some woman over in the corporation office and asked me to look into the matter. I phoned the office, talked with someone there—it is my recollection it was Mr. Curry—he said that that was the fact, and the papers had just been received from the West Coast, and it would be six weeks or a couple of months before the return preparation would be completed.

I made a memorandum of that on the bottom of the paper and sent it back to Colonel Coulson and my—I think that answers your question.

Q. That memorandum, Mr. Polk, reads as follows:

(Testimony of James K. Polk.)

"Colonel Coulson:

As I understand the procedure in the New York office, only the lady referred to has any part in the preparation of the return. She now has separate company data and will require several weeks to prepare consolidated schedules. She 'confers' with accounting firm, but Mr. Curry says they are too impoverished to hire accounting help. They paid on 3-15 a quarterly payment of $1,000,000. [1335]

No decision has been reached as to depreciation treatment. I will follow this up if you so direct in about four weeks."

You recall that, do you not?

A. I do.

Q. And do you recall then a memorandum from Mr. Coulson to you: "Better follow up"?

A. I know that that notation is on there. I have no independent recollection of it, sir.

Q. At that time you or your firm were not the attorneys for either the defendant or the plaintiff or the trustees in bankruptcy, were you?

Mr. Adams: You mean in tax matters, Mr. Phleger?

Mr. Phleger: Yes, in tax matters, in these matters. A. No, sir.

Q. You became attorney after you made this inquiry? A. That is right.

Q. Do you know, Mr. Polk, of any similar case to this, that is, where the parent's stock loss in a subsidiary was used in a consolidated return to eliminate the tax for the affiliated group?

(Testimony of James K. Polk.)

A. No, I have no personal knowledge.

Q. Well, you never heard of any such case, did you?

A. Well, the way you stated it, it is a rather usual circumstance. [1336]

Q. Well, you state it. You are an expert.

A. I know, but you state where the parent's loss has been used to offset system income, that is a rather usual circumstance.

The Court: He means the parent's loss of its own stock in a subsidiary.

Q. (By Mr. Phleger): Yes, its ownership in the subsidiaries.

A. I know of no such case.

Q. As a matter of fact, this case could not have happened except for a change in the law in October 1942, could it?

A. No, it could not have.

Q. What was that change in the law which made this possible?

A. Well, there was a very unfair situation in consolidated return accounting up to that point that section 23(g)(4) was designed to correct. You see, under consolidated returns intercompany transactions are eliminated, and where a parent corporation puts out its cash for a subsidiary company and then the subsidiary company becomes worthless, if you eliminate the worthlessness as an intercompany transaction, there has been, in the usual case, a deprivation of capital, a loss of

(Testimony of James K. Polk.)

capital and no reflection for tax purposes, and that was corrected by the insertion into the Internal Revenue Code of Section 23(g)(4).

Q. So that my statement is correct, is it not, that this particular tax handling became possible because of the new law passed [1337] in October of 1942?

A. It was the Revenue Act of 1942, yes, sir.

The Court: Perhaps we might take a recess at this time.

(Recess.) [1337-A]

Q. (By Mr. Phleger): Mr. Polk, when was the first time it was decided to use the stock loss?

A. In late December 1943, I had reached the conclusion that I would recommend its use. In January of 1944 I did recommend its use and the decision was made to use it.

Q. Who made the decision?

A. Mr. Elsey, Mr. DeGraff.

Q. Where was it made?

A. Made in San Francisco.

Q. When was it decided to file a consolidated return including the defendant corporation for the first four months of 1944?

The Court: You mean the defendant corporation?

Mr. Phleger: A consolidated return of the plaintiff, including the defendant corporation for the first four months of 1944.

(Testimony of James K. Polk.)

Mr. Adams: Your Honor, I understand I have a running objection to the characterization due to the fact that we represent the reorganized company, which came into existence the first of 1945, and questions of this sort are subject to such a running objection.

Mr. Phleger: Well, Mr. Adams, the returns were filed in the name of the defendant corporation, were they not?

Mr. Clark: The plaintiff corporation.

Mr. Adams: The 1944, the first four months of 1944 were filed in the name of the plaintiff, and the last eight months [1338] were filed by the defendant corporation.

Mr. Phleger: Yes, but the participance in the first four months was in the name of the defendant corporation, was it not?

Mr. Adams: As it had always been throughout the trusteeship.

Mr. Phleger: Well, that is the question. Would you read the question?

(Previous question read by the reporter.)

A. I am not sure I can answer that. I can't tell you when I decided to recommend that.

Q. When was that?

A. That was shortly after the transfer of the stock, April 30, 1944, which terminated the affiliation.

Q. To whom did you make the recommendation?

(Testimony of James K. Polk.)

A. The recommendations were ultimately made to Mr. Elsey, Mr. DeGraff, Mr. Curry prepared the returns in accordance with them, and so forth.

Q. And they made the decision?

A. The decision to file the returns were, of course, made by the company.

Q. Yes. Now who made the decision to file a claim for refund for 1942?

A. Decision?—I prepared the claim for refund, and saw that it was finally filed.

Q. Well, who made the decision to file it? [1339]

A. Well, I guess that decision was made by Mr. Curry, who signed it.

Q. Well now, Mr.——

A. Well, you asked who made a decision to file it. I recommended and prepared the claim, which is a technical step to protect the interests of the group in the transaction, and sent it forward for execution by the proper signing officers, and it was executed and filed.

Q. Well, you prepared it on your own initiative, did you not? A. Certainly.

Q. And when you prepared it, had you discussed it with anyone in the corporation, the matter? A. No.

Q. And you sent it forward with the request that it be signed, did you not?

A. I did.

Q. Now you have stated at some length as to the circumstances surrounding the submission of

(Testimony of James K. Polk.)

the so-called Nunan offer, which was in February, 1947. Other than the power of attorney which you had received a year or more earlier, had you any authorization from the plaintiff corporation to make that offer in its name? A. No.

Q. During this entire period, did you give any advice to any officer of the corporation as to what its right might be as against any other officer of the affiliated group arising out of the [1340] filing of consolidated returns? A. No.

Q. Did you ever advise anyone representing the corporation, the plaintiff, that it could elect to file or not file consolidated returns?

A. Will you read that to me?

(Previous question read by the reporter.)

Mr. Phleger: No, strike that out.

Q. Did you ever advise anyone representing the corporation during this period it had the option to file or not file consolidated returns?

Mr. Adams: I object to the question, your Honor. Our contention being that there was no option under the circumstances, and it was obligatory on the part of plaintiff corporation to file returns which were filed.

The Court: Well, of course that is argument in the matter.

Mr. Adams: That is right. I state it in my objection.

The Court: All the question pertains to is a question of fact. Overruled.

(Testimony of James K. Polk.)

A. Well, I don't believe that I advised anyone in that form. I did advise in respect specifically of the 1942 tax returns, that the consolidated basis was a great deal less than the separate basis. It was quite apparent to everybody that we could have filed on either basis.

Mr. Phleger: Now will you read the question, Mr. Reporter, [1341] please?

A. I would like to complete my answer by stating that the same type of disclosure of advantage of consolidated over separate return was made for the year '43 and for the four months of '44.

Mr. Phleger: Would you read my question, please?

(Previous question read by the reporter.)

Mr. Adams: May we have the answer, your Honor?

Mr. MacKinnon: Yes, I would like to hear the answer.

The Court: You may during this period, Mr. Phleger?

Mr. Phleger: I mean during this entire period involving the returns for these years.

The Court: All right. Do you wish the answer, gentlemen?

Mr. MacKinnon: Yes.

Mr. Phleger: Well, he didn't answer this question.

Mr. MacKinnon: I assumed he did. I take the position that he did answer it. I think it is a

(Testimony of James K. Polk.)

responsive answer. It may not be what counsel wishes, but that is immaterial.

The Court: Well, if they want it, you may as well read it.

(Previous answer read by the reporter.)

Mr. Phleger: I submit the question has been answered. The question is, "Did you, during this period, with respect to this period, advise the corporation that it had the option to file or not file consolidated returns?"

Mr. Adams: I submit the question was answered directly.

The Court: Well, the first part of the question is in [1342] answer to it. He said he didn't.

Mr. Phleger: Well, if that is the answer, that he didn't——

Mr. Adams: I take it, your Honor, the answer was in respect of the privilege to explain the witness' answer.

The Court: Well, of course, he gave part of it—part of it is his conclusion and opinion, as to whether everybody assumed something or not. That is, of course, his opinion and conclusion.

Mr. Phleger: That is right. But do I understand your Honor to interpret his answer is that he said——

The Court: He said he didn't do it in that form, which means that he didn't do it.

Mr. Phleger: All right.

The Court: Because your question was a specific

(Testimony of James K. Polk.)

question, I am not attempting to shut you off; you can pursue it as far as you want to.

Mr. Phleger: Well, the witness hears your interpretation of the answer, and I accept it.

The Witness: Well, I didn't mean my answer to be so interpreted.

Q. (By Mr. Phleger): Well, suppose you answer the question, then?

Mr. Adams: Move to strike out that remark of counsel's; it is inappropriate to this record.

The Court: Well, the question was a narrow one. The [1343] attorney wanted to know whether you advised anyone connected with the corporation that the corporation, during this period of time, had the option to file or not to file any affiliated returns.

The Witness: Well, your Honor, that was perfectly apparent when I discussed with them——

The Court: It may be. Now that is a matter that I am going to have to decide. All he wants to know is whether you, from your own mouth, by word of mouth or in writing, specifically so told any of the officers of the plaintiff corporation. Now there are a lot of lawyers here that are going to carry it further, I suppose. But that you can answer.

The Witness: Very well.

The Court: And you don't have to be afraid to answer it because it may be there is some other evidence to show that they did not know that. But all

(Testimony of James K. Polk.)

he is asking you is whether you told them that. That is all.

The Witness: Well, when I discussed the advisability of filing one or the other, it was perfectly apparent that they understood that they could have filed either of them.

Mr. Phleger: I move that be stricken out and that the witness answer the question.

The Court: Yes, it may go out. That still may come into the case, but all you are being asked is whether, at the time you told them that. [1344]

A. Very well, sir.

Q. (By Mr. Phleger): Will you answer the question?

A. I have answered it as well as I can, sir.

Mr. Phleger: Will you read the question, Mr. Reporter?

(Previous question read by the reporter.)

The Court: It is not a question of whether you considered it necessary to do that; but in fact, did do it.

A. Well, I certainly considered that I had.

Mr. Phleger: Well, I move that that be stricken out.

The Court: Yes. That may go out.

Mr. Phleger: And that he answer the question.

A. It is my belief that I did.

Mr. Phleger: Now I would like the deposition of this witness, page 1985.

(Testimony of James K. Polk.)

(Deposition produced by clerk.)

Q. (By Mr. Phleger): I read to you from your deposition, page 1985, about eight lines from the bottom of the page:

"Q. In connection with the preparation and filing of the 1944 tax, did you advise the corporation that the corporation could elect to file a non-consolidated return for that year?

"A. I did not."

Do you recall that testimony?

A. Well, I don't recall all that I said on deposition, no, sir.

Q. Well, was that statement true when it was made? [1345]

A. Well, it is my present recollection, as I have tried to testify that Mr. Curry, an officer of the corporation, was advised of the type of return and reason for filing that type of return, as against a separate return, as each return was prepared—'42, '43, and '44. Now that is the fact; what that amounts to I cannot say. I am not attempting to testify——

Q. Well, you have been asked the direct question as to whether you advised them—that is, the plaintiff corporation—that they had the option or election to file or not to file a consolidated return. Now what is your answer?

Mr. MacKinnon: I submit, your Honor, that that is a different question than was asked previ-

(Testimony of James K. Polk.)

ously, and I object to it on the ground that, if it is purported to be the question that was previously asked, the previous question, if I recall, was "anyone connected with the plaintiff corporation." Now he says the "plaintiff corporation."

Mr. Phleger: Well, I see no difference.

The Court: I will overrule it.

Mr. MacKinnon: I see a material difference.

The Court: Overruled.

The Witness: You are not excluding Mr. Curry in that connection?

Mr. Phleger: No.

A. I gave no written opinion on that to anyone. I was not asked the specific question, so far as I can recall, by anyone. [1346] It was discussed and decided as an available alternative method of filing in each year, and the decision was to file on the basis which produced the least tax.

Q. And that is the only answer you can make to my direct question as to whether you advised?

A. That is.

Q. And you want the record to remain in that shape. You know during all this time that the plaintiff corporation could elect to file a separate return if it saw fit, did you not?

A. Well, I would have so advised. There are lots of periods during this time that you are talking about when they could not have, sir. You realize that this was not a continuing new election each year. It was something that came up by way of

(Testimony of James K. Polk.)

the commissioner's authorization at varying dates, so there were considerable periods when there was no election available. Having once filed the consolidated returns, you were bound by it.

Q. Having made that qualification, will you answer the question?

Mr. Adams: I object to the question as stated.

The Witness: I just can't answer your question. It is not so, that they had a free election all during this period.

Q. (By Mr. Phleger): Is it not a fact that you knew that at each time a consolidated return was in fact filed for 1942, 1943 and 1944, that the corporation at the time of filing had an election not to file a consolidated return but an individual return? You knew that, didn't you? [1347]

Mr. Adams: Your Honor, I object to that. I contend the statement in the question is inaccurate. That is an issue in this case. Your Honor appreciates one of our contentions is directed to the contrary, and counsel is asking of this witness a question which is an issue of law before your Honor.

The Court: He is only asking him as to what his knowledge was in the matter. Overruled.

The Witness: I think at the time each return was in fact filed that there existed the election to file either separate or consolidated returns.

Q. (By Mr. Phleger): Mr. Polk, when in your opinion did it become clear for the first time that the tax loss would be accepted by the government?

(Testimony of James K. Polk.)

A. August 14, 1947, sir. I do not mean to be facetious, but this was a doubtful item and it was not until the Bureau had finally allowed the settlement that I knew that we had the benefit of it.

Q. As a matter of fact, you considered any litigation about the tax benefits premature prior to that date, isn't that right?

Mr. MacKinnon: That is objected to, your Honor, on the ground it is irrelevant and immaterial to any issue in this case.

Mr. Adams: And this witness' opinion on a question of law of that sort is wholly irrelevant, your Honor.

Mr. Phleger: He is your attorney, acting for both parties at this time. [1348]

The Court: I do not think it is necessary to argue it. I think it is within the reasonable limits of proper cross-examination. Overruled.

The Witness: May I have the question read.

(Question read.)

A. I considered any estimate of the amount of savings premature prior to that date.

Mr. Phleger: I would like the witness' deposition, please, page 2496.

Q. I read now from your deposition, page 2496, about eight lines from the bottom. It has to do with a conference in which the settlement with the government was being discussed:

"Q. Were you discussing in those conferences the amount which is the subject matter of the liti-

(Testimony of James K. Polk.)

gation in California as affected by the settlement?

"A. That is not quite clear to me, sir.

"Q. What was the relationship between the subject matter that you described as having been discussed at this conference and the litigation in California?

"A. I think I was raising the question that any action was premature until the liability to the government was determined. You cannot calculate any savings until you know several factors, and one of the most important ones is the liability under the returns as filed."

Did you give that testimony that I have just read?

A. Yes, sir.

Q. Was it true when given? A. Yes.

Q. Is it true now? A. Yes.

Q. On your direct testimony——

Mr. MacKinnon: I want to submit the very next question and the very next answer, which was not read.

Mr. Phleger: I will be glad to read them.

The Court: You can take that up on redirect if you wish.

Q. (By Mr. Phleger): Mr. Polk, on your direct testimony you testified that you, after some thought on the subject, decided that you would advise the plaintiff corporation of the offer of settlement which you had made in its name and as its attorney in fact on February 11, 1947, and that you thereupon

(Testimony of James K. Polk.)

wrote a letter to the plaintiff corporation so advising it under date of April 2, 1947; do you recall that testimony? A. Yes.

Q. Did you write that letter?

A. I dictated the letter.

Q. How did you dictate it?

A. I dictated it to Mr. Noneman.

Q. Over the telephone? A. That is right.

Q. Where were you at the time? [1350]

A. I was in San Francisco.

Q. So you dictated this letter from San Francisco to your partner in New York and he wrote the letter and signed your name, is that right?

A. May I see the letter? I thought it was signed with the firm's name, but it may be my name.

Mr. Adams: Plaintiff's Exhibit 68, I believe.

The Court: That is just a copy of it.

Mr. Phleger: Yes, the copy shows signature by James K. Polk, if it is a correct copy.

Mr. Clark: It is conceded to be correct, your Honor.

The Witness: I do not suppose it is incorrect. I do not know.

Q. (By Mr. Phleger): This is the letter that you read over the telephone from San Francisco with the request that it be sent, is that not so?

A. Yes, yes, that is so. But I mean as to signature, whether it is James K. Polk or Whitman-Ransom, I do not know.

Q. It is your letter, isn't it?

(Testimony of James K. Polk.)

A. Yes, it is my letter.

Q. Did you dictate this letter over the telephone from San Francisco after conference with the attorneys in this litigation?

Mr. Adams: May I have that question read?

(Question read.)

The Witness: You mean on the subject matter of the letter [1351] or just in point of time?

Q. (By Mr. Phleger): Both.

A. It was after conference with Mr. Matthew and Mr. Adams, but the conference was not on the subject matter of this letter.

Q. It was about this litigation in part, wasn't it?

A. Oh, yes, yes.

Q. And after you had conferred about this litigation, you concluded then that you had better advise the plaintiff corporation?

A. In point of fact, that is correct.

Mr. Phleger: That is all.

The Court: Any questions?

Mr. Clark: Just a few, your Honor.

Cross-Examination
(Interveners)

By Mr. Clark:

Q. Mr. Polk, did you get Mr. Coulson's authorization before you prepared the January 11, 1944, opinion which is in evidence in this case?

A. Approval of what, sir?

Q. Did you get Mr. Coulson's authorization be-

(Testimony of James K. Polk.)

fore you prepared the January 11, 1944, opinion which you have testified you gave to Mr. Elsey?

Mr. MacKinnon: I object to it on the ground it is irrelevant and immaterial to any question in the action.

Mr. Clark: I will submit the objection, your Honor. The witness testified under direct examination——

The Court: I will overrule the objection. [1352]

The Witness: I can best answer that by relating the exact facts as I recall them.

Q. (By Mr. Clark): Will you please answer the question?

A. Well, I did not get Col. Coulson's approval to anything, sir.

Q. I asked whether you got his authorization before you prepared the opinion which you gave the defendant company.

A. You mean authorization to give them an opinion?

Q. Yes, sir. A. No.

Mr. Clark: May it please your Honor, I will offer in evidence a copy of telegram, James K. Polk to R. E. Coulson, dated January 10, 1944, having been marked Interveners' Exhibit 118 on deposition.

Mr. MacKinnon: May I see it, please?

Mr. Clark: The authenticity of which has been conceded.

Mr. MacKinnon: I object to it on the ground

(Testimony of James K. Polk.)

it is irrelevant and immaterial to any issue in the action.

Mr. Clark: The only portion of the telegram I am concerned with, your Honor, reads as follows:

"As basis for closing 1943 book entries, letter requested from firm as to effect of stock loss deduction in consolidated return on railroad company tax liability stop I will prepare letter if you authorize by wire."

We will submit the offer.

The Court: It may be introduced. [1353]

(The telegram referred to was thereupon received in evidence and marked Interveners' Exhibit No. 20.)

Q. (By Mr. Clark): At that time, Mr. Polk, did Mr. Coulson instruct you that the opinion should be held before becoming effective until cleared by him?

Mr. MacKinnon: I object to it on the ground it is irrelevant and immaterial to any issue.

Mr. Clark: I will submit it.

The Court: I do not know exactly what you are getting at. Are you making some distinction between the lawyers in the same firm?

Mr. Clark: I do not intend to. I intend to show there was no distinction, your Honor. There has been testimony in this case that Mr. Polk was the person who was relied upon, and that he had a certain conception of his duties. Also in his direct examination Mr. Polk testified the only reason the

(Testimony of James K. Polk.)

opinion was held up or sent to New York, or rather, clearance from New York was requested was because he did not have certain data out here. My point is it was cleared with Col. Coulson, the head of the firm, and it was a firm proposition.

The Court: Overruled.

Q. (By Mr. Clark): Did Mr. Coulson instruct you to hold up the opinion until he cleared it from New York?

A. I recall an arrangement, but I recall no instructions.

Mr. Clark: We will offer in evidence, if it please your [1354] Honor, a memorandum dated January 13, 1944, signed J. K. P., which is conceded to be Mr. Polk's initials, which is heretofore described as Interveners' Exhibit 178 on deposition, the only part of which I am interested in reading as follows:

"There was delivered to Mr. Elsey the letter of January 11 to be held by him per instructions of Col. Coulson until Mr. Elsey had telegraphic clearance from Col. Coulson in New York."

Mr. MacKinnon: I object to the letter on the ground it is irrelevant and immaterial to any issue in the action, and I state again to your Honor, that this is a situation where he takes two documents—these are only two out of many—and offers them. So if this extraneous matter is going in, there is no other alternative than to meet it.

The Court: Mr. MacKinnon, you have told me that a great many times during the trial of this

(Testimony of James K. Polk.)

case, and I am not going to admit or make ruling admitting or excluding evidence on the basis of some threat that that will cause the other side to produce any documents that you consider proper in product any documents that you consider proper in the case, and if it is proper and material I shall admit it.

Mr. MacKinnon: I am objecting to it on the ground it is irrelevant and immaterial.

The Court: I will overrule the objection.

(The document referred to was thereupon received in [1355] evidence and marked Interveners' Exhibit 21.)

Q. (By Mr. Clark): Mr. Polk, directing your attention to the conference at Denver, or rather, the meeting at Denver in June of 1943 with Mr. Schumacher and Miss Valouch in this business car of the railroad which you testified to in your direct examination, will you state whether or not at that time you advised Miss Valouch concerning the allocation of 1942 taxes in accordance with the rule then followed by the Securities and Exchange Commission?

Mr. Adams: Your Honor, may I have that question read?

(Question read.)

A. It is my recollection that there was some discussion of the allocation of taxes, and that I called attention to the U-45 rule of the Securities

(Testimony of James K. Polk.)

and Exchange Commission, and said that when I got back east—I was going to San Francisco—when I got back east I would check further into the matter, particularly as to the rules of allocation approved by the Interstate Commerce Commission, the prescribed system of accounts or individual rulings if any existed.

Q. At that time were you familiar with rule U-45 B 6?

A. I have on my deposition testified that I was familiar with the version of it which I had in my own file. If that is the same as the rule which now exists, I am familiar with it. I furnished the copy of the text with which I was familiar.

Mr. Clark: Now, may it please your Honor, I will ask counsel [1356] for a stipulation that the following releases of the SEC, being numbers 4806, in the matter of the Consolidated Electric and Gas Company; 4329, in the matter of Consolidated Electric and Gas Company and the Islands Gas and Electric Company; and 4444, in re Consolidated Electric and Gas Company and Islands Gas and Electric Company, and release 5535, in re Cities Service Company, Cities Service Refining Company. I will ask for the stipulation that they were received, that is, copies of them, by the office of Whitman, Ransom, Coulson and Goetz on or about the dates the releases bear, these being cited in the briefs which have been filed before your Honor.

(Testimony of James K. Polk.)

Mr. Adams: Is that in a deposition?

Mr. Clark: That is in the deposition, and it was so conceded.

Mr. MacKinnon: What page?

Mr. Clark: I can furnish you with the page later, subject to correction.

Mr. Adams: Well, it is stipulated, subject to correction.

Mr. Clark: Will you so stipulate, Mr. MacKinnon?

Mr. MacKinnon: No, but I won't stipulate they came to the notice of Mr. Polk.

Mr. Clark: I am not asking for that. I am simply asking for a stipulation that those were received by the firm of Whitman, Ransom, Coulson and Goetz on or about the date of the releases, which range from January 3, or rather from June 1, 1943, [1357] through January 3, 1945.

Mr. MacKinnon: I will accept it subject to the qualification that if I don't find such stipulation in the deposition, I withdraw it. They represent it is in the deposition.

Mr. Clark: That is satisfactory to us, your Honor, and that is all for this witness. [1358]

* * *

JAMES K. POLK

resumed.

Mr. Adams: I assume the cross-examination has been completed. May I have the exhibits, please,

(Testimony of James K. Polk.)

handed in by the interveners upon the cross-examination of Mr. Polk? What I have reference to were the documents that were referred to in the stipulation obtained that they were in the files of Whitman, Ransom, Coulson & Goetz.

Mr. Clark: Those SEC papers, Mr. Adams?

Mr. Adams: Yes.

Mr. Clark: I didn't have them marked or offered, because they are cited in the briefs as legal authority.

Mr. Adams: May I have them?

Mr. Clark: You may certainly have them, the four of them.

(Handed to counsel.)

Mr. Adams: This refers, your Honor, to the SEC release described by Mr. Clark upon his cross-examination of the witness, or releases, rather, being releases dated July 28, 1943, Holding Company Release No. 4444; June 1, 1943, Holding Company Account Release No. 4329; January 3, 1944, Holding Company Account Release No. 4806; and January 3, 1945, Holding Company Release No. 5535. [1359]

Redirect Examination

By Mr. Adams:

Q. I will hand the documents to the witness and ask the witness to tell me the time, if at all, when any of these releases first came to his attention.

(Testimony of James K. Polk.)

A. It is my recollection that they were brought to my attention at the time of the taking of my deposition in New York in this proceeding, and that at some time after the institution of the Van Kirk action in New York, a summary of one of them was brought to my attention in connection with a law memorandum prepared by Mr. Cavanaugh.

Q. Your deposition was taken, I take it—well, the record shows—in the year 1948, and referring to the Van Kirk action, by that you mean the litigation commenced in the middle of 1946 in New York? A. That is right.

Q. And prior to that time, that earlier date, had you ever had any knowledge concerning these releases or any of them? A. I had not.

Mr. Adams: Now, your Honor, referring to the portion of the deposition read upon the cross-examination by plaintiff's counsel, I desire to read what immediately follows, two questions, two answers.

Mr. Levy: What page is that?

Mr. Adams: Page 2497:

"Q. What were you referring to when you said 'Any [1360] action was premature?'

A. Any action to recover a tax saving. It is impossible to compute the savings until you know what the tax liability is.

Q. Were you suggesting that the corporation's action could be defeated as premature upon that ground?

(Testimony of James K. Polk.)

A. Not at all. I was merely making the point that the case was still unsettled and that there was no way of saying what tax dollars belonged in any year."

Q. Do you recall giving that testimony upon the taking of your deposition, Mr. Polk?

A. I do.

Q. And were the answers which you then gave correct? A. They were.

Mr. Adams: Now may I see the exhibits, please, offered by interveners, the telegram of Januray 10?

The Court: Interveners' No. 20.

Mr. Adams: Thank you, your Honor.

(Handed to counsel by the clerk.)

Mr. Adams: Your Honor, at this time I offer as Defendants' 38-A a telegram from Mr. Coulson to Mr. Polk of January 11, 1944, sent from New York and addressed to Mr. Polk, care of Charles Elsey, the Western Pacific Railroad Company, San Francisco.

(The telegram referred to was received in evidence and [1361] marked Defendants' Exhibit 38-A.)

Mr. Adams (reading):

"Your telegram tenth received"——

Mr. Clark: Just a moment, your Honor. How is that identified on the deposition?

Mr. Adams: Oh, thank you. Interveners' 70-A.

Mr. Clark: Will you wait just a moment.

Mr. Adams: Surely.

(Testimony of James K. Polk.)

Mr. Clark: Very well.

Mr. Adams (reading):

"Your telegram tenth received. Have wired Hart my tentative plans. Ask Mr. Elsey's office to try and arrange return space streamliner for February fifth. No success so far this end. Stock of operating company was not transferred to committee on December 31 owing to Delaware litigation. Think letter as to effect of stock loss deduction on consolidated return should be released from this office if possible. Suggest you draft and forward airmail. Hope you are having a pleasant vacation."

And I offer as Defendants' 38-B a telegram of January 15, 1944, addressed from Mr. Coulson to Mr. Charles Elsey, President, Western Pacific Railroad Company, San Francisco, sent from New York. [1362]

(The telegram referred to was received in evidence and marked Defendants' Exhibit 38-B.)

Mr. Adams (reading):

"We have reviewed opinion letter"——

Mr. Clark: The deposition number, please.

Mr. Adams: Oh, thank you. 71.

Mr. Clark: Very well.

Mr. Adams (reading):

"We have reviewed opinion letter of January 11 left with you by Mr. Polk. Have made some minor typographical changes, but approve substance and conclusions. Revised signed copy being mailed today to substitute for copy left with you."

(Testimony of James K. Polk.)

The balance of the telegram does not relate to the opinion.

It will be stipulated, I think, that as upon the deposition, these telegrams were sent and received?

Mr. Clark: No doubt about that. The authenticity is conceded as to all these exhibits,—that one being signed "Coulson," I believe?

Mr. Adams: Both of them being signed "Coulson." Right.

Mr. Clark: Right.

Q. (By Mr. Adams): Now, Mr. Polk, have you ever known of a case in which a member of an affiliated group whose loss has been included in a consolidated return, with resulting tax advantage to other members of the group, but with no [1363] tax disadvantage to the loss company, has been compensated for joining in the return, that is, where such loss company has been compensated for joining in the return?

Mr. Phleger: Just a moment. I object to that upon the ground it is incompetent, irrelevant and immaterial, not within the scope of either the direct or cross-examination of the witness, an entirely different question.

The Court: Do you want this witness to decide this case for me?

Mr. Adams: Counsel for the plaintiff asked the witness a very broad question whether he ever heard of a case like this one.

Mr. Clark: Oh, no, that was not the question.

(Testimony of James K. Polk.)

The Court: He did not ask any questions along that line. He asked him whether he ever heard of a case where the affiliated return resulted in no taxes because the parent company was enabled to take the loss, the complete loss of its holding in the subsidiary company.

Mr. Adams: I take it, your Honor, this question is of a similar nature to that.

The Court: It is similar in that it is a question that involves taxes. That is as far as I can see. [1364]

* * *

The Court: I will sustain the objection. I think it is completely improper.

Mr. Adams: Your Honor, I have just one further question, somewhat like the last one. The last question asked the witness was if he had known of a case in which payment had been made for the tax advantage. That is the question to which objection was made and your Honor sustained the objection. Now, then, the next question varies slightly from that because the question was asked, "Have you ever heard of a claim," and I want to ask this one question:

Q. Mr. Polk, prior to the time that you learned of the stockholders' litigation in New York that was instituted in New York in 1946, had you ever heard of a claim on the part of a member of an affiliated group, whose loss had been included in a consolidated return, with resulting tax advantage to other

(Testimony of James K. Polk.)

members of the group, but with no tax advantage to such loss company, to be compensated for joining in the return?

Mr. Phleger: I object to that upon the ground it is incompetent, irrelevant and immaterial and not within the [1368] scope of either the direct or cross-examination.

Mr. MacKinnon: May I make one more statement and I will sit down. I think this question is relevant, and I think the prior question was, on the basis of the discharge of this witness' responsibility to the plaintiff. If he did not believe that the plaintiff had any right to any share in the tax savings, then certainly his standard of conduct would be very different than if he did believe he had a right. If he knew or had come across a case of that type, then I think his standard of conduct with respect to the plaintiff would be a very different standard than it would be if he had never heard of any such claim and he had never heard of any compensation having been paid.

The Court: I think it is entirely incompetent what the witness' view or knowledge or effect of what he was doing was.

Mr. MacKinnon: That has been put in issue.

The Court: I do not conceive that it is. It certainly does not meet any evidence that has been presented on behalf of the plaintiff or the intervener.

Mr. MacKinnon: It meets the question as to

(Testimony of Robert E. Coulson.)

books a reserve or a fund to protect possible liability if the Treasury Department denied that deduction. I took it up with Mr. Ecker and Mr. Wright, to the best of my recollection, and secured approval of Mr. Elsey's recommendation.

Q. When, if you recall, did you first learn of the type of federal tax returns which were to be recommended for the year 1944?

A. To the best of my recollection, it was late in the year 1944 that I first learned of it. I can't fix the time unless there is [1380] correspondence that shows.

Q. Who made the recommendation, if you recall?

A. It was Mr. Polk's determination to give that advice.

Q. Now when did you learn that a claim for refund of the taxes paid in 1942 had been or would be filed?

A. Again I cannot fix the time, but I think I learned of it at or about the time the claim for refund was filed.

Q. Now in the record here it appears that a stockholders' action which we call the "Van Kirk Action," was instituted in New York along at the end of June, 1946. When did you learn of the commencement of that litigation?

A. Shortly after it was started, because I was served as a defendant, with the company.

Q. Did you then believe that there was any con-

(Testimony of Robert E. Coulson.)

flict in your firm's representation of the affiliated group in the tax matter?

Mr. Phleger: Just a moment—well, I will withdraw that.

The Witness: I saw no conflict arising as a result of that litigation, no.

Q. And what is the basis of the answer you have just given?

Mr. Phleger: Now, I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Well, you let him answer the question as to his belief. I suppose on the theory that that is a separate fact. Now you are asking to argue the matter and give his reasons why he felt that way about it. [1381]

Mr. Phleger: That is right.

Mr. Adams: That is a fair statement, your Honor.

The Court: Well, wouldn't that, of course, be subject to the orthodox objection that it is his opinion and conclusion?

Mr. Adams: Well, this is the party to the transaction; his firm were representing the trustees in the tax matter. There is some complaint about how the tax matters were handled in this case. I confess I don't get either the point or the significance of it; but I have heard some such complaint voiced. I have heard a generalization that this was taken over. I don't thoroughly understand what is meant by that. I am seeking to meet it, because that is

(Testimony of Robert E. Coulson.)

brought to us. This is a party to the transaction, your Honor, and I am asking about his action and about his understanding of his position at the time.

The Court: Well; you ask him to give his reasons for it. He can tell you almost anything he wants to as to that.

Mr. Adams: Well, I dare say we all expect answers from witnesses to be correct to the best of their ability.

The Court: Yes, but we are so often disappointed that we have these rules of evidence to prevent that.

I think the objection is good. I will sustain it. It just puzzled me a little bit why Mr. Phleger didn't object to the first one and did object to the second one.

Mr. Phleger: I just wanted to assist in the expedition of the case. I didn't think he would ask the second question. [1382]

Mr. Adams: I am very grateful to counsel for his cooperation.

Q. When did you first learn of the plaintiff's decision to bring this action now pending?

A. Mr. Polk told me about it at the time he had an exchange of correspondence, which I think was put in the record this morning, as to whether it would interfere with his tax work. And I think I had also been told by Mr. Osborn or Mr. Wood or Mr. Curry at or about that time, that it was proposed.

(Testimony of Robert E. Coulson.)

Q. Now you referred in your answer to correspondence that was put in this morning, and I will hand to you Defendant's Exhibit 37A, being a letter from the president of the corporation addressed to your firm, of September 27, 1946, and Defendant's 8A—no, 37B, being a letter from Mr. Curry to Mr. Nicodemus and Mr. Osborn of October 5, 1946, and 37C, being a copy of Mr. Polk's letter to Mr. Curry of October 4, 1946, the preceding day, and I will ask you if that is the correspondence and those are the letters to which you referred in your previous answer (handing to witness).

The Court: You are referring to Plaintiff's Exhibits or Defendant's Exhibits?

Mr. Adams: Defendant's, your Honor.

A. Well, the only letters I saw, Mr. Adams, were of course Plaintiff's Exhibit 8B and the exhibit, Defendant's Exhibit 37A, or Plaintiff's Exhibit 7, I guess it is here. I did not see Mr. [1383] Curry's letter to Mr. Nicodemus, and Mr. Osborn, which is 8A, Plaintiff's Exhibit 8A.

Q. I should not have shown it to you, obviously.

The Court: Now we have got the record all mixed up.

Mr. Adams: Yes, and so that the record may be all clear, because I have been confused and referring to some other marks instead of the ones here—the document Defendant's Exhibit 37A carries a deposition mark, Plaintiff's Exhibit 7. But

(Testimony of James K. Polk.)

cross-examination with respect to the failure to notify from February 11 to April 2.

The Court: Yes, but that only goes to the manner in which this matter was handled, not with respect to any motive. I do not see that there is any question of motives involved in it at all. Anyhow, I think the question is generally [1369] objectionable on the ground stated, and I will sustain it.

Mr. Adams: I have no further questions of Mr. Polk.

The Court: Anything further, gentlemen?

Mr. Phleger: No.

Mr. Clark: Nothing from us, your Honor.

Mr. Adams: At this time, your Honor, I offer as Defendants' Exhibit 39 a memorandum identified as Interveners' Exhibit 232 upon the deposition, and I will ask counsel to look at that and agree with me, if we can, upon a statement in regard to it.

Will it be stipulated that this memorandum, which carries a pencil notation upon it, "November 22, 1944," is a memorandum that was made in New York at or prior to that time by Miss Valouch, and that the memorandum was produced from the tax files in New York that were examined upon the taking of the depositions?

Mr. Clark: And also, as the exhibit shows, that the memorandum was handed to Mr. Engelbright of the defendant company on November 22, 1944.

Mr. Adams: Yes, that may also be stipulated.

(Testimony of James K. Polk.)

May I have the stipulation of my statement? [1370]

Mr. Phleger: If that is the fact, all right. I think it is so short you might read it to the court.

Mr. Adams: I think I shall, but I want to get it authenticated right before I read it.

Mr. Clark: We will concede your statement.

Mr. Adams: The memorandum reads, your Honor:

"Approximate tax savings account worthlessness WPRR Company stock in 1943 (consolidated basis). 1942 carry-back $4,000,000; 1943, $8,000,000; 1944, carry-forward $3,000,000."

Underneath that in parentheses:

"Four months, total $15,000,000."

And the intials:

"M.C.V."

All of that I have read so far being in typewriting, and then in the handwriting of Miss Valouch,

"Copy handed to Mr. Engelbright November 22, 1944."

Mr. Engelbright is the assistant to the president identified by Mr. Elsey.

My particular purpose in offering this document at this time is in response to the showing with regard to the refund claim for 1942 which was filed five months after the date when this memorandum was made and filed in New York.

(Document referred to was thereupon received in evidence and marked Defendant's Exhibit 39.) [1371]

* * *

ROBERT E. COULSON

called as a witness on behalf of the defendant, sworn.

The Clerk: State your name to the Court.

A. Robert E. Coulson.

Direct Examination

By Mr. Adams:

Q. Will you please state your business and your business address?

A. Lawyer, 40 Wall Street, New York.

Q. How long have you been engaged in the practice of the law? A. Something like 35 years.

Q. And you are a member of the firm of Whitman, Ransom, Coulson and Goetz, with its offices at that place? A. Yes.

Q. How long have you been a member of the firm? A. Slightly over 30 years.

Q. Have you specialized in any particular field of law?

A. No, I have been engaged in general business and corporate practice during the period.

Q. When did you first meet Mr. Arthur Curtiss James?

A. To the best of my recollection, in 1919. I can't fix it more closely.

Q. And in what connection? [1372]

A. He became a client of our office shortly after its organization.

Q. And was it in connection with the law work

(Testimony of Robert E. Coulson.)

being done in the office for Mr. James that you met him? A. Yes.

Q. And did you thereafter, yourself, engage in legal service for Mr. James? A. Yes.

Q. How long did you continue to represent him?

A. Until his death in 1941.

Q. Now, Mr. Coulson, did you participate in the Western Pacific reorganization proceedings?

A. Yes.

Q. In what capacity?

A. I was counsel for the A. C. James Company.

Q. And that was from the beginning of the proceedings?

A. Well, the A. C. James Company didn't intervene at the beginning of the proceeding, but it came in before the Interstate Commerce Commission, to the best of my recollection, some time in 1936. The petition was filed in '35.

Q. From the time——

A. May I complete my answer?

Q. Yes, pardon me.

A. (Continuing): And a claim was filed by the A. C. James Company in the bankruptcy court in San Francisco in the Northern District [1373] of California, Southern Division, shortly after the petition was filed in 1935.

Q. And from the time that the A. C. James Company became a party to the reorganization proceeding, did you represent it as a party in the reorganization proceedings? A. Yes.

(Testimony of Robert E. Coulson.)

Q. And continued to do so throughout the proceedings until they were concluded?

A. Subject to the qualification that I acted as a member of the reorganization committee from the fall of 1943 until the consummation of the reorganization at the end of '44.

Q. Well, now, in speaking of that, Mr. Coulson, you are speaking of an additional relation which you had to the reorganization, are you not?

A. There was no termination of the relation of the office as counsel for the A. C. James Company.

Q. Were you at any time a director of the plaintiff corporation, the Western Pacific Railroad Corporation? A. Yes.

Q. And during what period were you a director of that company?

A. To the best of my recollection, from about 1934 until about February, 1942.

Q. Now in February, 1942, you resigned and your resignation was accepted?

A. Yes. [1374].

Q. And was Mr. Carman's resignation as a director accepted about the same time?

A. At about the same time.

Q. Now to your knowledge did the James interests have any representation on the Board of Directors of plaintiff corporation after resignation of Mr. Carman and yourself? A. No.

Q. You have said you were a member of the reorganization committee?

(Testimony of Robert E. Coulson.)

A. That was a committee, your Honor, that was provided for in the plan of reorganization and constituted during the latter part of the proceedings.

Q. Who were the other members, Mr. Coulson?

A. Mr. Frederick H. Ecker was chairman of the Metropolitan Life Insurance; Mr. Frank C. Wright, Reconstruction Finance Corporation—their railroad expert was a member, and I was the third member.

Q. And who designated you for such membership?

A. The designation was a joint designation by the Railroad Credit Corporation and the A. C. James Company, which was as provided in the plan.

Q. And the committee selected your firm to be its counsel? A. Yes.

Q. Now do you recall that your firm were retained as tax counsel by the reorganization trustees in the Western Pacific [1375] reorganization?

A. Yes.

Q. When were they retained?

A. Well, it occurred in the spring of 1943, and to the best of my recollection not very long after the Supreme Court decision of March 15, 1943.

Q. Were you in charge of that tax work?

A. No.

Q. Who was in charge of it?

A. Our partner, Mr. James K. Polk, who was in charge of the tax work in the office, the prior witness.

(Testimony of Robert E. Coulson.)

Q. Did you supervise Mr. Polk's activities in his work as a tax lawyer in this matter?

A. No.

Q. Did he keep you generally informed as to the work that he was doing? A. He did.

Q. Who decided what advice should be given in respect of tax matters involved in that work of your firm for the reorganization trustees?

A. Mr. Polk took the responsibility for the decision of the work being done by him and his associates in his department.

Q. Now who made the decision to recommend that consolidated federal tax returns be filed for 1942? A. Mr. Polk. [1376]

Mr. Phleger: Just a moment. If you know.

Q. (By Mr. Adams): Yes, if you know, surely.

A. I do know that Mr. Polk wrote a letter in the spring of 1943. I can't fix the date, but I saw the letter before it was sent.

Mr. Adams: Plaintiff's 50, please.

(Document produced by the clerk.)

Q. (By Mr. Adams): Mr. Polk, I show you Plaintiff's Exhibit 50, a letter dated May 20, 1943, (handing to witness), and I ask you if that is the letter to which you referred in your answer of a moment ago. A. Yes.

Mr. Phleger: I don't want to interrupt, but that is the May 20 letter?

Mr. Adams: Yes.

(Testimony of Robert E. Coulson.)

The Witness: The letter shown me is the letter of May 20, 1943, signed by James K. Polk and addressed to Mr. M. J. Curry, in the New York office at 37 Wall Street.

Mr. Phleger: I don't want to interrupt, but the returns had already been filed.

Mr. Adams: Well, I think that is an interruption and certainly has no reference whatever to the question I asked. The witness in his answer referred to a letter, and I produced the document to see if that is the letter he referred to.

Mr. Phleger: I am sorry. I just want to—I thought the [1377] question was who gave the advice about the filing of the consolidated returns for 1942, and he said Mr. Polk, and then he cites a letter written after the date.

Mr. Adams: Your Honor, I would like to proceed with my examination. It will be simpler.

The Court: All right.

Q. (By Mr. Adams): Mr. Coulson, when did you first learn of the possibility of using the stock loss in the federal tax return?

A. It was at or about the time of the letter of May 20, 1943, was written.

Q. Who informed you?

A. Mr. Polk discussed that matter, and it is referred to in the letter.

Q. And will you state to the best of your recollection the substance of your discussion with Mr. Polk about that at that time?

(Testimony of Robert E. Coulson.)

A. Mr. Polk told me that he felt that there was a substantial possibility of claiming a substantial loss on the part of the holding company because of the finding under the plan that the stock was worthless, and that when the plan was consummated, it would disappear as a worthless security. At the time I questioned whether, with an unlisted stock of that kind, he wouldn't have serious difficulty in establishing the year of loss. That is to the best of my recollection the conversation that occurred.

Mr. Adams: Now may I have Plaintiff's 50 once more, Mr.——

Q. You just looked at Plaintiff's 50, didn't you, Mr. Coulson?

A. If that is the letter of May 20, 1943. I didn't notice your notation on it.

Q. Yes. Now did you see Plaintiff's 50, the letter of May 20, 1943, before it was sent?

A. To the best of my recollection, I did.

Q. Now when, if you know, was the first time it was decided to recommend that the stock loss be used in a federal tax return?

A. It was either, so far as my own knowledge, it was either determined some time in December of '43 or January of '44, to recommend that to Mr. Elsey.

Q. And who, if you know, made the recommendation to Mr. Elsey? A. Mr. Polk.

Q. Did you have any discussion at or about that time of the book treatment to be afforded the federal tax accruals? A. Yes.

(Testimony of Robert E. Coulson.)

Q. And please state when, and with whom, as well as you can remember, and what the discussion was.

A. To the best of my recollection, I discussed with Mr. Polk, whether it was in New York or on telephone from San Francisco, I cannot remember, the question whether, if the returns for '43 were filed with the tax loss as a deduction, the amounts that had been accrued on the books, maintained by the agent for the trustees, the company's books here, should be reversed. And if [1379] so, what accounting treatment should be given of the possible liability, if the deductions were subsequently disallowed by the Treasury Department. Now I can't place the time of those discussions, except that it was in either December or January—December of '43 or January of 1944.

Q. To the best of your recollection, with whom did you have those discussions?

A. So far as I recollect, with Mr. Polk. There may have been discussions with Mr. Elsey, but I don't recollect them.

Q. Now did you participate in the decision to recommend the setting up of a contingent reserve fund for the federal taxes for the year 1943?

A. Yes.

Q. In what capacity did you participate in that discussion?

A. Mr. Elsey submitted to the reorganization committee, through me, his desire to put on the

(Testimony of James L. Cockburn, Jr.)

A. Certified public accountant.

Q. Please state briefly your education.

A. I went to primary and high school in Edinburgh Royal High School, in Edinburgh, Scotland. I was one year at the Heriot-Watt College in Edinburgh, an engineering course, and after coming to this country, in Honolulu, I attended classes in the evenings at the University of Hawaii, and the YMCA in accounting courses, and upon coming to San Francisco in 1926, I continued with my studies, including evening courses at Pace & Pace, San Francisco. This led to my sitting in an examination and getting my certified public accountant certificate in 1930, in California.

Q. Now, will you state briefly what professional experience you have had? [1396]

A. Well, I have been in public accounting, accounting and tax work, for approximately twenty-five years, starting with Young, Lamberton & Pearson in Honolulu in 1923, Price and Waterhouse from 1926 to the present time, except for a period of about three years, of which two and a half were spent as an assistant to the Comptroller of the California Packing Corporation in San Francisco and a few months in independent practice.

Q. Now, from about 1934, what part of your work would you say had been, had had to do, primarily, with tax work?

A. From 1934 on to 1943, I worked almost entirely in the tax department of Price, Waterhouse

(Testimony of James L. Cockburn, Jr.)

and I was in charge of the tax department from 1937 to 1943.

Q. And since that time have you continued to engage largely in tax work?

A. Both tax work and regular auditing work.

Q. Are you at the present time a member of the faculty of the Golden Gate College in San Francisco? A. I am.

Q. And what course are you giving there?

A. Auditing of revenue accounts.

Q. Auditing of revenue accounts. And you were admitted to practice before the United States Treasury Department in 1935?

A. That is correct. [1397]

Q. And you were admitted in the same year to practice before the United States Board of Tax Appeals, now the United States Tax Court?

A. I was.

Q. Of what professional—rather, let me put it this way: Would you please state briefly your activities, if any, in professional societies.

A. Well, I am a member of the American Institute of Accountants; I became a member of that organization in 1936. I have been a member of the California Society of Certified Public Accountants since 1930. I was a member of the Committee on Taxation of the State Society at various times, and was chairman about 1945-46 here. I was president of the San Francisco chapter of the California Society in 1947, and I have been a member of various committees in the society and chapter.

Mr. Adams: Now, at this time, your Honor, I

(Testimony of Robert E. Coulson.)

it is Defendant's Exhibit 37B—also marked Plaintiff's Exhibit 8A on deposition. And Defendant's 37C is also marked Plaintiff's 8B on deposition.

The Court: All right.

Q. (By Mr. Adams): Now referring to the time when you learned of plaintiff's decision to bring an action out here in San Francisco with regard to the tax matters here in issue, did you then believe that there was any conflict in the firm's representation of the affiliated group? A. No.

Mr. Phleger: Well, I will object to the question now upon the ground it calls for the conclusion of the witness, incompetent, irrelevant and immaterial.

The Court: Well, I think so. What have you got in mind there? He heard that they were going to be sued, and whether or not when he heard they were being sued, what was his belief as to whether the firm had acted in any improper manner? Is that [1384] involved?

Mr. Adams: No, the question is, your Honor, at that time the firm and Mr. Polk, the active man in charge, was handling these tax matters for this group before the government. This litigation came in New York, and the witness has said he personally was a defendant in it. He was a party to that litigation, in which were involved claims against the tax results of Mr. Polk's work, when, as, and if Mr. Polk's work should bring about tax results.

The Court: I understand that; but all you were asking him is what his belief was.

(Testimony of Robert E. Coulson.)

Mr. Adams: That is correct.

The Court: But he must have believed, giving him the benefit of all possible doubts, that we give everyone, he must have believed it was all right and then he went ahead and did it.

Mr. Adams: Precisely, your Honor. That is right.

The Court: What is the point of asking that of the witness then?

Mr. Adams: Well, I think we can assume that would be the answer, but that is the answer I expected from the question I asked.

Your Honor has ruled? I wasn't quite sure of it.

The Court: Well, I don't see the competency of it. I will sustain the objection. I know he is not going to say "No." He is not going to give the wrong answer, so don't worry about it. [1385]

Mr. Adams: Well, let me say this: I am sure that both the witness and his counsel will very firmly persist in the view that there was no conflict and that what was done was right. But that is a matter of argument.

The Court: I think so.

Q. (By Mr. Adams): Now, Mr. Coulson, did any representative of the plaintiff corporation inform you that he believed there was any conflict between the tax work that was being done for the affiliated group by your firm and Mr. Polk in particular, and your relations to the litigation, either in New York or here in San Francisco, in which

(Testimony of Robert E. Coulson.)

there were conflicting claims about the tax savings?

Mr. Clark: I object to that, your Honor, on the ground it is incompetent, irrelevant and immaterial. That is one of the allegations or burdens of the New York action, in which this gentleman was named as a defendant, part by the minority stockholders on behalf of the corporation.

The Court: Well, I think in this question it is pretty long, but in the beginning it started out with asking if anyone had made any on behalf of the corporation, had pointed that out to him; isn't that right?

Mr. Adams: That is right.

The Court: I think that may be proper. Overruled.

A. No one did.

Q. (By Mr. Adams): Now when did you first learn of the filing [1386] of the complaint in intervention in this litigation here in San Francisco before his Honor?

A. I can't fix the time, but to the best of my recollection, I learned of the complaint in intervention shortly after it was filed. [1386A]

Mr. Levy: Mr. Adams, Mr. Coulson's affidavit in opposition is dated March 21, 1946, if that would help you.

Mr. Clark: And it is in this record.

Mr. Adams: The record undoubtedly will show those dates.

Q. Had you any discussion with anyone con-

(Testimony of Robert E. Coulson.)

cerning settlement of the tax claim with the Treasury Department prior to February 11, 1947?

A. No.

Q. When did you first learn of the proposal of settlement?

A. When Mr. Polk called up from Washington when I was here in San Francisco, which to the best of my recollection was February 11.

Q. You recall the occasion?

A. I recall the occasion.

Q. Would you tell his Honor briefly the conversation that Mr. Polk had with you on that subject.

A. Mr. Polk called up from Washington and said that he had a discussion, a formal hearing before the Treasury Department officials there, that it looked as if the alternative was either to try out the issue of worthlessness before the tax court and the courts or to have some settlement of those issues satisfactory to the Government and to the taxpayer. He asked me to go to Mr. Elsey's office and discuss the matter with Mr. Elsey and advise him whether Mr. Elsey and his company would approve an offer of settlement to be submitted then [1387] on an informal basis, which would involve accepting the returns as filed, which meant an agreement by implication if the thing went through to give up any claim for refund as to 1942.

I did go to Mr. Elsey's office. Mr. Elsey did communicate with all the directors that could be

(Testimony of Robert E. Coulson.)

reached, except one that was away, or maybe two, and Mr. Polk was advised from Mr. Elsey's office that he was authorized to submit the settlement and a telegram and letter was sent to him at that time, as I recollect.

Q. Was anything said at that time about notifying or not notifying the plaintiff corporation?

A. I have no recollection of anyone mentioning it at that time.

Q. Did you ever at any time tell Mr. Polk that he was not to notify the plaintiff of the proposal of settlement? A. No.

Q. Mr. Coulson, do you recall that Mr. Curry was retained by your firm at the time of the closing of the New York office of the corporation and the trustees—actually then of the reorganized railroad company—along early in 1945?

A. Well, it was at or about the closing of the New York office.

Q. Mr. Coulson, I show you Plaintiff's Exhibit 32-A in this case. This is your signature, is it not?

A. It looks like a photostat of a letter which I signed, judging from the signature. May I look at the letter? This [1388] letter of April 21, 1945, addressed to Mr. Charles Elsey, was a letter which I recollect writing and signing at about that time.

Q. Prior to that time, Mr. Coulson, had you discussed the proposed retainer of Mr. Curry with anyone, to the best of your recollection?

A. Yes.

(Testimony of Robert E. Coulson.)

Q. With whom had you discussed the matter?

A. To the best of my recollection it was the subject matter of several discussions with Mr. Schumacher, Thomas M. Schumacher, who had been the chief executive in the New York office for many years. It was also, as I recollect, discussed with Mr. Osborn more briefly. It was discussed with Mr. Curry, and I think also with Mr. Nicodemus.

Q. And as regards Mr. Nicodemus, is your recollection clear one way or the other?

A. I am not sure. I recollect quite clearly and definitely the discussions with Mr. Schumacher and with Mr. Curry, because those discussions covered not only Mr. Curry's retainer but the other members of the staff in the New York office. Those I am quite clear on. And they were extended. I am quite clear I had some discussions with Mr. Osborn and I think some with Mr. Nicodemus, but I can't be positive as to that.

Q. Referring to the discussions on the subject of Mr. Curry's prospective retainer, will you please state to the best of your [1389] recollection the substance of the discussions you had on that subject before the retainer was effected?

A. Mr. Schumacher had discussed the problem at some length on the basis of the application of the company's retirement plan, not giving Mr. Curry a pension, which bore, as Mr. Schumacher saw it, a reasonable relation to the salary which Mr. Curry had been receiving as an executive in the New York office.

(Testimony of Robert E. Coulson.)

I want to add one more to the people I discussed it with, because before I wrote that letter to Mr. Elsey which you showed me, I took up the matter by telephone with Mr. Polk, who was away from New York, as to whether the suggestion that had been made in my talks, that Mr. Curry would be useful in connection with the consolidated return, was in his judgment well founded. Mr. Polk told me on the telephone, as I recollect it, that he thought Mr. Curry's usefulness would be substantial if these consolidated years of 1942, 1943 and 1944 came to trial, especially on depreciation matters and historical matters as to earlier years. It was on that basis that I then wrote Mr. Elsey suggesting that he be put on the stand by retainer in an amount about equal to the pension he would get from the operating company, and which brought his total overall compensation for the period while the tax matter was in process up somewhat more closely to his prior salary as an executive in the New York office [1390]

Q. Was there some discussion at or about the same time with regard to the other employees who had been in the New York office?

A. They were all discussed, both with Mr. Schumacher and with Mr. Curry.

Q. Please state to the Court briefly about that discussion and what was done as respects such employees.

(Testimony of Robert E. Coulson.)

A. Well, the employees in the New York office, other than Mr. Schumacher and Mr. Curry, who were the executives, and who were under the pension plan, were given by the railroad company a separation allowance of, to the best of my recollection, six months' salary. Some of them did not want immediate employment for one reason or another. There were two who wanted to go on working, and those two were employed by our office at that time and were referred to in that letter you showed me which I wrote to Mr. Elsey, although they were not a problem of the operating company except in the sense that the operating company was interested in knowing what happened to the New York emloyees after the closing of the office.

Q. And two of those employees came over to your office and you took them in?

A. Miss Valouch and Miss O'Neill came, and they are both still there.

Q. What services did you tell Mr. Curry he was to perform for his retainer when you made that arrangement with him? [1391]

A. I explained what we had in mind, that he would be available to assist Mr. Polk and would probably be used as a witness if those cases came to trial, and meanwhile he was to have a standby attitude of helpfulness to Mr. Polk in the preparation of material to assert the claims in the Treasury Department.

Q. I show you Plaintiff's Exhibit 33, being

(Testimony of Robert E. Coulson.)

a letter addressed to Mr. Curry of June 6, 1945, and ask whether that is the letter which you sent to Mr. Curry at that date stating the terms and outlining the services in respect to his retainer.

A. This letter accompanied the first quarterly payment of his retainer. It was not intended to outline his services which had been covered in conversations. It merely stated to him that the check was transmitted and that he was in the status of an independent contractor, so no deductions were being made for Social Security taxes or other deductions which would have been made had he been an employee of our office in the strict sense.

Q. How many times did you see Mr. Curry after he was retained by your firm?

A. I can't fix the number of times. It was not very often.

Q. Did you give him any instructions as to what he should or should not do?

A. Only the initial request that he put himself at Mr. Polk's disposal in connection with the consolidated return.

Q. Prior to the commencement of the VanKirk litigation in [1392] New York had you ever heard of a claim with respect to taxes in the nature of the claim set forth by the plaintiffs in that lawsuit?

Mr. Phleger: I object to that question on the ground it calls for the conclusion of the witness, irrelevant, incompetent and immaterial.

The Court: I suppose Mr. Adams means prior

(Testimony of Robert E. Coulson.)

to that time had anyone asserted that claim to his knowledge.

Mr. Phleger: That is not the question.

Mr. Adams: I did ask, your Honor, if the witness had ever heard of any such claim.

The Court: You mean any such claim being made against whom?

Mr. Adams: Any claim like this one.

Mr. Clark: Against anybody.

Mr. Adams: That is right. I did ask that question.

Mr. Clark: We join in the objection.

Mr. Adams: I have stated in argument from time to time that one of our contentions is that this is an afterthought claim, and this is the same sort of question that I have asked prior witnesses.

The Court: I think what counsel is bothered about, is this the same kind of question that you asked Mr. Polk?

Mr. Adams: I do not think it is, your Honor.

The Court: You are referring to the claim against the [1393] defendant in this case, are you not?

Mr. Adams: No, not at all. I am asking this witness, just as I asked Mr. Ehrman, Mr. Elsey and Mr. Osborn, if they had ever heard of a claim to be paid for the tax benefit of your loss when you are a loss company in a consolidated return. I did ask all those gentlemen that question, in view of my argument that this is an afterthought.

(Testimony of Robert E. Coulson.)

Mr. Clark: It is the same question that has been ruled on, your Honor.

The Court: I think it is objectionable. I do not see that it has anything to do with the question of its being an afterthought.

Mr. Adams: Do I understand that the objection is sustained?

The Court: Yes.

Q. (By Mr. Adams): Prior to the commencement of the Van Kirk action, Mr. Coulson, had you ever heard of the claim there asserted in behalf of the plaintiff corporation?

Mr. Phleger: I submit that has been asked and answered.

Mr. Adams: I would like to ask it again.

The Court: Read the question.

(Question read.)

The Court: You said that was the first time you had heard about it.

The Witness: No one had suggested it before, I think my [1394] prior testimony was, Judge. I can't bring it back word for word.

Q. (By Mr. Adams): Prior to the Van Kirk action had it ever occurred to you that the plaintiff had any such claim as was asserted in its behalf in the Van Kirk lawsuit?

A. Definitely——

Mr. Phleger: I submit the same objection that was made to substantially the same question some time ago. It is incompetent, irrelevant and im-

(Testimony of Robert E. Coulson.)

material and calls for the conclusion of the witness.

The Court: Sustained.

Mr. Clark: May the answer go out?

The Court: Yes.

Mr. Adams: I have no further questions, your Honor.

Mr. Phleger: I have no questions.

Mr. Clark: Nothing from us.

* * *

JAMES L. COCKBURN, JR.

called on behalf of the defendants; sworn.

The Clerk: Will you state your name to the Court, please.

The Witness: My name is James L. Cockburn, C-o-c-k-b-u-r-n, Jr. [1395]

Direct Examination

By Mr. Adams:

Q. And, Mr. Cockburn, will you please state your business and your business address.

A. I am with Price, Waterhouse & Company, certified public accountants, at 351 California Street, San Francisco.

Q. And you are forty-five years of age?

A. That is correct.

Q. You came to the United States in 1922 from Scotland and became a citizen in 1930?

A. That is correct.

Q. And your profession is?

(Testimony of James L. Cockburn, Jr.)

would ask to have marked for identification as Defendants' Exhibit 40 a printed report entitled "The Western Pacific Railroad Corporation and Subsidiaries' Report on Federal Income Taxes Paid for the Years 1918 to 1944 and Settlements Amongst Companies in Respect Thereto," over the name of Price & Waterhouse Company, 351 California Street, San Francisco 4.

(The report referred to was marked Defendants' Exhibit 40 for Identification.)

Mr. Adams: And if I may take the liberty, I will hand up [1398] a copy to his Honor and state that copies of this report were furnished to counsel sometime prior to the pre-trial.

(Document handed to Court.)

Q. (By Mr. Adams): Now, Mr. Cockburn, did our firm request you to make an examination of the files and records of the Western Pacific Railroad Corporation and its affiliated companies for the period beginning in 1916 and ending April 30, 1944? A. It did.

Q. And would you state, please, the objectives of the examination which was requested?

A. We were asked to undertake three things: One, to determine the Federal and excess profits taxes paid by the Western Pacific Railroad Corporation and its subsidiaries for the period 1916 to 1944; secondly, we were asked to determine the settlements that were made between companies

(Testimony of James L. Cockburn, Jr.)

within the group, within the affiliated group, with respect to the Federal taxes on income; and, thirdly, we were asked to determine whether any company included in the consolidated return having a net income made a payment to a company with a net loss by reason of the fact that that net loss was included in the consolidated return.

Q. And did you make such an examination?

A. I did.

Q. Who made it?

A. It was made by me, assisted by several individuals in our [1399] San Francisco and New York office.

Q. And the assistants of whom you speak proceed with their work under your supervision and direction? A. That is correct.

Q. Would you please identify the persons who assisted you in your examination?

A. Mr. Richard Brown, Mr. Harold Erb, Mr. Frank Turk; and my principal assistant was Mr. Edwin H. Morse of San Francisco. Mr. Turk and Mr. Erb are in our New York offices.

Q. And would you also state what relation, if any, Mr. Morse has had to Price, Waterhouse & Company?

A. Mr. Morse has been with Price, Waterhouse & Company since 1939, except that he was originally with our New York office, and has been with us since that time except for a period of time in the armed services, with the Department of Audits, Washington.

(Testimony of James L. Cockburn, Jr.)

Q. And with which office of Price, Waterhouse & Company is Mr. Brown connected?

A. San Francisco.

Q. Was all the work in this examination done by you or under your personal direction?

A. It was.

Q. About how long a period of time was occupied in your work of examination and the completion of your report?

A. We commenced the work in May, 1948, and completed it early in January, 1949. [1400]

Q. Has your report been delivered to the Western Pacific Railroad Company? A. It has.

Q. Now, I hand you, Mr. Cockburn, the report now marked Defendants' Exhibit 40 for Identification (handing to witness). Is that a copy of the report? A. It is.

Q. Will you please describe briefly the records which you examined?

A. We first visited the office of the Western Pacific Railroad Company in San Francisco and there examined copies of Federal income tax and excess profits tax returns, Revenue Agents' reports and other material in the Federal income tax files. We examined the general books of account, including the general ledger, cash book, general journal, voucher register. We also inspected canceled checks and correspondence.

Q. And in addition to that, did you do some work with respect to the Western Realty Company records or accounts?

(Testimony of James L. Cockburn, Jr.)

A. We inspected similar records of the Western Realty Company at its office in San Francisco.

Q. Did you do any of your examination in New York? A. Yes.

Q. What did you do there?

A. We proceeded to New York and examined there similar records of the Western Pacific Railroad Corporation, and also their [1401] corporate minutes.

Q. Now, did you obtain any additional information from other sources beyond what you have already described? A. Yes.

Q. What was that?

A. We obtained additional information from the Treasury Department at Washington, D. C., consisting of certificates of over-assessment relating to certain years, and we also obtained certain additional information from the Utah Fuel Company.

Q. And where did you get that information?

A. At Salt Lake City.

Q. Now, Mr. Cockburn, what procedure did you follow in determining your findings?

A. Well, we made an analysis of the accounts relating to the tax expenses and receivable and payable accounts. With respect also to all of the companies in the Western Pacific group.

Q. And are your findings summarized in your report? A. They are.

Q. Now, in what manner, if at all, did you check your findings?

(Testimony of James L. Cockburn, Jr.)

A. We were able to check the taxes paid according to the expense accounts with the tax returns, Revenue Agents' reports and similar data. We were also able to check the tax paid by the various companies against the surplus reconciliation appearing in the tax return. Thirdly, we were able to cross-check the payments made between companies as between the books [1402] of the intercompany transactions and in particular letters concerning the transactions between the San Francisco and New York offices.

Q. So that you did in fact check entries both in San Francisco and corresponding entries and records in New York?

A. That is correct.

Q. In making such cross-checks did you find any discrepancies? A. We did not.

Q. Are your findings with regard to the subject matter of your examination correctly summarized in your printed report?

A. They are.

Q. Does your printed report correctly summarize the information contained in the tax records of the respective corporations for the period and on the subjects covered by your report?

A. It does.

Q. Do you believe it to be correct?

A. I do.

Q. Now, Mr. Cockburn, I will ask you to explain to the Court the schedules and tabulations it contains. Will you please first take Schedule 1.

(Testimony of James L. Cockburn, Jr.)

Mr. Phleger: May it please the Court, I think this is probably an appropriate time to interpose an objection to the admissibility of this identified exhibit and the material which it contains. The objection is that it is incompetent, irrelevant [1403] and immaterial. I think we have argued and discussed this matter at length heretofore. It is our position that what was done in the years previous to the critical years under different circumstances and under different law is no evidence in the case.

Mr. Clark: In addition to that, your Honor, so far as this document is concerned, it also contains conclusions as to matters of fact which are not subject to expert testimony, such as a statement in the first page to the effect that it was the consistent practice of the Western Pacific group to do this and that. It is also based upon certain assertions of fact which should properly be elicited by oral testimony. We will add to our objection that this is not a proper method of developing any expert opinion this gentleman may have.

Mr. Phleger: Our objection hasn't anything to do with that. Our objection is it is just incompetent, irrelevant and immaterial because the circumstances which existed during this entire period were entirely different from those which existed in these critical years, and the law was different.

Mr. Adams: May I respond to plaintiff's objection, because I think the interveners' objections are premature, the report not yet having been offered.

(Testimony of James L. Cockburn, Jr.)

Mr. Clark: We are simply adding them at this time to plaintiff's objection, in which we concur.

Mr. Adams: The objections are wholly premature as stated [1404] by the intervener since I have not offered the report. The objections may run to the report when it is offered, but plaintiff's objection runs to the whole subject matter of this report and should, I think, fairly be answered at this time.

Your Honor, this is our defense. You will recall we had some discussion of this when Mr. Elsey was on the stand. One of our defenses is this, that during the whole period of affiliation between the plaintiff corporation and the defendant railroad company and other companies in that group, which began in 1916, and which ended for tax purposes on April 30, 1944, a consistent procedure was followed in the allocation of taxes, and that consistent procedure was that taxes should be allocated to the income-producing members of the group, and that no payment should be made to the loss company for the tax advantage which its loss brought to the affiliated group. That is our defense, your Honor, offered on our theory of the defense, on the particular facts in this case. We contend that that procedure, which this report is offered to establish, is binding upon the plaintiff corporation, being the party responsible and which established it. We contend further that it establishes a practice or contract relationship which will govern the determination of this case.

(Testimony of James L. Cockburn, Jr.)

We say further—and this is an additional reason for bringing forward this evidence—that when the plaintiff corporation comes into equity, and having enjoyed the advantages [1405] of an arrangement under which it secured the tax advantages of the losses of other companies and did not pay for them, it does not come into equity on the basis that equity can respond to, because of the ordinary rule that one who has had the fat off an arrangement between interlocking companies cannot then, when the thing turned out to be advantageous to someone else at the end of the period, insist upon taking a different position than that which he himself established and enforced during the time the arrangement was advantageous to him. These are theories. We have argued them before. And, as I say, this is our defense that we are putting in, and I take it your Honor can, of course, receive the evidence and consider its materiality in relation to any judgment your Honor may pronounce, but it would be inappropriate to exclude at this time evidence going to show the facts that are stated in the report. [1406]

The Court: I suppose there is really no dispute as to the fact because it all appears from the income tax returns and books that this was what was done, that is, what is shown in the report was done?

Mr. Adams: I think that is correct. This has been a very thorough and very arduous job to get the facts. We have had Mr. Cockburn and his associates, those who assisted him in his determination, spending months in getting the facts and

(Testimony of James L. Cockburn, Jr.)

getting them on a basis so that we think we have given a full, complete and correct account with respect to this matter for over all these years.

The Court: Of course, the only ultimate fact that is of any consequence is that each year the taxes were allocated as described in the report, and no credit or allowance was made to a company which suffered a loss in the group, or having contributed that loss, as it were, for the benefit of the final tax liability of the parent company or the group as a whole. I suppose there is no doubt about that.

Mr. Clark: Yes, there is, your Honor.

Mr. Adams: There are details provided in the report. If it is in; then counsel can use it. I rather assume that there is not going to be much question about the complete accuracy of the report. Then all counsel will have it to use as a basis of arguments, but we feel it is incumbent upon us—and we pleaded this in our pleadings—and we think it is a matter of defense [1407] that this was the continuous, standard practice that was followed throughout these years during all the time that the plaintiff corporation was the controlling party.

The Court: I would be inclined to think that as between the same parties to a transaction, that might be a persuasive argument. But, of course, you have the legal question here of whether this reorganized company can have the benefit of that. That, I think, would be one of the important questions that you have to present.

(Testimony of James L. Cockburn, Jr.)

Mr. Adams: I understand that is the plaintiff's theory of the case. We have a view that where the plaintiff starts during the period when it is in command and control and takes advantages out of the arrangement which it establishes, and then when, at the end of a tax period an advantage comes to another member of the affiliated group, the plaintiff should not be heard to complaint of the advantage of the other member if under its own practice established by itself it took the advantage in prior years and neither recognized any claim nor heard any complaint from any other member of the group that the plaintiff was doing what the plaintiff now complains of here.

The Court: I think those are matters that you will have to argue on the submission of the case. I still think the main question in this case is the question of the right, if any, in the plaintiff and the admeasurement of that right. There is no conflict that the reorganized company got the benefit of this. [1408] It may be that you can show that the plaintiff had no right or had no right that is capable of monetary measurement. I do not know. That is the real question in the case. I do not think any of these other matters make any difference.

Mr. Adams: We offer it as a part of our defense, your Honor, and you will appreciate it if I were to take a very simple situation—let us say you and I have been engaged in some kind of a common enterprise, and at the beginning of the term the arrangement between us has been very satisfactory

(Testimony of James L. Cockburn, Jr.)

to me. I do not think then at the end of the term, because it turns out to be very satisfactory to you, that I am in a position to complain about that.

The Court: As I say, if it is the same parties, of course, there might be a good argument, but your opponents contend that some new owners here got the benefit of this and they still think they have a right to get some salvage out of it because these other fellows got a benefit. I do not know if they have such a right. My mind is open on that, or whether it is capable of admission. That is a problem you gentlemen will have to labor under.

Mr. Adams: I am just seeking to put in my defense so I will have my facts, so that when the time comes for argument we will have them to argue from.

The Court: I merely suggested, counsel, that there is not much point in spending a lot of time arguing about the [1409] admissibility of this at this time. Why not let the witness testify that everything in this report is correct, and if you are not satisfied with his statement in that regard, you can cross-examine him on that. If you do not wish to cross-examine him, let the record be admitted in evidence and the question whether it has a legal bearing upon the issues of this case you can argue at the time of the submission of the case.

Mr. Phleger: We think we should interpose our objection so as to preserve our position. Counsel, I am sure, inadvertently, misstates the situation.

(Testimony of James L. Cockburn, Jr.)

We were the parent company during this period, and as the tax laws contemplated and intended, of course, we got the benefit. That did not require allocation of losses back and forth at all, but when we became a complete stranger, with no further financial stock in the situation, why, what took place in prior years is utterly immaterial.

The Court: I understand the position of the parties in the matter, but the defendant wants to assert a defense which he says he cannot present unless he has some record to present it on, because if he just says he is presenting it on the basis of the past conduct of the parties, he hasn't anything in the record to show what that was. He has no factual basis upon which to predicate that defense, and I think it probably would be a waste of time now to argue this thing out, because when you get all through I think I would take refuge in the rule of civil procedure which would allow me to reserve ruling on it, because I would want to [1410] consider it. I would want to have the benefit of the arguments of both sides on it, and I think the most sensible thing to do, and which would save time for everyone concerned, so that the whole question could be presented with its various facets at one time, would be simply to make your pro forma showing and have the witness testify that everything in that report is true and correct as a result of his investigations, and I will admit it in evidence subject to the future determination upon the sub-

(Testimony of James L. Cockburn, Jr.)

mission of the case as to whether or not it has a material bearing and does sustain the legal defense which is urged, and then you can argue that out at the time of the submission of the case. It certainly is unnecessary for me to sit here and listen to this witness go into each schedule and tell how he did it, if you are not going to raise any question about that.

Is that procedure generally agreeable to all counsel?

Mr. Phleger: That is entirely satisfactory.

Mr. Adams: I will ask the question asked by your Honor:

Q. Based upon the examination you have described, does your credit report correctly summarize the information contained in the books and records of the respective corporations for the period and on the subject covered by the report?

A. It does.

Q. And you believe it to be in all respects true and correct to the best of your capacity?

A. I do. [1411]

Mr. Adams: I will offer Defendant's Exhibit 40 for identification now as Defendant's Exhibit 40 in evidence.

Mr. Clark: To which we object, your Honor, on the ground stated by Mr. Phleger for the record, and also we specifically object to the inclusion of the first two pages, that is, the narrative on the first two pages of the offer as being conclusions on factual matters which should not be considered

(Testimony of James L. Cockburn, Jr.)

as evidence in the case. Other than that we have no objection to the suggestion of the court as to how they should be treated.

The Court: I won't give any weight to the opinion of the witness in that regard, inasmuch as it is a factual report. And I will admit it subject to the conditions which the court has already stated. However, if after examining the report either the plaintiff or the intervener wishes to conduct any cross-examination of the witness in respect to the accuracy of any statement, that right should be reserved to both the plaintiff and the intervener.

Mr. Clark: Very well, your Honor.

Mr. Adams: The record will show, your Honor, that counsel for all the parties have had copies of this report since some time prior to the pre-trial in this case.

Mr. Phleger: That is right.

Mr. Clark: That is right. [1412]

* * *

(The Defendant's Exhibit No. 40 for identification was thereupon received in evidence.)

Mr. Adams: If the Court please, I ask that there be marked for identification as Defendant's Exhibit 41 for identification a single sheet dated February 16, 1949, entitled "The Western Pacific Railroad Company, Federal Income and Excess Profits Taxes for Years 1942 and 1943 and for the First Four Months of 1944," on the basis of assuming that the Western Pacific Railroad Company had filed sepa-

(Testimony of James L. Cockburn, Jr.)

rate returns and had the benefit of its own net operating loss carry-overs and excess profits credit carry-overs computed as though it had filed separate returns in prior years, and the additional deductions from income as shown in the note below, and ask that the document be marked for identification Defendant's 41. And if I may take the liberty, I will hand up a copy to the Court, copy having been furnished this day to opposing counsel.

The Court: This would be similiar, then, to Plaintiff's Exhibit 73?

Mr. Adams: Basis 2. [1413]

The Court: Is that Basis 2?

Mr. Adams: Yes, Basis 2. It is more or less similar to Basis 2, but there is quite a wide difference, your Honor.

The Court: I mean you are attempting to show the same general thing?

Mr. Adams: I will ask the witness about that.

The Court: Very well.

Q. (By Mr. Adams): Mr. Cockburn, I hand you Defendant's Exhibit 41 for identification. Is that paper a summary of computations which you made?

A. It is.

Q. Where did you obtain the basic information from which your computations were made?

A. From the tax returns filed.

Q. And the tax returns for what years?

A. For the years 1939 to 1944, inclusive.

Mr. Adams: Now may the record show that the

(Testimony of James L. Cockburn, Jr.)

returns for 1940 to '45 have already been offered by the plaintiff?

Q. And do you have a copy of the 1939 tax return here? A. Yes.

Q. May I refer to that?

Mr. Adams: I will ask that Mr. Morse hand it up.

Mr. Phleger: The return for 1945 is not in evidence and we would like to have it in evidence, and also that for '46 and '47. [1414]

Mr. Adams: Well, my recollection was that Mr. Buchanan testified with regard to the basis of his computations, that he had used the returns from 1940 to 1946. Am I correct in that?

Mr. Phleger: Mr. Buchanan?

Mr. Clark: No, it is not.

Mr. Phleger: 1944.

Mr. Clark: In the last eight months, I think he said, of '44.

Q. (By Mr. Adams): Oh, that is in, yes. Well, your Honor, I don't have the returns for '46 and '47 with me, but with counsel's permission, I may proceed with the examination on the calculations, and we can produce the basic returns when we resume at the next session, if that is agreeable.

I do, at this time, offer as Defendant's Exhibit 42, the corporation income and excess profits tax return of the Western Pacific Railroad Corporation for the year 1939.

The Court: Well, why do you need that in connection with this?

(Testimony of James L. Cockburn, Jr.)

Mr. Adams: The witness testified he had to go back to the figures in that return in order to get his computations.

The Court: For Exhibit 41?

Mr. Adams: Yes, your Honor.

The Court: I see.

The Clerk: Are you offering that in evidence?

Mr. Adams: Yes. And may I state I am producing this from [1415] the files of the defendant railroad company, being a copy sent by the plaintiff corporation to the defendant railroad company of the consolidated returns for 1939.

(Whereupon income tax return for 1939 was received in evidence and marked Defendant's Exhibit 42.)

Q. (By Mr. Adams): Now, Mr. Cockburn, referring to Defendant's 41 for identification, the schedule in your hands, did you make any correction in the information appearing on the income tax returns you have described in making the computations on this schedule?

A. Yes, I have made two principal corrections: one, the information from which these corrections were made appears in revenue agent's report dated June 12, 1947, relating to an examination of 1940 and 1941 consolidated federal income tax returns. The first adjustment related to a loss claimed on abandonment of Deep Creek properties, and the second related to an amount of reorganization expense of $169,000, that was disallowed.

(Testimony of James L. Cockburn, Jr.)

Q. Now his Honor inquired how it came about that the income tax return for 1939 was related in any way to these computations. Did that arise in connection with the Deep Creek loss?

A. Part of it, yes.

Q. Well, please tell his Honor that part, and the other part as well.

Q. The Deep Creek loss was originally reported in 1940 federal [1416] income tax return. The revenue agent in his report explained that it was a 1939 item, and we therefore repositioned the loss to 1939; and as a result of a difference in the law, the item, the greater portion of the item, or $600,000 for which the loss was claimed in 1940, was considered to be a capital loss, and since the company had already availed itself of a $2,000 capital loss reduction, no benefit was obtained by repositioning the loss into that year. The balance of the adjustment of reorganization expense was just not claimed as a deduction in 1940.

Q. Go right ahead. I didn't want to interrupt you.

A. To explain further, the reason it was necessary to take into consideration the 1939 figures, the 1939 loss is a carry-over into the year 1941, for a net operating loss deduction, and in turn, that affects the excess profits credit carry-over into subsequent years.

Q. Was the consequence of this correction which you made to increase or to decrease the tax liability computations on 41 for identification?

(Testimony of James L. Cockburn, Jr.)

A. It increased the computation, the tax.

Q. Now in your computations, Defendant's 41 for identification, what treatment did you give inter-company interest accruals?

A. We treated that interest as a deduction.

Q. Had those inter-company interest accruals been eliminated in computing the consolidated return tax liability? [1417]

A. They had.

Q. Is it your understanding that they may be properly restored as deductions in computing income on a separate return basis?

A. It is.

Q. And do you have an understanding with respect to the recognition of such interest accruals where they have occured during reorganization proceedings?

A. Yes, and the Commissioner has ruled on that.

Q. To what ruling do you refer?

A. I believe it is X.T. 3635.

Q. Now in the consolidated returns which were actually filed, were deductions taken for accruals of interest on all Western Pacific Railroad obligations that were held outside the affiliated group?

A. They were.

Q. Is it your understanding that such interest is deductible, even though not taken up as income in the accounts or tax returns of the creditors?

A. It is.

Q. Did you make any deductions not appearing on the consolidated returns as filed in the computations in your exhibit, 41 for identification?

A. I did.

(Testimony of James L. Cockburn, Jr.)

Q. Will you please state what they were?

A. We made deductions for accelerated amortization in the years [1418] 1942, in the amount of $127,531.24; in 1943, in the amount of $259,654.81; in the first four months of 1944, in the amount of $522,741.10. I also made deductions for the United States Government freight cut-backs and refunds in 1941 of $50,000; in 1942, $780,000; in 1943, $1,060,000; the first four months of 1944, $40,000. I also made a deduction for a partial bad debt loss on the Sacramento Northern Railway notes and advances in 1943, in the amount of $8,526,690.72.

Q. Now, Mr. Cockburn, referring to the amounts you have stated, of deductions on account of accelerated amortization, will you please state the basis of deductions taken for accelerated amoritization?

The Court: Well, the witness has answered that question. May I make this inquiry, so I can get myself a little bit oriented to this? I may be in error in this, but is the difference a substantial difference between Mr. Buchanan's basis and this estimate, the items that are listed at the bottom of the page of this Exhibit 41? I mean, a big, substantial difference?

Mr. Adams: Your Honor, your Honor's inquiry is based on, of course, at first, the proposition that the deductions that are taken in the lower half of this exhibit were not taken in Mr. Buchanan's Basis 2.

(Testimony of James L. Cockburn, Jr.)

The Court: Well, of course. I say that is the reason why this basis in Exhibit 41 is so much lower than that which this witness has included, or in which this witness has included, the [1419] substantial items that Mr. Buchanan did not use in his basis. I am not asking you to commit yourself, I just wanted to find out if, substantially, that is the basis of the difference between the two estimates.

Mr. Adams: Well, I would like to ask Mr. Cockburn one question to help me in giving your Honor my answer.

Q. Leaving out of account the effect of deductions, Mr. Cockburn, the three deductions that are taken account of in this schedule, have you made any figure to determine the variance or approximate variance between the computations you have made and the computations which Mr. Buchanan made on his Basis 2 of Plaintiff's Exhibit 80?

A. No.

Mr. Adams: Well, perhaps we can bring that to your Honor in the morning. We can give you a figure that would more accurately answer your Honor's question.

The Court: Well, it just kind of looks like it to me, and that is why I asked the question, because I see there is about $10,000,000 and if you add that to $7,000,000—well, you get pretty close to it. There must be some other figures involved in it, but it looks to me as if that might be the substantial difference.

Mr. Adams: The witness has stated he has taken

(Testimony of James L. Cockburn, Jr.)

account of some inter-company interest deductions that Mr. Buchanan did not take account of, and some other factors. [1420]

The Court: There might be some other factors.

Mr. Adams: I think your Honor is right.

The Court: It seems to me the bigger amount by way of difference are these figures.

Mr. Adams: I believe that is true; and furthermore, I believe that Mr. Buchanan gave some figures on accelerated amortization that somewhat resemble the figures that are produced on this exhibit. So that the larger deductions are the latter two in effect. Mr. Buchanan said himself that he hadn't taken off accelerated amortization in producing his Basis 2 figures, but he gave us some figures when we talked with him about it.

Mr. Phleger: I don't like to interrupt, but would it not be helpful if this witness, in the morning, could give us the figures without these adjustments?

Mr. Adams: Well, it is a little quick work; these things don't get done in five minutes.

Mr. Phleger: In other words, if he gave us the figures without the adjustments, then you would have the comparable figures for Basis 2.

The Court: Well, maybe you can calculate that.

Mr. Adams: Let me suggest this: Mr. Cockburn and Mr. Buchanan have been discussing this matter one with the other.

Q. Have you not? A. That is correct.

Mr. Adams: I think Mr. Buchanan can produce

(Testimony of James L. Cockburn, Jr.)

the figures [1421] for Mr. Phleger that the plaintiff desires.

The Court: I only asked the question because it would seem to me that the thing could centralize on these figures here that you are examining him about. That will create the real issue as between the two estimates.

Mr. Phleger: That is correct.

Mr. Adams: Well, I think in addition to that we can produce a figure of our own—or at least I hope so. If we have any substantial variance with Mr. Buchanan's figures, on his own hypothesis, that is.

The Court: I think that would be helpful, Mr. Adams.

Q. (By Mr. Adams): Now, Mr. Cockburn, referring—wait a moment, didn't I have an open question, your Honor, and then your Honor asked a question?

The Court: Yes, you asked him the basis of these figures on accelerated amortization, and then is when I interrupted you. There is where there was some question like that asked by you, I seem to recollect.

Mr. Adams: That is what it was about, yes, your Honor.

Q. Would you state the basis of the deductions taken here for accelerated amortization? When I say "taken here," I mean on 41 for identification.

A. Under the provisions of the Internal Revenue laws, a taxpayer which had constructed an emer-

(Testimony of James L. Cockburn, Jr.)

gency facility for war purposes was permitted to amortize the cost of the facility over [1422] a 60-month period, with provision in the law that if the war ended earlier, and by proclamation of president, they would then have the election of amortizing the cost of the facility over the period from the date the facility was completed to within a certain period of time after the date of proclamation, or to take the balance of the amortization over the normal life of the asset involved.

The Court: Was 1942 the first year, then, that that could be availed of?

The Witness: That was the first year in which, your Honor, the Western Pacific Railroad Company had any assets constructed under these provisions of the law. I am not sure whether it began, or actually could have started in 1941 or '42, if they had facilities in an earlier year.

Q. (By Mr. Adams): Now, Mr. Cockburn, referring to the deductions as indicated on 41 for identification, during the four years, 1941, 1942, 1943, and the first four months of 1944, for United States Government freight cut-backs, refunds, will you please state the deductions you have taken in your computations for those freight cut-backs and refunds? [1423]

Mr. Phleger: Now excuse me for interrupting; I am trying to be helpful. Are you dropping the amortization claim now? Because in our view, the witness has not supported at all his deductions. He

(Testimony of James L. Cockburn, Jr.)

has stated what the law is, but he hasn't stated what the facts are.

Mr. Adams: Well, my recollection is that Mr. Buchanan, the witness, came out about the same with these figures. I am not dropping it at all; I don't have any query in my mind about it. What is your question as to amortization?

Mr. Phleger: Well, I would say before any foundation was laid, for any such deduction, you would have to show how much the emergency facilities were that were constructed, and when they were constructed, the years in which they were taken, how he readjusted them, and what the tax credits by this readjustment were that the company received that should have been offset by these additional amounts.

Mr. Adams: Can you answer Mr. Phleger's question?

A. The first portion of his question I might answer by stating that the information from which these figures were computed appears in the tax returns which were filed. The portion of the amortization, the facilities, are listed in the schedule attached to the return, and the computation of the accelerated portion of that amortization, which is listed here, was determined from the information appearing there. [1424]

Mr. Phleger: Yes, but not in returns that are in evidence.

Mr. Adams: If your Honor please, I didn't surrender the witness altogether.

(Testimony of James L. Cockburn, Jr.)

Mr. Phleger: No, but I wanted to be helpful. I will not ask any further questions. I will have to object to this exhibit on the acceleration matter, because there is no proper foundation. The information that he refers to in our later returns——

The Court: Well, he will have to develop that inquiry first.

Mr. Adams: The witness has been interrupted, I thought, in his answer, and I would like to have him continue with his answer.

Mr. Phleger: Excuse me.

A. (Continuing): These computations were made by us from the information appearing in the returns for the years '42, '43 and '44, and we assumed in making these computations that the taxpayer, the Western Pacific Railroad Company, would have elected to claim the benefit of accelerated amortization if it had been to its benefit to do so.

Q. (By Mr. Adams): Now, making that assumption, did you find in the returns as filed the figures from which you were able to compute the deduction for account of accelerated amortization, if that election were exercised? [1425]

A. I did.

Q. Those figures you found in the returns as filed? A. That is correct.

Q. Were they all that you required as an accountant, a tax accountant, to satisfactorily compute that deduction? A. That is correct.

Q. Now, then, may I turn to the item of deduction for the United States Government freight cut-

(Testimony of James L. Cockburn, Jr.)

backs and refunds; and I will ask you to explain that deduction appearing for the four years I mentioned.

A. The figures from which these deductions were computed were obtained from the general auditor's office of the Western Pacific Railroad Company, and a sum was obtained, an approximate total freight cut-back of $2,000,000 for the period '42 to '46.

Q. Now, then, what method did you use in determining the particular amounts of the deductions applied to '41, '42, '43 and the first four months of '44, out of that total of $2,000,000?

A. These are based on the actual figures obtained from the general auditor's office and rounded out to the nearest $10,000.

Q. So that you obtained actual figures for each of the particular periods which are indicated here, each of the particular years, and part of the year, which are indicated here on 41 for Identification?

A. That is correct.

Mr. Phleger: Do I understand that these figures were given to the witness or that he got them out of the files?

The Witness: They were given to us.

Mr. Phleger: Then I move that that matter be stricken out as hearsay.

Mr. Adams: Well, your Honor, it is just a question of connecting up. I am putting in a computation at this time, and I assume that with an objection of this sort, it will be necessary for me to

(Testimony of James L. Cockburn, Jr.)

produce the witness who has taken two months to make the particular computation on this calculation, on which this calculation is predicated.

The Court: Yes. Well, subject to its not being connected up you can, of course, move to strike it out.

Q. (By Mr. Adams): Now, Mr. Cockburn, will you please explain the deduction of some $8,500,000 in 1943 on account of the partial bad debt loss on Sacramento Northern Railway notes and advances?

A. On December 31, 1943, Sacramento Northern Railway Company, a wholly owned subsidiary of Western Pacific Railroad Company, owed to the Western Pacific Railroad Company on unsecured notes and open account advances the amount of $9,474,100.80. Mr. Elsey has informed us that in his opinion these notes and advances were worth only 10 per cent of face at that time.

Q. That is in what year? [1427]

A. In the year 1943.

Q. Now, could a deduction have been taken on account of a part of that indebtedness in 1943?

A. It could.

Mr. Phleger: Just a moment. I move that that be stricken out on the ground that it is a conclusion of the witness. And no proper foundation laid, a legal matter.

Mr. Adams: Well, we don't expect to bind his Honor as to any legal matter, but certainly the man who made the computations should be in a

(Testimony of James L. Cockburn, Jr.)

position to explain it, and that is the purpose of these questions.

Mr. Phleger: Well, that is an entirely different matter. He is acting upon a certain assumption.

The Court: Well, of course this is just a computation. I don't think that the witness is offering to testify in order to prove that that is a proper deduction.

Mr. Adams: Certainly not, your Honor.

Mr. Phleger: That was the question that was asked him, namely, could this deduction be taken in that year.

The Court: Well, that depends upon the facts as to whether that would be a proper deduction.

Mr. Adams: Of course, your Honor. But the witness knows something about this, and I think he should state from his point of view as an expert accountant the basis on which a deduction, speaking as an expert accountant, could have been [1428] taken in a return for that year. It wouldn't be binding on your Honor, nor on any party, but it will explain how the witness makes the deduction, and it is for that purpose that I ask the question.

Mr. Phleger: Now, there is pending a motion to strike out the previous question and answer. The witness was asked whether or not this could be deducted in that year. He said "Yes," and I moved that it go out.

The Court: Yes, I think that motion is good. You can ask the witness to give the reasons why he included it in his computation.

(Testimony of James L. Cockburn, Jr.)

Mr. Adams: Thank you, your Honor. He may do that.

The Court: That, of course, wouldn't be a statement that it was deductible in that year.

Mr. Phleger: No, because this is a legal question, not an accounting question.

The Court: That is right. I think there is no doubt about that.

Q. (By Mr. Adams): Would you state the reasons, Mr. Cockburn, why you included this item in your calculations, including the same deduction in your calculations on 41 for Identification?

Under the provisions of Section 23(k) of the Internal Revenue Code, a taxpayer is permitted to claim a deduction for a debt which is partially worthless, and may claim that portion of the debt down to the point to which it is worthless, [1429] and which is written off in the year in which it is deducted.

Mr. Phleger: Now may it please the Court, that is a legal answer. He is quoting the law.

Mr. Adams: He is stating his understanding.

Mr. Phleger: We don't agree that the law justifies this deduction.

Mr. Adams: Well, your Honor, we shall never contend——

The Court: That is the reason he put in this tabulation. That is the effect of the testimony. I will allow it for that purpose. That doesn't prove that it is a proper deduction.

(Testimony of James L. Cockburn, Jr.)

Mr. Adams: Surely.

The Court: It merely indicates the reason on the part of the man who made the tabulation for including it.

Mr. Adams: We shall always contend the witness is an excellent tax accountant, but any question of law is for the Court.

Q. Now, Mr. Cockburn, upon what hypotheses or assumptions did you include this particular deduction in the computations in Defendants' Exhibit 41?

A. Upon the assumption, first, that it was worth only 10 per cent of face on December 31, 1943; secondly, that it had been written down by a 90 per cent amount in the accounts for that year; and, thirdly, that no deduction had been claimed for this amount in prior years, and allowed.

Q. And did you also assume, as I think you stated in your [1430] schedule, that the railroad company filed a separate return for that year?

A. The railroad company was included in a consolidated return for the year 1943.

Q. Yes. I am asking you upon what assumptions you included this deduction in your computations. That is No. 41 for Identification.

The Court: He has already said that this is a schedule that refers to the filing of a separate return for these years by the committee. What this amounts to is if it is a good deduction, why, then, it could be taken. That is all.

(Testimony of James L. Cockburn, Jr.)

Mr. Adams: Yes, your Honor.

The Court: And that if it were taken, this would be the result of the calculation.

Mr. Adams: I perhaps could just get one question on this, and finish with this particular exhibit.

The Court: Very well.

Q. (By Mr. Adams): In your opinion, Mr. Cockburn, do the computations you have made on Defendants' Exhibit 41 for Identification state correctly the tax liability of the Western Pacific Railroad Company for Federal income and excess profits taxes for the years 1942 and 1943, and the first four months of 1944, on the basis of the assumptions that are described in the computation, and to which you referred in your testimony?

A. They do. [1431]

Mr. Phleger: Well, just a moment. I will object to that. He stated what he did. Now, some of the assumptions are on this document. There are some other assumptions that are in his testimony, and I am sure we are going to find there are a lot of other assumptions. I think this should rest, that this is a computation made on the basis that he has testified to, and that the accuracy of the figures on that basis, that he believes the figures are accurate on that basis, not that the tax liability is as shown.

Mr. Clark: The question calls for his testimony that this is a correct tax liability upon this.

Mr. Adams: Oh, on the basis of the assumptions that were included in my question, your Honor, it

(Testimony of James L. Cockburn, Jr.)

is a computation of tax liability on the basis of the various assumptions that are indicated.

The Court: I don't see any objection to that. I will overrule the objection.

Mr. Adams: And I will offer the document, then, now, as Defendants' Exhibit 41.

Mr. Phleger: Well, now, I——

Mr. Adams: Subject to being connected up.

Mr. Phleger: I don't think the foundation has been laid at all for these assumptions.

The Court: Well, I think all this amounts to is that having these, without any question as to the validity of the [1432] various deductions that are taken, that if they were taken, the calculations would be as stated in this.

Mr. Phleger: Well, that is all right.

The Court: Well, that is the way I understand the testimony.

Mr. Clark: Or if they could be taken.

Mr. Phleger: In other words, if they could have been taken upon the basis stated, that this is the tax that he figures out would have been paid.

The Court: Well, I think that is what Mr. Adams had in mind.

Mr. Adams: That is right, your Honor, and I understand further that it will be obligatory on my part to connect up, by another witness, the cut back and refund figures that are shown here on this exhibit.

Q. It is a fact, is it not, Mr. Cockburn, that the figure for the Sacramento Northern Railway notes

(Testimony of James L. Cockburn, Jr.)

and advances is 90 per cent of the amount of these notes and advances as of the end of the year 1943?

A. That is correct.

(Defendants' Exhibit 41 for Identification was received in evidence.)

Mr. Adams: I have no further questions this afternoon, your Honor. If it is an appropriate time to recess?

Mr. Phleger: Before adjournment, do I understand, Mr. [1433] Adams, that this witness will have the figure as to what the computation would be without the deductions down below?

Mr. Adams: I don't think so. I think you can get it easily from Mr. Buchanan. I think this witness will be very busy, but we will do the best we can. But why don't you try Mr. Buchanan?

Mr. Phleger: Well, after all, these are his figures (indicating).

Mr. Adams: No, you were asking for a comparison with Mr. Buchanan's figures.

Mr. Phleger: I am not asking for a comparison, I am asking what figures this witness would show without the deductions.

The Court: Can you figure that?

The Witness: No, we have not figured that.

The Court: You didn't make any calculation leaving out these items of amortization and cutbacks for the Sacramento Northern? That is, you didn't make any calculation leaving out those figures

(Testimony of James L. Cockburn, Jr.)

as to what the tax would be if a separate return was filed? Or did you?

The Witness: We have made quite a number of computations, your Honor, and I couldn't be too certain. I don't think we have. That takes a little while; it would be a different set of computations, and a different net operating loss carry-over, excess profit credits and other elements entering into the computations. They are very involved computations. [1434]

The Court: That may be so.

Mr. Phleger: Then there will be no estimate on this basis if these assumptions are not correct or any of them. [1435]

* * *

JAMES L. COCKBURN, JR.

resumed.

Direct Examination

(Continued)

By Mr. Adams:

Q. Mr. Cockburn, since yesterday's session have you made a rough computation of the amount of tax liability which the Western Pacific Railroad Company would have incurred on the various assumptions contained in Defendants' Exhibit No. 41, exclusive of the deductions that are described in note 1 to that schedule? A. I have.

Q. What is the amount?

A. Approximately $14,800,000.

Q. I would like to call your attention to the

(Testimony of James L. Cockburn, Jr.)

computation described as Basis 2 in Plaintiff's Exhibit No. 80. Do you have a copy of it?

A. I have.

Q. That computation shows a total tax liability of approximately $15,572,000 for the Western Pacific Railroad Company for the same period on the assumptions stated in that document?

A. That is correct. [1437]

Q. I direct your attention to the fact that the difference between that figure and the one you have just given is about $771,000, and I will ask you if you will tell the Court briefly the principal factors accounting for that difference.

A. The principal factors are the deductions claimed by us in our computations for interest on inter-company holdings of indebtedness, the repositioning of the Deep Creek loss from 1940 to 1939, the elimination as a deduction in 1940 of reorganization expenses, the changes required in the computation of the net operating loss, and reversing excess profits credit carry-overs, result in a difference in our bases; and also other minor inaccuracies which are not material to the computations and which can probably be corrected.

Mr. Adams: At this time, your Honor, I offer for identification a schedule dated February 16, 1949, marked C, consisting of one page entitled "Western Pacific Railroad Company Federal Income and Excess Profits Taxes for Years 1942 and 1943 and the First Four Months of 1944," on the basis of assuming that the Western Pacific Railroad

(Testimony of James L. Cockburn, Jr.)

Company had filed separate returns and had the benefit of its own net operating loss carry-overs and excess profit carry-overs, computed as though it had filed separate returns in prior years, and the additional deductions from income as shown in the note below.

I believe that will be 43 for Identification.

(The document referred to was marked Defendants' Exhibit 43 [1438] for Identification.)

Mr. Adams: May I ask that a copy be handed up to his Honor.

Q. Mr. Cockburn, do you have a copy of that schedule C in your hands? A. I do.

Q. You also have a copy in your hands of Schedule D, which is now Defendants' Exhibit 41?

A. I do.

Q. Will you please explain to the Court the difference between Schedule D introduced yesterday as Defendants' Exhibit 41 and this Schedule C, which you have in your hands.

A. The computations in Schedule C are based on exactly the same figures as used in Schedule D, with the exception of the amount deducted for United States Government freight cut-backs and refunds. Those in Schedule D were on the basis of a total of approximately $3,000,000 for the period 1942 to 1946, and on Schedule C on the basis of $3,000,000.

Mr. Adams: Will you read the answer?

(Answer read.)

(Testimony of James L. Cockburn, Jr.)

The Witness: I wish to correct that answer. The computations in Schedule D were on the basis of $2,000,000 for the period for United States Government freight cut-backs and refunds, and the computations in Schedule C are on the basis of $3,000,000 for the same deductions. [1439]

Q. (By Mr. Adams): That is the only difference between Schedule D, which is Exhibit 41, and this Schedule C in your hands?

A. That is correct.

The Court: That is about $370,000?

The Witness: That is correct, your Honor.

Q. (By Mr. Adams): And so that your testimony yesterday, stating the bases, and assumptions on which you prepared Schedule D would apply likewise to this schedule with that one difference?

A. Yes, it would.

Mr. Adams: I will offer the schedule previously marked 43 for Identification as Defendants' Exhibit 43.

Mr. Phleger: I object to the receipt upon the ground that it is incompetent, irrelevant and immaterial and also upon the basis that the assumptions shown to have been made with respect to this item are contrary to the evidence in the record.

The Court: Well, I admitted the other exhibit merely as a computation, not as proof of the validity of any of the deductions claimed therein—but only as a computation assuming the validity of the deductions, that the tax would be so much.

(Testimony of James L. Cockburn, Jr.)

Mr. Phleger: Yes. I think that the assumptions, or some of the assumptions, are contrary to the evidence in the record. If I can simply have my objection noted, I have no——

The Court: Well, I take it, Mr. Phleger, that Mr. Adams is perhaps putting this on, shall we say, a little bit out of [1440] order, as he may be intending to put in some other kind of evidence to sustain the validity of these deductions which are asserted in this return, or to make some legal showing on that.

Mr. Adams: I would like to respond to your Honor on that. With regard to the deductions for accelerated amortization, we consider they have been proved. With regard to the deduction for partial bad debt loss on the Sacramento Northern Railway notes and advances, we consider we have offered all of the proof, and our own proof is that that deduction is based upon the hypothesis that the partial loss was written into the books in 1943, which it was not, in fact. So that this is a hypothetical approach on a separate tax return basis. With regard to the United States Government freight cut-backs and refunds, the third item of deduction in this computation, I stated yesterday to your Honor that I would have to connect up the $2,000,000 figure, Mr. Elsey having spoken about that as the actual figure, but having gotten his information from his auditing department. So I will have the witness here to testify to that actual $2,000,000 figure.

(Testimony of James L. Cockburn, Jr.)

Now, this Exhibit C carries that deduction on the $3,000,000 basis. Mr. Elsey testified to an estimate of an additional million dollars, and that is just why this is $3,000,000 in this schedule whereas it was $2,000,000 in the other schedule.

Mr. Phleger: But Mr. Elsey also testified that he was [1441] unable to allocate those statements to any year.

The Court: Well, of course, now we are getting into an argument as to the effect of the testimony with respect to these items. I see no harm in, subject to the limitations stated, allowing the computations in; so that if it appears that there is validity to the deductions, the Court will have before it a calculation showing the amounts involved. If it appears that there isn't validity to these deductions, then the schedules will be of no importance in the matter.

Mr. Clark: Well, may it be understood, your Honor, that they are admitted subject to motions to strike in the event they are not connected up?

The Court: I think perhaps that might be the best way of handling it, so with the statement that the Court has made, that these two exhibits—has 41 been admitted here?

Mr. Adams: Yes, your Honor.

The Court: So that 43 may be admitted on the same basis as 41 was admitted, plus the conditions that the Court has just included in admitting the statement in evidence.

(Testimony of James L. Cockburn, Jr.)

(Defendants' Exhibit 43 for Identification was received in evidence.)

Mr. Adams: I take it the same understanding should apply to Plaintiff's 80, the computation the plaintiff has introduced?

Mr. Phleger: Oh, not at all. They were mathematical computations from the income taxes. [1442]

Mr. Adams: I am not arguing how good or bad they were, merely if there is to be an open proposition about a motion to strike as to our computations, we should, by parallel reasoning, have the same right.

The Court: Well, of course, on the face of the case it would involve the amount of taxes, both sides can argue as to the effectiveness of their computations with respect to taxes. I don't think we need to make any particular rulings on that at this time.

Mr. Adams: No. I just asked for parity of treatment.

The Court: It is very obvious what these schedules are for. One side says, "Now, if we win the case we have to show what the saving of income tax was. This is our calculation of what it was. It is based on certain factors." The other side says, "Well, even if you do win the case, it isn't as much as you say, because these other factors have to be taken into account."

Now, that is one of the issues the Court will have to determine, and the schedules merely assist the

(Testimony of James L. Cockburn, Jr.)

Court in fixing the amounts, depending upon which respective contention is established. That is all. Now, I think with what we have said, we understand one another, and each side's rights are protected in the record.

Mr. Adams: Now, if your Honor please, I offer for identification the single schedule sheet dated February 16, 1949, [1443] marked B, entitled "The Western Pacific Railroad Company Federal Income Taxes for 1942 and 1943 and the First Four Months of 1944, on the Basis of Assuming That the Western Pacific Railroad Company Had Filed Separate Returns and Had the Benefit of Its Own Net Operating Loss Carry-overs and Excess Profits Credit Carry-overs Computed as Though It Had Filed Separate Returns in Prior Years, and the Additional Deductions from Income as Shown in the Note Below," and I will ask that a copy be handed up to his Honor.

(Copy of document handed to Court.)

(The document referred to was marked Defendants' Exhibit 44 for Identification.)

Q. (By Mr. Adams): Mr. Cockburn, do you have a copy of the schedule B, now marked Defendant's 44 for Identification, in your hands?

A. Yes.

Q. Now, in this Defendants' 44 for Identification, at what figure is the deduction for United States Government freight cut-backs and refunds taken? A. $2,000,000.

(Testimony of James L. Cockburn, Jr.)

Q. And then what difference is there between Defendants' 44 for Identification and Defendants' 41, the schedule introduced yesterday, in which the cut-backs were t ken at the same figure?

A. You refer to Schedule D? [1444]

Q. Yes.

A. The difference between those two schedules is that in Schedule B, identified as B, we have deducted United States Government reparations as claims in the amounts indicated, and in the years indicated, based on total reparations claims of $12,000,000.

Q. Now, the figures you have there on that matter are stated under the years 1942, 1943 and 1944. Can you explain what relation those figures bear to the $12,000,000 figure which you assumed on account of the reparations claims?

A. We went to the company's office, and from certain records there obtained totals of the Western Pacific Railroad Company's United States Government freight for the years 1942 to 1946, inclusive. And we assumed that the $12,000,000 should be prorated over the years in proportion to the amounts of United States Government freight in the years 1942 to 1946.

Q. And I take it you yourself do not take any responsibility for the $12,000,000 figure which was supplied to you as an assumed figure over the whole period for the amount of reparations?

A. That is correct.

Q. And this, then, is a computation, this Sched-

(Testimony of James L. Cockburn, Jr.)

ule B, Defendants' 44 for Identification, which involves in addition to the hypotheses and assumptions on which 41 is based, the further assumption that deductions may be taken for reparations claims, and that such deductions would apply to the tax years in [1445] question; you have both of those assumptions, do you not, in respect of the deduction for the reparations claims in this schedule? A. That is correct.

Mr. Adams: I offer the document, your Honor, as Defendants' Exhibit 44, and not as in any wise proof of the validity of that last deduction, but as the computation which will be made, assuming that any figure can be made for the amount of reparations claims. We know, of course, that at present that litigation between the Government and the carriers has not proceeded to a point upon which any definite figure can be ascertained.

Mr. Phleger: May it please the Court, I object to the admission of this proposed exhibit upon the ground it is irrelevant, incompetent, immaterial and no foundation has been laid for it. We had an extensive discussion, as you will recall, upon this matter and on our objection to the admission of this evidence, which was sustained.

Mr. Clark: Same objection.

Mr. Phleger: That is, claims predicated upon railroad reparations.

The Court: I think counsel is entitled to have in the record a calculation that would show what

(Testimony of James L. Cockburn, Jr.)

the situation would be if the evidence were proper. I see no objection to allowing it merely as a calculation. It is not offered in proof of [1446] any of the facts stated.

Mr. Phleger: Your Honor, in the course of the argument it was demonstrated that this is a reparation matter pending before the Interstate Commerce Commission, which all the railroads resist as being absolutely unfounded. It not only involves validity of claims, but it involves the amount of claims and it involves the assumptions that are made as to the spreading of the claims.

The Court: Mr. Phleger, I understand all of that, but counsel on the other side seems to think he should have a calculation in the record. It does not prove anything, and if there is no validity to the deduction, then the calculation does not mean anything. I see no harm in allowing it as a calculation subject to those conditions.

Mr. Clark: And subject to a motion to strike.

The Court: Subject to a motion to strike.

(Defendants' Exhibit 44 for Identification was received in evidence.)

Q. (By Mr. Adams): Mr. Cockburn, I ask you to turn for a moment to Defendants' Exhibit 43, the schedule marked C, and referring to the amounts shown there on Defendants' 43 for the freight cutbacks and refunds, please state what procedure you followed in calculating and computing those amounts for each of those years.

(Testimony of James L. Cockburn, Jr.)

A. The United States Government freight cut-backs and refunds [1447] on Schedule C are based on figures obtained from the general auditor's office and rounded out to the nearest $10,000.

Q. Referring to the fact that on Schedule D, Defendants' 41, the figures for the same deduction are in each case lower, and in that Schedule 41 aggregate approximately $2,000,000—do you bear that in mind? A. Yes.

Q. Is that correct?

A. I probably should explain that on Schedule C the figures are based on the figures obtained from the general auditor's office increased by 50 per cent.

Q. In other words, the method by which you got your cut-backs and refund figures in Defendants' 43, marked C, was to increase roughly by 50 per cent the figures that are shown for the same deduction in 41 marked D?

A. That is correct.

Mr. Adams: If your Honor please, I offer for identification as Defendants' 45 a schedule marked A, dated February 16, 1949, consisting of one page and containing a title similar to the title of the papers previously offered, that is, the Exhibits 41, 43 and 44. I hand up a copy to the Court.

(The document referred to was marked Defendants' Exhibit 45 for Identification.)

Q. (By Mr. Adams): Mr. Cockburn, referring to this schedule marked A, February 16, 1949, Defendants' 45 for Identification, [1448] will you

(Testimony of James L. Cockburn, Jr.)

please state to the Court what difference there is between that schedule and the schedule marked B, Defendant's 44?

A. The only difference between those two schedules is that in Schedule A the United States Government freight cut-backs and refunds are based on a $3,000,000 figure, whereas in Schedule B they are on a $2,000,000 figure.

Q. And otherwise the Schedule A is based on the same assumptions and hypotheses on which the Schedule B, Defendants' 44, was based?

A. That is correct.

Mr. Adams: I will offer the exhibit now marked Defendants' Exhibit 45 for Identification as Defendants' Exhibit 45. It does contain figures in addition for the reparations claim, as your Honor will note, and the statement, of course, that I just made applies with respect to that matter.

Mr. Phleger: May I note the same objection and reserve a motion to strike?

The Court: The exhibit will be admitted subject to the same objection, under the same conditions, and subject to the same motion to strike.

(Defendants' Exhibit 45 for Identification was received in evidence.)

Mr. Adams: If your Honor please, I offer as Defendants' Exhibit 46, and hand up a copy to the Court, for identification, [1449] a single sheet entitled "Western Pacific Railroad Corporation Federal Income Taxes for the Years 1922 to 1944,

(Testimony of James L. Cockburn, Jr.)

Inclusive, on the Basis of Assuming That the Western Pacific Railroad Corporation Had Filed Separate Returns and Comparison Thereof With Taxes Allocated to That Company on the Basis of Consolidated Returns Filed Dated January 14, 1949."

(The document referred to was marked Defendants' Exhibit 46 for Identification.)

Q. (By Mr. Adams): Mr. Cockburn, do you have a copy of that schedule, Defendants' 46 for Identification, in your hands? A. I do.

Q. Now, have you computed the taxes which the Western Pacific Railroad Corporation would have paid during the period 1918 to 1944 if it had filed separate returns whenever permissible?

A. I have.

Q. And I have handed you this document, Defendants Exhibit 46 for Identification. Did you find that the corporation would have paid $593,976.33 more on a separate return basis than it actually did pay during the period on a consolidated return basis? A. I did.

Q. And that is the figure appearing at the bottom of the last column of this tabulation, Defendants' 46 for Identification? A. Yes.

Q. You believe that the tabulation is correct?

A. I do.

Mr. Adams: I will offer the document, your Honor, as Defendants' Exhibit 46.

Mr. Phleger: I wish to object to its receipt upon the ground it is incompetent, irrelevant and imma-

(Testimony of James L. Cockburn, Jr.)

should be made in order to arrive at a correct computation on that basis?

A. I would make adjustments for accelerated amortization, United States Government freight cut-backs, and refunds, and United States Government reparations claims. [1461]

Mr. Phleger: Well, now I object to that response and move that it go out.

The Court: I can't see the point of that answer at all.

Mr. Adams: Well, your Honor, the Basis 3, according to its own title, purports to be "Federal Income Taxes and Excess Profits Taxes on Basis of Consolidated Returns as Filed, but Excluding Corporation's Stock Loss."

The Court: Yes, but all Mr. Buchanan did was to take the stock loss out of it, and on the same information that was in the return, make this calculation. Now I don't think the witness is intending to say that on that basis, this basis is incorrect.

Mr. Adams: Well, I take it that the witness being an accountant, he is permitted to say what approach he would make to the same question that is indicated at the top.

The Court: Well, what you are asking him now to testify is that if he had filed the consolidated return for this corporation at the time it was filed, and he wasn't including the stock loss in it, that he would have included something else in it.

Mr. Adams: That is right.

(Testimony of James L. Cockburn, Jr.)

The Court: That is what you are asking him to say.

Mr. Phleger: Well, he is not even saying that, your Honor, because the reparations didn't occur until years later. Cut-backs, too. [1462]

Mr. Adams: It didn't occur to me that this answer could be objectionable, since it is an expert's statement of his differences, and that is all it is.

The Court: Yes, but this Basis 3 was offered in connection with testimony of Mr. Buchanan, only to show that the calculation of the taxes on the basis of the return as it was filed, if the stock loss would have been excluded, would have shown this result. Now that is all the witness testified to. That is all Mr. Buchanan testified to, according to my recollection.

Mr. Adams: Yes.

The Court: Now with that in mind, Mr. Cockburn, is there any inaccuracy in these figures as far as you know?

The Witness: Schedule 3, Basis 3——

Mr. Adams: Just a moment. Pardon me the interruption.

The Court: Well, all right, I will withdraw the question.

Mr. Adams: Well, I think I can put the question this way.

Q. Mr. Cockburn, you notice that Basis 3 carries a notation, "Corporation's excess profits credits for 1944 prorated." A. That is correct.

(Testimony of James L. Cockburn, Jr.)

Q. And is it your understanding—you discussed this with Mr. Buchanan—that that proration was on one-third of the corporation's excess profits credit for the year? A. That is correct.

Q. He used that in making his computation?

A. That is correct.

Q. Now if you assume that you are going to make the computations on Basis 3 and only give one-third of the corporation's excess profits credit for 1944, would you then find any error in the computations themselves?

A. Yes, I would.

Q. And what error would you find there?

A. I do not agree with the portion of the computation whereby two-thirds of the excess profits credit——

Q. No, Mr. Cockburn, you didn't understand my question. My question was, If you assume that you are making the computation on the basis of a one-third proration, then would you find that the computations themselves were inaccurate?

A. No, I would not.

Mr. Adams: That gets at what your Honor had in mind, I take it?

The Court: Yes.

Mr. Adams: And now at this time, your Honor, I would like to offer a chart. It is a reduced picture of the big picture that is over there on the side wall (indicating). It is a replica in smaller form and easier of reference. This chart is a chart

(Testimony of James L. Cockburn, Jr.)

that we, the counsel, prepared, like the charts over on the righthand side of the court room as I face your Honor (indicating). It is a pictorial representation, all of the figures in which and all of the data in which is taken from that [1464] exhibit you have in your hand, Defendant's Exhibit 40.

The Court: All right.

Mr. Adams: I offer this as Defendant's Exhibit——

The Court: As a pictorial representation?

Mr. Adams: Simply as a lawyer's representation of what is contained in the report.

But I should say one further word about it. In the report which your Honor has before you, Defendant's Exhibit 40, there is stated, particularly in note 2 to Schedule 1 to that report, a full statement with regard to a special transaction between the plaintiff corporation and the Utah Fuel Company. Your Honor will see there is quite an elaborate statement in note 2 about that. Now this chart does not take that special transaction into account in any way. It leaves it out.

I might explain, by way of further elucidation, why that is left out. Neither the Western Pacific Railroad Company nor any of its subsidiaries were participants in the special transaction between the plaintiff corporation and the Utah Fuel Company.

Mr. Clark: You will concede, though, Mr. Adams, won't you, that the Utah Fuel Company was a member, a subsidiary and member of the affili-

(Testimony of James L. Cockburn, Jr.)

terial, just like all of the other previous records.

The Court: It goes to the weight of that phase of the testimony that counsel is offering. I will overrule the objection.

(Defendants' Exhibit 46 for Identification was received in evidence.)

Mr. Adams: I offer as Defendants' 47 for Identification a single sheet schedule dated February 15, 1949, entitled "Western Pacific Railroad Company Federal Income Taxes for the Years 1922 to 1941, Inclusive, on the Basis of Assuming That the Western Pacific Railroad Company Had Filed Separate Tax Returns and Comparison Thereof With Taxes Allocated to that Company on the Basis of Consolidated Returns Filed," and ask that this be marked Defendant's 47 for Identification, and I would ask that a copy be handed up to his Honor.

(The document referred to was marked Defendants' Exhibit 47 for Identification.)

Mr. Phleger: Have you copies of that?

Mr. Adams: Yes. I gave them to you yesterday.

Mr. Clark: We do not have a copy of that.

Mr. Adams: Yes; I handed three copies to counsel yesterday.

Mr. Levy: We have everything else, but not that.

Mr. Adams: I do not know what happened to them, because, of course, we were handing all these papers to you.

(Testimony of James L. Cockburn, Jr.)

Mr. Phleger: That is all right. We can get it later.

Mr. Adams: Would you like to come and look at it as I talk about it?

Mr. Phleger: We are going to object to it anyhow.

Q. (By Mr. Adams): Mr. Cockburn, have you computed the taxes which the Western Pacific Company would have paid during the period 1922 to 1941, inclusive, if it had filed separate returns whenever permissible during that period?

A. I have.

Q. Did you find that the Western Pacific Railroad Company would have paid during that period $408,869.51 more on a separate return basis than it actually did pay during this period on a consolidated return basis? A. I did.

Q. That is the figure appearing in this tabulation at the bottom of the column?

A. That is correct.

Q. You believe it is correct? A. I do.

Mr. Adams: I will offer this document as Defendants' 47, and as your Honor will see, we are really proving a converse [1452] here for the benefit of our adversaries.

The Court: You are showing the advantage of a consolidated return.

Mr. Adams: Both ways, and the net advantage to the plaintiff corporation.

Mr. Phleger: We say there is only one advantage to the consolidated return and that is to the

(Testimony of James L. Cockburn, Jr.)

parent corporation. May I note the same objection?

The Court: Yes. The exhibit will be admitted under the same conditions.

Mr. Adams: I take it the plaintiff cannot have 47 without having 46. The two things are correlative, one with the other.

(Defendants' Exhibit 47 for Identification was received in evidence.)

Q. (By Mr. Adams): Mr. Cockburn, have you examined Plaintiff's Exhibit 80 in this case, consisting of computations of income taxes for the plaintiff corporation and its affiliates on three separate bases for the years 1942, 1943, and the first four months of 1944?

A. Do you refer there to Basis 1?

Q. I referred to all three bases, and asked you if you had examined Plaintiff's Exhibit 80, which consists of all three bases? A. I have. [1453]

Q. Do you have a copy of it in your hands?

A. I have.

Q. Would you look, please, at the first page of Plaintiff's Exhibit 80, in which is set forth the so-called Basis 1. Have you made an effort to check Basis 1? A. Yes.

Q. Do you agree that Basis 1 is a correct statement of what the tax liability of these companies would have been if they had filed separate returns for the period indicated, using data actually shown on the consolidated return, without any change or

(Testimony of James L. Cockburn, Jr.)

adjustment? A. No, I do not.

Q. In what respect do you think that these computations on that assumption or hypothesis are incorrect?

A. These computations fail to claim a deduction for intercompany interest. The net operating loss carryovers are not included; excess profits——

The Court: This schedule is without the carryovers. There is a separate schedule in it that covers that.

Mr. Adams: That is right, your Honor. I take it the witness is commenting on certain matters that he thinks would necessarily be taken into consideration merely from taking the figures off the returns.

The Court: That is going to be confusing now, because there is a separate schedule on it. [1454]

Q. (By Mr. Adams): Mr. Cockburn, leaving out any reference to net operating loss carryovers and any reference to unused excess profits credit carryovers, you have stated, as I understand it, that the computations are incorrect in that the intercompany interest deductions were not restored.

A. That is correct.

Q. Is there any other correction, if you leave out those carryovers that I have mentioned, that you think should be made in the figures shown on the returns to correct the figures shown on Basis 1?

A. Net operating loss carrybacks within the period were not deducted.

Q. If the figures were corrected so as to take

(Testimony of James L. Cockburn, Jr.)

proper account of the two factors that you have mentioned, your restoration of the deductions and the allowance for carryback of net operating losses, do you believe that the figures would then show the amount of tax which those companies would have been required to pay for this period if they had filed separate instead of consolidated returns?

A. No.

Q. And why not?

Mr. Phleger: I object to that. This is merely an argument of some of the basic legal propositions involved in the case. He is not attacking the computation. He is saying this is not the way to determine what the tax saving is. On the same [1455] basis all of these last exhibits would have been rejected, it seems to me.

Mr. Adams: This is a computation. It states on its face what it is.

The Court: This computation, Mr. Cockburn, of Basis 1 would be correct in your opinion, would it, as a computation were it not for the fact that these interest payments that you refer to were not included? I am talking about it now as a computation. Forget about the argument that you make as to the validity of the deductions; just as a computation. The thing that is wrong with it as a computation is—what amount did you come to on that? Was it about $300,000 of interest?

A. No.

Q. You mentioned some amount.

Mr. Adams: We gave a difference of——

(Testimony of James L. Cockburn, Jr.)

The Witness: $770,000 approximately.

Mr. Adams: ——of approximately $770,000, but that was as to Basis 2, was it not, Mr. Cockburn?

The Witness: That is correct.

Mr. Adams: The Judge is asking about Basis 1.

The Court: Now, what I am trying to find out, and I think it will shorten this matter, is that you have before you a computation of one of your competitors here.

The Witness: That is correct.

The Court: And all we want to know, or all I want to know at this stage of the proceeding is, is that a correct calculation. I take it it would be correct as a calculation, were it not for the failure to include this interest item that you speak of. But as a calculation, and irrespective of the validity of the various deductions and the right to take them.

The Witness: There is one element I would like to explain there, your Honor, before I answer that categorically yes or no.

The Court: All right.

The Witness: The net operating loss deductions —strike that. No adjustment has been claimed for accelerated amortization, which the company might have elected to take.

Mr. Phleger: Well, that is not shown on the returns.

The Court: This is a calculation, as I recall the testimony, that was taken from information on the

(Testimony of James L. Cockburn, Jr.)

consolidated return. Now all we want to know is, as a calculation of the information on the consolidated return, is this a correct calculation? Forget about whether the deductions are right.

Mr. Adams: Now if your Honor please, may I suggest that your Honor's question carries within its content some different—— [1457]

The Court: Well, I will get somebody myself to calculate it. It seems to me that what I am suggesting is a very simple matter.

Mr. Adams: Your Honor, I think it is, if the witness——

The Court: And if Basis No. 1 wasn't calculated correctly from the return, somebody can tell me that without going into the legal questions as to the validity of the various deductions involved. That is all it wa offered for.

Mr. Adams: That is right. What I think is implicit in the witness' mind, and of course I don't know, but I am assuming this, is that when he is asked about the correctness of calculations he has in his mind that this Basis 1 assumes to be some kind of an approach to what the tax liability would have been on a hypothesis, and so really is different; that there are various computations which, in his view, should have been included in this which aren't made here.

Q. That is right, is it not, Mr. Cockburn?

A. That is correct.

Q. So that, to answer his Honor's question, you

(Testimony of James L. Cockburn, Jr.)

think, as far as the arithmetic goes, as far as this computation is concerned, you don't quarrel with the arithmetic but you point out certain deductions you mention which should be included, and that certain allowance for carry-backs were not included that you would include if you were to make a computation like that?

The Court: Well, of course that is obvious, and it was [1458] obvious from the testimony of Mr. Buchanan that those items were not included in his calculation.

Mr. Adams: And does that answer your Honor's question?

The Court: Am I right about that, Mr. Cockburn?

The Witness: The answer is "yes" to your question on that basis.

The Court: All right.

Mr. Phleger: Well, can't we get a figure? I don't want to interrupt, but can't we get Mr. Cockburn's check of the figure that appears on Basis 1 of——

The Court: He just said it is correct.

Mr. Phleger: Oh, it is correct. Oh.

The Court: Without it being admitted that these factors that he has in mind were not included.

Mr. Adams: But your Honor, we shall contend, of course, that is manifestly incorrect, because such consideration should be taken into account.

The Court: Well, I don't deprive you of that right. I understand that.

(Testimony of James L. Cockburn, Jr.)

Q. (By Mr. Adams): Now I would like to turn to Basis 2, Mr. Cockburn, in Plaintiff's Exhibit 80, and then turn to your schedule, Defendant's—no, not the schedule.

Bearing in mind that I asked you this morning if you had made a computation of the tax liability which would have been incurred on the various assumptions in our Exhibit 41, but [1459] excluding the deductions—you recall giving that testimony?

A. I do.

Q. And you recall that your brief computation of that amount came out at about $14,800,000?

A. That is correct.

Q. And then——

The Court: That is about $900,000 less than the Basis 2?

Mr. Adams: No, you see the Basis 2 that we are comparing our figure with is the one given for the Western Pacific Railroad Company, the first one on the righthand column.

Mr. Phleger: $772,000.

Mr. Adams: No, $15,726,000 if I read that rightly.

Mr. Phleger: No.

Mr. Adams: I beg your pardon, $15,572,000.

Mr. Phleger: That is correct.

Mr. Adams: Yes.

Mr. Phleger: It is the top figure, your Honor, opposite the "Western Pacific Railroad Company," $15,572,630, of Mr. Cockburn, or I mean, of Mr. Buchanan.

(Testimony of James L. Cockburn, Jr.)

The Court: I see.

Mr. Phleger: Against $14,800,000 of the witness.

The Court: Besides a difference of about $700,000.

The Witness: About $770,000.

The Court: The difference between the result of Basis 2 and your Exhibit 41? [1460]

The Witness: That is correct.

Q. (By Mr. Adams): Now do you believe that Basis 2 makes proper allowance for the carry-overs?

A. No, I do not.

Q. Will you explain that, please?

The Court: You mean they haven't calculated the carry-overs correctly in this schedule?

The Witness: That is correct.

The Court: We will take a brief recess at this time.

(Recess.)

Q. (By Mr. Adams): Mr. Cockburn, I wish you would turn to the third page of Plaintiff's Exhibit 80, Basis 3. Have you examined that basis and checked it? A. I have.

Q. Do you think that the tax liability shown on Basis 3 are the amounts of the taxes which would have been payable on a consolidated return basis for the years '42 and '43 and the first four months of '44 if the stock loss of the Western Pacific Railroad Corporation had been disallowed in toto?

A. I do not.

Q. And would you please state what corrections

(Testimony of Clarence L. Droit.)

upon the ground it is incompetent, irrelevant and immaterial.

Mr. Adams: The sole point of this, your Honor, is to prove notice to the intervener Offerman, who was associated with Goodbody, of a copy of one of those annual reports which contained all the data about this tax matter. [1478]

Mr. Levy: He is an employee of Goodbody.

Mr. Adams: He is just what was described, a customers' broker in Goodbody & Company.

Mr. Levy: He was an employee.

Mr. Clark: We will object to it, your Honor, on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. (By Mr. Adams): The question was, What did you ascertain in that regard?

A. Well, I ascertained that Goodbody & Company were stockholders and appeared on the stock list, and they were mailed a notice of the annual meeting by the Central Hanover Bank and Trust Company, which also contained proxy material and a copy of the annual report.

Q. For what year?

A. The year 1944.

Q. And approximately when was that proxy material mailed? A. June 1, 1945.

Mr. Adams: No further questions, your Honor.

Mr. Clark: Nothing from us, your Honor.

The Court: That is all.

LUCIO M. MINTZER

called on behalf of the defendants; sworn.

The Clerk: State your name to the Court, please. [1479]

The Witness: Lucio M. Mintzer.

Direct Examination

By Mr. Adams:

Q. Mr. Mintzer, do you have with you the schedule which I expect to produce and identify?

A. No, I do not have it with me.

Q. I have it.

I offer as Defendants' Exhibit 49 for Identification a statistical statement on two sheets entitled in this case, "Record of Weekly Sales of Preferred and Common Shares of the Western Pacific Railroad Company on New York Stock Exchange January 1, 1945, to October 31, 1946, as published in 'The Commercial and Financial Chronicle' of New York," and these two sheets show, your Honor, the volume of trading by weeks in the railroad company's preferred and common stock and the weekly range of prices in that stock, the period being from the time the reorganized company took over on the 1st of January, 1945, to the approximate time of the commencement of this litigation here in San Francisco; but since it is set out by weekly dates, it will also show the figures up to the time the stockholders' suit was begun in New York. The purpose of this showing, like the showing with re-

(Testimony of Lucio M. Mintzer.)

spect to the conversion of the income bonds, is to show the change of position that took place in respect of these stock holdings between the time the reorganized company started operating and the time this claim was first asserted. And I am reminded that I have not gone through the [1480] proper formalities in asking Mr. Mintzer to please state his business and business address.

The Witness: I am employed by the firm of McCutcheon, Thomas, Matthew, Griffiths & Greene.

Q. (By Mr. Adams): Mr. Mintzer, it was at our request that you made this study?

A. It was.

Q. And this is your work? A. It is.

Q. Would you state generally the nature of your business as at present and for some years past?

A. I have handled investments and made recommendations for investments to the partners in the firm with respect to clients' accounts, trusts, and so on.

Q. Is this to the best of your knowledge a correct statement of the record of weekly sales of preferred and common shares of Western Pacific Railroad Company, as identified in the title for the period therein stated? A. Yes, it is.

Mr. Adams: I offer it, your Honor, as Defendants' Exhibit 49.

Mr. Phleger: Your Honor, I object to the receipt of the exhibit upon the ground it is incompetent, irrelevant and immaterial, and particularly

because it shows the prices at which these shares were bought and sold, and seems to me [1481] entirely immaterial, if not misleading. I am willing to stipulate, although I do not even think it is material, that those stocks were traded on in the New York stock exchange during this period.

The Court: The reorganized company?

Mr. Phleger: That is right.

Mr. Adams: Yes. Your Honor, we consider the prices are significant for the reason that in the reorganization plan those stocks were created, and we consider it a part of the equity position before this Court to show, as this exhibit shows, what relation to that value the market value of the stock had from year to year and from time to time prior to the time this claim was first made.

The Court: I do not see what the materiality of that is. What would you say is the materiality? It sometimes happens something you buy is not as good as you thought it was.

Mr. Adams: This much, your Honor: We offered a schedule the other day that we prepared showing that one of the secured creditors in the reorganization was not paid to the extent of some three and a half million dollars. Now, the schedule shows that that stock, which was received by that claimant under the plan, was received at a price of $62 a share. If this schedule does nothing else in respect of prices, it discloses as a definite fact that at no time thereafter could it possibly be said that that claimant had been paid one

(Testimony of James L. Cockburn, Jr.)

ated group at that time, namely, up to the year 1924?

Mr. Adams: I make all the concessions which are stated in note 2 which includes the statement Mr. Clark just made. All the facts are fully stated in that report, and I expect both counsel can talk about them to the extent they want to. [1465]

With that explanation, your Honor, I offer this as a lawyer's chart for your Honor's convenience, and not as proving anything additional to what is proved in Defendant's Exhibit 40.

Mr. Phleger: As we objected to 40, I would like to record the same objection to this.

The Court: On the incompetency of the material itself?

Mr. Phleger: Right.

The Court: Well, I think we have sufficiently covered that ground, so that the record is clear. It may be marked.

(Chart referred to was then received in evidence and marked Defendant's Exhibit 48.)

Mr. Adams: No further questions, your Honor.

Cross-Examination

By Mr. Phleger:

Q. Mr. Cockburn, referring to your computations on Defendant's 41, as to what the tax would be eliminating the deductions as noted at the bottom, I understand your figures was $14,800,000?

A. Is that Exhibit D? I do not have it.

(Testimony of James L. Cockburn, Jr.)

Q. D, yes. And I understand also that you have compared with Basis 2 of Plaintiff's 80, the figure, being $15,572,630, on Basis 2?

A. That is correct.

Q. Now will you state exactly what the difference between your figure and Mr. Buchanan's figure is?

A. Well, we only made approximate computations, and computed [1466] that the approximate difference was $14,800,000, and the figures I testified to were the computations of the liability of our Schedule D, but not claiming any of the deductions as stated in footnote 1.

Q. Then let me ask this question: Is Mr. Buchanan's computation, Basis 2, opposite the Western Pacific Railroad Company, $15,572,630, incorrect as a matter of computation upon the basis on which he computed Basis 2?

Mr. Adams: Well, your Honor, is it clear what is meant when reference is made to the basis on which Mr. Buchanan computed?

Mr. Phleger: Yes, it is stated in the caption.

Mr. Adams: Well, that is just the point; I don't think the caption does state it. For example, Mr. Buchanan did not restore the inter-company interest deductions. He did so testify. I don't think the witness who is now on the stand was here at the time Mr. Buchanan so testified.

Mr. Phleger: I want to have a comparison, a real comparison, between Basis 2, according to Mr.

(Testimony of James L. Cockburn, Jr.)

Buchanan and his computation, and according to this witness' computation.

A. The basic differences between the two computations, without being able to give exact tax amounts caused by the different deduction amounts, the deductions for inter-company interest, is the repositioning of the Deep Creek loss from 1940 to 1939, the disallowance of deduction or not claiming a deduction of [1467] approximately $169,000 for reorganization expense, which was claimed in the return for 1940—differences in the net operating loss carry-overs and excess profits credit carry-over as a result of the different assumptions, and certain minor differences, errors, in computations, which I think could be corrected.

Q. Well, other than for those changes which you have just recited, your figure would be approximately the same as Mr. Buchanan's figures?

A. That is correct.

Q. Now the computation on Defendant's 41 and on Plaintiff's Exhibit 80, Basis 2, is as a matter of fact, not in accordance with the regulations, is it?

Mr. Adams: Now just one moment; your Honor, if your Honor please, I object to the question. The question assumes something that is not stated in the question. Both those computations have been made upon the assumption of separate returns being filed.

Mr. Phleger: No, that isn't my point, Mr. Adams.

(Testimony of James L. Cockburn, Jr.)

Mr. Adams: It is my point in objecting to the question.

Mr. MacKinnon: I object to it upon the ground that it calls for the witness' expression on a question of law. That is for your Honor to decide.

Mr. Phleger: The purpose of my question, your Honor, was to point out that the exhibit prepared by this witness and introduced by the defendant assumes a fact that is contrary to existing [1468] law, namely, that you cannot, having filed consolidated returns in one period, file separate returns in a later period and use the carry-forwards and carry-backs, contrary to regulation 110, Section 33.31 (e) and (f). Isn't that correct?

Mr. Adams: Your Honor, I object to the question and I direct your Honor's attention to the caption of the schedule itself. And further I object on the ground the question asked is a question of law, the same objections having been addressed to my interrogation of this witness and sustained.

The Court: I think it is needless to pursue this particular line of inquiry as a matter of evidence. It is very obvious that your accountant is of the view, probably supported by some legal advice, that these carry-overs cannot properly be included, but nevertheless he has put them in anyhow and to make another basis of calculation, and the witness on the witness stand may or may not have the contrary view, but it is really of no importance because that question is a question of law, isn't it?

(Testimony of James L. Cockburn, Jr.)

Mr. Phleger: I think I have not made myself clear at all. What I am trying to point out to this witness—and the fact that I have not made it plain justifies the question—is that both this witness, in Defendant's Exhibit 41, and Mr. Buchanan in Basis 2, have both made the computation, although it is not permitted by the regulation which is cited as regulation 110, so that they are on the same basis. [1469]

The Court: Except that this witness may have a different view. He may say that it is permitted under that regulation. I do not know.

Mr. MacKinnon: If your Honor please, I do not think it makes any difference what he says because you are going to determine that question.

Mr. Phleger: I want to point out that the basis of the two exhibits is the same.

The Court: I think that is obvious without the witness' testimony.

Mr. Adams: With the variances between the figures which the witness has testified to.

Q. (By Mr. Phleger): Did you examine the books of the defendant corporation as to the manner in which its amortization claims were in fact handled?

A. Do you refer there to subsequent treatment of those claims?

Q. No, the actual way in which they were treated.

A. The treatment of the amortization is dis-

(Testimony of James L. Cockburn, Jr.)

closed in the returns which we inspected and from which we made our computation.

Q. So you did then examine the actual treatment made of the amortization claims as shown by the tax returns? A. That is correct.

Q. It is a fact, is it not, that this company in 1945 received credits of $4,998,648.28 on account of amortization claims?

A. Our inspection related to the period ending April 30, 1944. [1470]

Q. You did not know then that those claims had been allowed? A. No, sir.

Q. You just learned about them from me now, is that right?

Mr. Adams: You mean as to the amount or the fact?

Mr. Phleger: The fact and the amount, both.

A. Yes, sir.

Q. (By Mr. Phleger): With respect to the United States Government freight cut-backs and refunds, did you make any investigation at all, either you or anyone acting for you, of the actual facts with respect to the payments of refunds or the application of cut-backs? A. No, sir.

Q. Do you know whether or not the actual figures which you have used in your estimate here have or have not been used as the basis for reduction of income tax? A. I do not.

Q. Your assumption is based upon the proposition that in years subsequent to 1942 and 1943

(Testimony of James L. Cockburn, Jr.)

and the first four months of 1944 that the company was in fact charged, either paid out or did not collect on account of these amounts, isn't that right? A. That is incorrect.

Q. What was your assumption?

A. The assumption was the Western Pacific Railroad Company could have claimed these adjustments by the government arising out of cutbacks or refunds in subsequent years, could have been [1471] claimed as a deduction in the years 1942, 1943, and the first four months of 1944.

Q. But that assumption is in turn predicated upon the proposition that those amounts were in fact paid out in later years, is that not true?

A. Paid out or withheld?

Q. Yes. A. That is correct.

Q. And did you take into consideration when paid out or withheld in later years, that the company received the income tax benefit of that treatment? A. I did not. [1472]

Q. Did you give any consideration to that at all in this matter of this computation?

A. I did not.

Q. Do you know whether or not the company paid excess profits taxes in the last eight months of 1944? A. I believe they did.

Q. Did they pay excess profits taxes in 1945?

A. I believe they did.

Q. Did they pay excess profits taxes in 1946?

A. They did not.

(Testimony of James L. Cockburn, Jr.)

Q. There weren't any excess profits taxes?

A. That is correct.

Q. Did you make any investigation of the partial debt loss on the Sacramento Northern Railway notes and advances?

A. Yes, we made an analysis of the advances, times and amounts of advances to the company, from the records of the company, which shows the dates and the amounts that were advanced, and the dates of refunds or repayments by the Sacramento Northern to the Western Pacific Railroad Company.

Q. Do you have that computation?

A. Yes, I believe we have those papers here.

Q. I would like to have them.

Mr. Adams: Just one minute. Let us get clear what you are speaking of. Will you ask the witness, please, so we can get an identification of what you would like to have? I did [1473] the same thing with Mr. Buchanan.

Mr. Phleger: It is perfectly clear here. He said he made an investigation of time and amounts of advances made by the Western Pacific Railroad Company to the Sacramento Northern and also the dates and amounts of repayments.

Mr. Adams: Right.

Mr. Phleger: And I asked him for them.

Mr. Adams: Yes. Are you now asking this witness to prepare a new paper, or are you asking him for some paper that he has got?

(Testimony of James L. Cockburn, Jr.)

Mr. Phleger: I am asking him for the paper he just testified——

Mr. Adams: He did not say he had a paper. That is my point. I would like to get an identification of what you are talking about.

Q. (By Mr. Phleger): Do you have a paper which shows the advances and repayments?

A. We have certain working papers showing the listing of the advances and the repayments.

Q. And you will be glad to furnish them to me, will you?

Mr. Adams: Just a minute. I object to that. The witness has his working papers, and I take it we are willing, and have always been willing, that they may be inspected, but that they should be furnished to opposing counsel I do not think is proper, and I did not make that request of your expert witness. [1474]

Mr. Phleger: I do not see the difference.

Q. Do you have them here? Suppose you let me look at them.

A. I believe we have them with us.

(A document was handed to Mr. Phleger.)

Mr. Adams: I would like to have the record in some way indicate the nature of the work sheet that has just been exhibited to opposing counsel. If opposing counsel will be good enough to designate the approximate number of sheets or something in the way of showing the substance of the papers he is now looking at, I would appreciate it.

(Testimony of James L. Cockburn, Jr.)

Mr. Phleger: May it please your Honor, I do not want to take up the time of the Court while I examine this. May it be understood that at the noon recess I will have access to these working papers and have an opportunity to look over them?

Mr. Adams: Certainly. May I ask that some description, counsel, be now placed on the record?

The Court: Let the witness testify what he has produced. Mr. Phleger probably cannot tell at a glance what it is.

Mr. Adams: A question can be addressed to him for response after he has a chance to inspect them.

Mr. Phleger: Let us do what you did, Mr. Adams. Let us request the clerk now mark with an identifying mark every working paper that this witness used in preparation for the testimony that he has just given.

Mr. Adams: I will be very glad to do that. The arrangement, [1475] however, that we made relieved the clerk of that task and we accomplished it privately.

Mr. Phleger: All right. Will you mark them for me?

Mr. Adams: I think that since we marked yours, we might ask you perhaps to indulge the same practice.

Mr. Phleger: I will trust you to mark them.

Mr. Adams: I would certainly trust you to mark them, Mr. Phleger.

Q. (By Mr. Phleger): Do you know whether any advances were made to the Sacramento Northern in 1942?

(Testimony of James L. Cockburn, Jr.)

Mr. Adams: May the witness have his working papers in his hands?

The Witness: If I may refresh my memory from the working papers—Yes, there were reimbursements——

Q. (By Mr. Phleger): I am asking about advances.

Mr. Adams: Will you read the question, please?

(Question read.)

A. Yes, there were.

Q. (By Mr. Phleger): In what amount?

A. $242,000.

Q. What were they represented by?

A. Cash advances.

Q. Notes? A. Cash advances.

Q. Were there any advances made during the year 1943? [1476] A. No, there were not.

Q. Were there any in the first four months of 1944? A. No, there were not.

Q. Were there any in the last eight months of 1944? A. Yes, there were.

Q. How much? A. $220,000.

Q. How much were made in the year 1945?

A. No advances made in 1945.

Q. 1946? A. $370,000.

Q. 1947? A. $700,000.

Mr. Phleger: That is all I have for the moment of this witness. I would like the noon hour to examine these and other documents and maybe I won't have any further questions.

The Court: Have you got some short witness, or would you prefer to recess?

Mr. Adams: I think I have one short witness I can call. I would like to call Mr. Droit. I have about one question to put to him. I have two short witnesses, your Honor. I will call Mr. Droit and maybe I can call Mr. Mintzer and excuse them both. [1477]

CLARENCE L. DROIT

called on behalf of the defendants; sworn.

The Clerk: Will you state your name, please?

The Witness: Clarence L. Droit.

Direct Examination

By Mr. Adams:

Q. Please state your business and business address.

A. 526 Mission Street, San Francisco.

Q. And you are the secretary of the Western Pacific Railroad Company? A. I am.

Q. And you have held that office since when, Mr. Droit? A. August, 1937.

Q. Mr. Droit, did I ask you to check the records and see whether or not during 1943, 1944 and 1945 there was sent out from your office to the firm of Goodbody & Company in New York any copies of the annual reports for 1943 and 1944?

A. You did.

Q. What did you ascertain with regard to that?

Mr. Clark: Just a minute. I will object to that

(Testimony of William A. Sutherland.)

Mr. Adams: May I say, your Honor——

The Court: That may mean something with regard to losing out on this point, I don't know.

Mr. Adams: May I say, with all due respect, that we would offer to prove that the questions, if the answers should be allowed, would be answered in the negative.

The Court: I beg pardon?

Mr. Adams: I would offer to prove that if your Honor would allow these questions, the answers to each of them would be in the negative.

The Court: Let the record so show.

Mr. Adams: And may I also state for the record that we have had very happy associations with Mr. Sutherland and also with Mr. George Maurice Morris, who have considered some of these problems with us. They have spent considerable time on the case. We would address the same questions to Mr. Morris. May I state briefly what his qualifications would be?

The Court: Very well.

Mr. Adams: Mr. Morris is a member of the firm of Morris, Kix Miller & Baar of Washington, D. C., having offices in Washington and Chicago. He is a graduate of Dartmouth College in 1911, and a graduate of the law school of the University of Chicago in 1916, with a degree of Doctor of Jurisprudence, [1496] and was admitted to practice in Illinois and the District of Columbia, and has practiced before the Supreme Court, several

(Testimony of William A. Sutherland.)

of the United States circuit courts of appeal, the Tax Court, Court of Claims, State and Federal courts of Illinois and the courts of the District of Columbia, and is admitted before the Treasury Department and was formally admitted in 1922.

Mr. Morris is a member of the American Bar Association, the Bar Association of the District of Columbia, the Illinois State Bar Association and honorary member of a number of other bar associations, and currently an official of the Interamerican Bar Association and the International Bar Association. He was Chairman of the Executive Committee of the Interamerican Bar Association and speaker of the House of Deputies of the International Bar Association. Now, Mr. Morris has specialized largely in the field of taxation and administrative law, advising taxpayers and representing them before administrative agencies and the courts. May I take the pleasure of introducing Mr. Morris to the Court?

(Mr. Morris then arose.)

Mr. Adams: I take pleasure in presenting Mr. George Maurice Morris, whose qualifications I have just read, and in stating that offer to prove that Mr. Morris, as well as Mr. Sutherland, would answer these two questions in the negative if your Honor permitted them to be answered.

The Court: Very well. Let the record so show. That is all.

(Witness excused.)

The Court: I don't want it to appear in the record, because sometimes when we read these things over afterwards, in the cold record they read pretty badly, and they are not intended that way. I have no criticism of the qualifications of any of the lawyers who come from afar to testify in these cases. I want to say, however, that I do not think we have to take a back seat out here in the West so far as qualifications of lawyers to testify goes. I know I held court in New York for a couple of months, and I found that our bar out here in the West did not have to take a back seat to the bar in the East. I think they are on a par, one with the other. That is why I said that the argument could be made on the same subject matter concerning which expert testimony was proffered to be made, as well as by the attorneys in this case, for whom the Court has considerable respect.

Mr. Adams: If your Honor please, I neglected to say, and would like to cure the neglect, that Mr. Morris is, as well, past president of the American Bar Association.

The Court: Very well.

Mr. Adams: If your Honor please, with the consent of counsel, in response to an open question upon the examination of Mr. Elsey, I will state that the amount, principal amount, of general mortgage 4½ per cent income bonds which had been converted at June 29, 1946, was $4,489,300, being converted into stock in the ratio of 20 shares of stock per $1,000 bond. I would like the record to

show that Judge Sloss, whose appearance in the reorganization proceeding as attorney for the plaintiff corporation upon its intervention, continued to represent the plaintiff corporation in the reorganization proceeding while that proceeding remained pending, and until it was completed.

Mr. Clark: Well, your Honor, in the first place, we think it is incompetent, irrelevant and immaterial, but we don't think we can give the concession without Judge Sloss' own testimony, which was taken on deposition, in which he testified to the limitation of his representation of the plaintiff corporation, as being solely having to do with presenting its position under the plan. Now, we have that testimony. If counsel thinks it is material it can easily be read into the record. We examined Judge Sloss on it.

Mr. Adams: I told Mr. Clark I would be happy to do it that way, and I am perfectly willing to do that, to read it into the record.

Mr. Phleger: Well, let's stipulate it may be copied into the record. It is so many pages.

Mr. Adams: Well, any part you want omitted,——

Mr. Phleger: Let's put it all in.

Mr. Adams: That is all right. We will just introduce [1499] Judge Sloss' record, or deposition, in the record by consent of all counsel.

Mr. Clark: That is satisfactory. The original is on file, your Honor.

The Court: Very well.

way or another, even in [1482] a loose sense, by an increase in the market price over or above that $62 figure.

The Court: Well, now, Mr. Adams, suppose I go out and buy some stock in a corporation on the stock exchange, and after I buy it I find out that somebody has some claim which he is asserting against the railroad company or a corporation, for instance, that affects the value of the stock; now, what bearing has my purchase or sale of that stock got on the rights of the parties who were involved in the claim that is presented here? I don't see the connection there, unless you wanted to show that everybody that bought stock in this corporation on the New York stock exchange made a very thorough investigation of the stock to find out whether or not there was a claim of this nature pending before they bought it—which would, of course, be contrary to everything that the American people do. With that assumption, why, then there might be some possibility of showing reliance, and hence a change of position. But of course you couldn't have a change of position without reliance.

Mr. Adams: Well, your Honor would bear in mind that during the period here covered by this report; for example, the annual report of the Railroad Company for '44 was published, contained a full statement about the tax matter, stating that there was this reserve fund, stating that it was there to respond to possible tax liability to the Gov-

ernment—and [1483] nothing was said in that report about this claim, because it hadn't been heard of.

The Court: Well, Mr. Phleger, you don't object to the accuracy of this computation, but merely to the relevancy?

Mr. Phleger: That is right.

Mr. Clark: And we object to the relevancy.

The Court: It may be marked for identification, and I will sustain the objection on the ground that it is incompetent, irrelevant and immaterial.

(The document referred to was marked Defendants' Exhibit 49 for Identification.)

* * *

JAMES L. COCKBURN, JR.

resumed.

Mr. Phleger: I have no questions at this time.

Mr. Clark: We have none, your Honor.

The Court: Any further questions, Mr. Adams?

Mr. Adams: One question, if your Honor please. Maybe there will be two, but it will be the part of one, if I make it two.

The Court: Very well.

Redirect Examination

By Mr. Adams:

Q. Mr. Cockburn, you recall this morning you gave the Court a figure, $14,800,000 as representing the amount of total tax liability of the rail-

(Testimony of James L. Cockburn, Jr.)

road company on the assumption of a separate return basis, on the assumptions in your Schedule D marked Defendant's Exhibit 41, if the deductions were disallowed. Do you recall that?

A. That is correct.

Q. And you recall also that you stated the difference between that figure and the amount shown on Basis 2 of Plaintiff's 80 was approximately $770,000? A. That is correct.

Q. Now you mentioned some factors that you said were responsible [1485] for this difference, and one of them was, was it not, the difference in the computation of the carry-overs?

A. That is correct.

Q. Now I would like you, in order to clarify the record, to explain the difference between the method you used in that computation and the method Mr. Buchanan used in his computation on Basis 2; and I might ask you preliminarily, have you checked Mr. Buchanan's computations with him?

A. I have.

Q. You have seen his working papers?

A. I have.

Q. Do you believe you are able to state the basis on which his computation was made as well as that upon which yours was made?

A. I do.

Q. Will you please then state what those two bases were, so that the Court may see the difference?

(Testimony of James L. Cockburn, Jr.)

A. The basis of Mr. Buchanan's computations, as stated in his heading to Basis 2, assumes that the Western Pacific Railroad Corporation and affiliated companies had filed consolidated returns up to and including December 31, 1941. And the net operating loss carry-over and excess profits carry-overs included in his computations for 1942, '43 and the first four months of '44 are taken from the consolidated returns filed, particularly, I think, from the 1942 return, where the carry-over [1486] from 1941 is shown. Our net operating loss carry-overs and excess profits credit carry-overs used in preparation of Exhibit D——

Q. That is Defendant's 41, is it not?

A. That is Defendant's 41. ——assumed that separate returns were filed from '39 onward, and that therefore the excess profit carry-over and the net operating loss carry-over years in our computation are those carry-overs which a company would have had going into 1942 had it filed separate returns prior to that time.

Mr. Adams: I have no further questions, your Honor.

Mr. Phleger: No questions.

Mr. Clark: No questions.

The Court: That is all.

(Witness excused.)

Mr. Adams: Now at this time, your Honor, in connection with the evidence just produced, I would like to offer as Defendant's Exhibit 50 a photo-

static copy of what I heretofore referred to as the ruling of the Commissioner of Internal Revenue in the Santa Fe case. This is a photostatic copy of a letter I have given to counsel. My reason for putting it into the record is simply that I am not certain whether or not it is a public-had ruling. The materiality of the ruling would be evident upon examining it. It is a ruling under which provision is made for the cut-backs to be taken into the accounts in the years in [1487] which the transportation took place, for income tax purposes.

Mr. Phleger: We do not object to its competency, but we consider it irrelevant and immaterial.

The Court: I will admit it.

(Photostatic copy of ruling referred to above was thereupon received in evidence and marked Defendant's Exhibit 50.)

WILLIAM A. SUTHERLAND

called as a witness on behalf of the defendant; sworn.

The Clerk: State your name to the Court.

A. William A. Sutherland.

Direct Examination

By Mr. Adams:

Q. What is your address, Mr. Sutherland?

A. Marine Building, Washington, D. C.

Q. What is your occupation?

(Testimony of William A. Sutherland.)

A. Lawyer.

Mr. Adams: If your Honor please, for the sake of brevity may I ask leading questions in regard to the qualifications of the witness?

The Court: Very well.

Mr. Adams: Mr. Sutherland, you are a member of the firm of Sutherland, Tuttle and Brennan having offices in Washington and in Atlanta, Georgia?

A. Yes, sir.

Q. You did your first year of college work at Florida and [1488] received your A.B. from the University of Virginia, your M.A. from the University of Wisconsin, and you graduated from the Harvard Law School in 1917 with an LL.B. degree?

A. Yes.

Q. Of what bars are you a member?

A. I am a member of the Bar of Georgia, the District of Columbia, the Supreme Court of the United States, the Court of Claims, the District Courts in Georgia, the Fourth, Fifth and Sixth Circuit Courts of Appeal, and I think the Second.

Q. And you are a member of the American Bar Association, the Georgia Bar Association, the Atlanta Bar Association, and the Atlanta Lawyers' Club? A. Yes.

Q. You were admitted to practice before the Treasury Department in 1923? A. Yes.

Q. What was your first position after you left law school?

A. I was secretary to Mr. Justice Brandeis

(Testimony of William A. Sutherland.)

of United States Supreme Court for his second and third years on the court.

Q. Were you at any time associated with the Federal Trade Commission, and if so, in what capacity?

A. Yes, when I left Justice Brandeis in 1919 I was with the Federal Trade Commission until the end of 1920 as an attorney examiner.

Q. And you were general solicitor and head of the Law Department [1489] of the Tennessee Valley Authority for a few months in 1933 and 1934?

A. Yes, sir. I did not give up my practice at that time.

Q. You have been engaged in private practice since 1921? A. Yes.

Q. Your firm has had offices in Washington since 1937? A. Yes.

Q. Have you specialized in any particular field of law practice?

A. I have specialized in federal taxes largely since 1923.

Q. Mr. Sutherland, in your opinion would a lawyer engaged to advise on the tax problems of an affiliated group of corporations be expected to advise one of the members of the group, which member had substantial losses, that it had the right, by refusing to join in a consolidated return, to deny to the income corporations in the group the use of the loss deduction to offset the taxable income of the group as a whole, where such member would

(Testimony of William A. Sutherland.)

suffer no tax disadvantage from joinder in the consolidated returns, and where the consolidated return was to be filed after the member sustaining the loss had severed all affiliation with the other members of the affiliated group?

Mr. Phleger: May it please the Court, I object to the question on the ground it is incompetent, irrelevant and immaterial and hearsay. I assume that this is supposed to be some testimony by an expert upon an issue which, I take it, would be either of law or of fact. If of law, I do not think it is an [1490] appropriate matter for expert testimony, and if a fact, it simply calls for the conclusion of this witness. It attempts to usurp the function of the court.

Mr. Adams: The question is directed, your Honor, to what we understand to be an issue in the case as evidenced by questions asked yesterday of one of the lawyers who handled tax matters, whether or not he expressly advised a member of the affiliated group that it had a right to file a separate return. Now, this question is addressed concededly to a well-qualified lawyer engaged in tax practice, and asks him whether in his opinion under the stated assumed set of facts the question that I addressed, which we regard as responsive to that particular issue, and as a question of fact upon which a qualified expert can answer, a question posed upon an assumed set of facts.

The Court: If it is a question that is posed on

(Testimony of William A. Sutherland.)

an assumed state of facts, it is not a question of fact.

Mr. Adams: The assumptions contained in the question, your Honor, we believe are all of the assumptions required to be made upon the record in this case.

The Court: Then it is just expert testimony.

Mr. Adams: It is undoubtedly the testimony of an expert witness that we are offering upon a hypothetical question.

The Court: I never heard of a case in which the lawyer could testify as an expert witness as to any issues in the case, except it be on some special subject, such as foreign law, or [1491] matters with which he might be acquainted and of which the Court might not be acquainted. If we admitted this kind of testimony it would result in each side getting the best lawyers they could think of to come in and tell the Court how to decide the case. It does not seem to me to have a proper place in the trial of a lawsuit.

Mr. Adams: Your Honor, I do not wish to argue this at length, but merely state what I perceive to be the point of the question.

The Court: I understand exactly what you are trying to bring out but the question is, can you bring in a lawyer to testify as an expert that what was done was properly done? If you can do that in this case, you can do it in any case.

Mr. Adams: Your Honor will bear in mind this

(Testimony of William A. Sutherland.)

question is directed to the conduct of a lawyer; it is not the ultimate issue in the case.

The Court: If it is not an issue in the case, then of course it is not competent.

Mr. Adams: I said to the ultimate issue. I think, as I understand it, there is some contention here, because of the questions asked yesterday, whether the lawyer did or did not give certain advice.

The Court: Suppose the witness testifies and answers your question, and I would be satisfied from all the facts and circumstances of the case that a different result should follow. [1492] Would there arise by virtue of that a conflict that would make a record so that a higher court reviewing it could say the court was making a finding with respect to conflicting presentations of an issue?

Mr. Adams: I would think that as in any case of expert testimony, the testimony is before the court to be weighed and considered as any other testimony. Certainly I do not understand in any case, except where there is no conflict in the testimony, a court is ever bound, certainly with regard to an issue of this sort.

The Court: Even if it was offered as expert testimony, wouldn't the witness have to qualify that he was familiar with all the material facts presented in connection with the matter?

Mr. Adams: We consider that this question embraces all the material facts requisite to an answer to the question.

(Testimony of William A. Sutherland.)

Mr. Clark: I might point out to your Honor that it does not embrace one important fact, namely, that there was an economic divorcement some years prior to the termination of the affiliation.

The Court: Mr. Adams, do you have with you any authority which sustains the right to present as competent the testimony of a lawyer with respect to any legal issues in the case, except where it involves some special subject such as foreign law or, in some cases, it is allowed in tax controversies?

Mr. Adams: If your Honor will allow me a moment, I will be [1493] sure of an answer.

The Court: I want to be sure there isn't something lurking in this that I do not know about.

Mr. Adams: We have no authorities to cite on the specific question.

The Court: I think the testimony is incompetent. I will sustain the objection.

Mr. Adams: I will ask one further question.

Q. Mr. Sutherland, in all your experience have you ever heard, prior to hearing the claim asserted in the proceeding now in this court, of a claim by a member of the group of corporations which filed consolidated tax returns to be paid anything by any other corporation in the group, any consideration for the tax advantage resulting from the loss sustained by the claiming member of the group? [1494]

Mr. Phleger: May it please the Court, I object to that question on the ground that it is incompetent, irrelevant and immaterial, calls for the con-

(Testimony of William A. Sutherland.)

clusion of this witness, and is another attempt to usurp the function of the Court.

Mr. Adams: Stating very briefly my answer, because this question is much like that your Honor ruled on with respect to the actors, it is our object to prove as a fact from an experienced counsel in the tax field that this claim had never been heard of by him. We think this is material to the issues in this case and is part of the character of this claim, as a later afterthought. We regard it as a material fact in the case, and this is a part of that proof. It is also responsive to any suggestions that any of the lawyers whose work was involved in handling the tax matter was in any respect other than the work of competent and conscientious lawyers, because obviously if the claim now asserted is one which was beyond the general purview of tax lawyers, then no criticism can be addressed to a lawyer who had not heard of it. Those are the purposes.

The Court: I will sustain the objection. Let me say to you, Mr. Adams, that you can make the same argument on the same subject matter in your briefs, and I, without meaning any disrespect to the witness, would listen to it perhaps even more attentively as coming from learned counsel who have practiced here, and for whom I have respect; I might [1495] consider the argument coming from the attorneys in the case as having more weight with me, since you are familiar with this case, than the testimony of an expert.

(Deposition of Marcus C. Sloss.)

of Appeals, together with $725.02 reimbursement for expenses incurred. The latter amount includes $705.82, which has been paid to Sloss & Turner by your firm in July of 1943. Under date of July 20th, 1943, you sent us a check for $780.91. On July 26th, 1943, I wrote you, pointing out that this was an overpayment of $75.09, the check for which was sent you under cover of the last-mentioned letter. The balance remaining is $705.82. A check for $705.82 payable to Whitman, Ransom, Coulson & Goetz, is enclosed herewith."

And then follows the paragraph—the only one that has any bearing here. [1512]

"I take it that this closes my connection with the Western Pacific reorganization proceeding. Let me at this time express my pleasure in the association with you, and my appreciation of your many courtesies. With best regards,

"Yours very sincerely,"

and signed by me.

Re-Examination

By Mr. Adams:

"Mr. Adams: I have one or two more questions, possibly.

"Q. Judge Sloss, during the entire course of your representation of the Holding Corporation in the bankruptcy proceeding, were you entirely devoted, so far as your activities and work were concerned, to the interests of the corporation to the exclusion of any other interested party?

(Deposition of Marcus C. Sloss.)

"A. Yes, entirely.

"Q. And you were entirely free from any direction, domination or control by any other interested party, or any representative or agent of such party?

"A. Yes, my employment—my representation was directed towards getting, if we were able to do so, more recognition of the position of the corporation as a stockholder and as an unsecured creditor.

"Mr. Adams: No further questions.

"Mr. Clark: Nothing further, Judge. Thank you very much.

/s/ "MARCUS C. SLOSS." [1513]

(The letter referred to reads in words and figures as follows:)

"November 14, 1939

Via air mail.
Hon. M. C. Sloss,
111 Sutter Street,
San Francisco, California.

My dear Judge Sloss:

At a meeting of the Board of Directors of the Western Pacific Railroad Corporation held on October 10, 1939, I was authorized as President of the Corporation to employ local counsel in San Francisco to represent the investment of this Corporation in the Federal District Court of California, Northern District, Southern Division, in the proceedings for reorganization of the Western Pa-

cific Railroad Company. This Corporation, as you know, not only owns all of the outstanding stock of the Western Pacific Railroad Company, but is a general creditor for [1513A] advances made to that company aggregating a substantial amount. Under the Commissio plan which is now before the Federal Court in San Francisco for consideration the interest of this Corporation both as stockholder and general creditor is treated as of no value. This treatment of the claims of this Corporation is based entirely upon Commission estimates of future earnings, as both the investment, fully depreciated, in the Western Pacific Railroad Company and the valuation of the property of that company made by the Interstate Commerce Commission for rate purposes considerably exceeds the total of debts of the Western Pacific Railroad Company with accrued interest to date.

Mr. F. C. Nicodemus, Jr., of Pierce & Greer, of 40 Wall Street, New York, N. Y., is counsel for this Corporation. In the pending proceeding for the reorganization of the Western Pacific Railroad Company, however, he has appeared as counsel for that company, the debtor in the proceeding, both in the Court and before the Commission. He will continue to appear in the proceeding in that capacity. It is the view of the Board of Directors of this Corporation that it should have completely independent representation in the Court in order that its claims against the debtor, both as stockholder and as a general [1514] creditor, may be

effectively pressed upon the Court. While you will not be in any sense under the control or direction of Mr. Nicodemus, he, as counsel for the debtor, will be glad to help you or cooperate with you in any way you may wish, not inconsistent with his desire to maintain a position of neutrality as between the various classes of security holders.

This Corporation has about 5,000 stockholders. Mr. A. C. James and companies in which he is the dominating stockholder own approximately 40% of the stock of this Corporation. Mr. James' interests are represented by Mr. Coulson who is formally appearing in the reorganization proceeding for the A. C. James Co., which is a secured creditor of the Western Pacific Railroad Company. Mr. Coulson has told me that he is prepared to cooperate with you to the fullest extent you may desire in the preparation of your objections on behalf of this Corporation to the Commission's plan of reorganization, and in your presentation in support of such objections.

Mr. Coulson has further advised me that he has arranged to secure for you an assurance from the Curtiss Southwestern Company, that to the extent your reasonable and proper fees for services in this reorganization proceeding are not allowed by the Court in the [1515] proceeding or paid by this Corporation, the Curtiss Southwestern Company will make such payment to you. The Curtiss Southwestern Company is desirous in its own interest as a substantial stockholder in this Corporation that

Mr. Clark: Oh, yes. And also, may it please your Honor, there is an exhibit that was introduced on that deposition which should go in evidence in connection with it; being a letter, or a copy of a letter, dated November 14, 1939, identified on deposition as Railroad Defendants' Exhibit 555.

Mr. Phleger: Well, I suggest, instead of its being introduced, that it be copied in as part of the deposition.

The Court: Is it not attached to the deposition?

Mr. Clark: Well, it is not, because it was one of the depositions, or one of the exhibits marked on deposition, your Honor, and it is among the original exhibits that came along with all the depositions. It should be copied in along with the deposition at an appropriate place in this record.

Mr. MacKinnon: I think it is irrelevant and immaterial to any issue in the action, but I have no objection if your Honor wants it taken in.

The Court: It may be considered as part of the deposition?

Mr. Adams: Yes.

The Court: Very well.

The Clerk: You wish this copied by the reporter in the [1500] record, is that it?

Mr. Phleger: Yes, in connection with the deposition.

Mr. Clark: Well, if it is just copied in, it won't have to take a number.

* * *

(The deposition referred to appears in words and figures as follows:)

MARCUS C. SLOSS

a witness called on behalf of the plantiffs in intervention, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Clark:

Q. Will you please state your name and present address for the record?

A. Yes. My name is Marcus C. Sloss. Do you want my business address? 351 California Street. My residence is at 2790 Green Street, both in San Francisco.

Q. Are you admitted and licensed to practice law in the [1501] State of California?

A. Yes.

Q. For how long have you been admitted in this state?

A. Well, this month, November, it will be 55 years if we include the time during which I was on the bench.

Q. Were you a Justice of the Supreme Court of the State of California? A. I was.

Q. During what period, please?

A. From February, 1906, to February, 1919.

Q. Are you presently the senior member of the firm of Sloss & Eliot? A. I am.

(Deposition of Marcus C. Sloss.)

Q. During the years 1939 to 1945, were you the senior member of the then firm of Sloss & Turner of this city?

A. I was. I answered yes. I am not quite clear as to when Mr. Turner retired. It may have been earlier than 1945. It may have been '44.

Q. During your practice, Judge, have you specialized in any particular branches of the law?

A. Well, since I left the Supreme Court, I have conducted a general practice, and also have done a good deal of consulting work and work as special counsel in cases after they had reached the stage of being on appeal.

Q. Have you at any time specialized in federal tax matters?

A. No, except so far as they affected general clients of our office. [1502]

Q. Particularly, have you specialized in matters pertaining to corporate income and excess profits taxes payable to the government?

A. I say, except in so far as they affected my clients that were corporations.

Q. And is that true with respect to any work that you may have done concerning the filing of consolidated income and excess profits tax returns by corporations with the Federal Government?

A. No, I have not specialized in those matters particularly.

Q. At one time, were you retained to represent The Western Pacific Railroad Corporation in any matter? A. I was.

(Deposition of Marcus C. Sloss.)

Q. Can you tell us about when that was?

A. The employment began in November, 1939. That was some four years after a reorganization proceeding had been instituted in the Federal Court, and after the Interstate Commerce Commission had promulgated a plan of reorganization, and reported it to the District Court here, for the Northern District of California; and it was at the time when the parties in interest had a right to file objections to the plan.

Q. At the time you were employed by the Corporation, what status did it have in the reorganization proceeding, if any?

A. The Corporation, as I understood then and have understood since, had not been directly represented in the proceeding before the Interstate Commerce Commission leading to the formulation of a plan. It was, however, a party in interest in two capacities: It was the owner of all of the stock, common and preferred, of the operating company; and it also held an unsecured claim of about $5,000,000.00 against the Company for money advanced; and its holding of stock and its position as an unsecured creditor were both held or found to be without value in the proposed plan of the Interstate Commerce Commission; and it was given no participation in the reorganized company, or in any of the securities that were to be issued under the plan.

Q. What was the status of that plan at the time

(Deposition of Marcus C. Sloss.)

you were retained by the corporation in 1939?

A. The plan had been reported to the District Court, and the District Court had made an order calling upon all parties in interest to file their objections to the plan before a certain date, which, I think, was to be sometime in December of the same year. Following that, there was to be a hearing of the objections, and a decision by the court.

Q. I will show you a document which has been marked Railroad Company Defendant's Exhibit 555 in this case, being a letter dated November 14th, 1939, addressed to the Honorable M. C. Sloss, 111 Sutter Street, San Francisco, California, and signed T. M. Schumacher; and I will ask you whether you received the original of that letter on or about the date it bears, namely, November 14th, 1939?

A. Yes, I received the original of which this is a photostatic [1504] copy about that time.

Q. Judge, does that letter correctly describe your retainer by the Corporation at that time?

A. Yes.

Q. At some time did you cease representing the Corporation?

A. Well, yes. When the reorganization proceeding was completed, and it ultimately went to the Supreme Court of the United States, and after the incidental matters in the District Court here—United States District Court—had been completed, I considered that my employment was ended.

(Deposition of Marcus C. Sloss.)

Q. Approximately when was that?

A. Well, I made a little memorandum of dates from my records in regard to that.

Q. Will you please refer to it?

A. With the exception of the proceedings in the District Court with reference to allowances of fees and expenses to different counsel and to the parties in the proceeding, which, I think, were not terminated until 1945, I think the last matter that I had anything to do with was on the 2nd of June, 1944, when I participated briefly in an argument before Judge St. Sure in the District Court on the question of whether that court had jurisdiction to determine the ownership of accommodation collateral that had been furnished by the Western Pacific Railroad Corporation to the debtor. I think it was to the debtor. It may have been to someone else. [1505]

Q. Judge, during that period, namely, from November 14th, 1939, to June 2nd, 1944, did you represent the Corporation generally in all of its legal problems?

A. No. No, I considered that my employment was limited to representing the interests of the corporation as a stockholder and unsecured creditor of the debtor in the bankruptcy proceeding—or the reorganization proceeding.

Q. During that time, were you ever called upon by the Corporation to give any advice whatsoever in any federal tax matters?

A. No, I was not.

(Deposition of Marcus C. Sloss.)

Q. During that time, were you ever consulted by the Corporation with respect to any federal tax matters? A. I was not.

Q. Specifically, during that time, were you ever called upon to give any advice to the Corporation concerning the filing in its name of a consolidated income and excess profits tax return for the year 1943? A. No.

Q. Were you ever consulted in any manner with respect to that matter? A. No, I was not.

Q. During that period, were you ever called upon to give any advice to the corporation with respect to the filing in its name of a consolidated income and excess profits tax return for the taxable year 1944? [1506]

* * *

The Witness: I was not.

Q. (By Mr. Clark): Were you ever consulted in any respect concerning such return?

A. You are referring to the year 1944?

Q. Yes. A. I was not.

Q. During the period we are discussing, namely, from November 14th, 1939, until June 2nd, 1944, were you ever called upon by the Corporation to give any advice with respect to the filing in its name of a consolidated income and excess profits tax return for the taxable year 1942?

A. I was not.

Q. And were you ever consulted in any manner with respect to such return? A. No.

(Deposition of Marcus C. Sloss.)

Q. During that period, Judge, were you ever called upon to give any advice to the Corporation whatsoever concerning the filing in its name of a claim for refund with reference to income and excess profits tax for the taxable year 1942?

A. No.

Q. Or with respect to the taxable year 1942? (sic).

A. The same answer. I was not.

Q. Were you ever consulted in any manner at any time on that matter? A. No. [1507]

Mr. Clark: That is all from us.

Mr. Dickerson: No questions.

Examination

By Mr. Adams:

Q. Judge Sloss, in answer to several questions put by Mr. Clark, he inquired if you were called upon to give advice or to consider any other tax matters as stated in his questions; and you answered in the negative. Did you mean by "called upon," that no one called upon you requesting any such consideration or advice?

A. I don't think I quite got the question.

Mr. Adams: Read it, Mr. Reporter.

(Question read by reporter.)

A. Yes, that was my meaning.

Q. In reference to your representation of the

(Deposition of Marcus C. Sloss.)

Holding Corporation in the reorganization proceeding, you referred to your file and noticed that the last activity on your part other than that involving consideration of compensation, was an occasion sometime in the middle of 1944?

A. I don't remember what the date of that was. I think it was a little later. I think that matter was finally decided in Judge St. Sure's court in '45; but I can refer to other papers and get that date for you later.

Q. It is not necessary. I am just trying to be sure that I understood the testimony that you have given to Mr. Clark, and [1508] I haven't any intention to raise a question as to the particular date.

Is it not the fact that your representation of the Holding Company in the reorganization proceedings remained in force throughout the pendency of those proceedings from the time that you first appeared in behalf of the Corporation?

A. It remained in force—you mean until the reorganization was completed in the court proceedings?

Q. Yes. A. Yes, I do think it did.

Q. You did not withdraw from that representation at any time, as far as you recall?

A. No, I never withdrew from it. I have in my file—I happened to see it yesterday—a letter which I wrote, which I can find shortly, which settled a little matter of advancement of expenses between

(Deppsition of Marcus C. Sloss.)

my office and Colonel Coulson's office; and in sending him a check for the small amount that was due him, I said that I think that this concludes my services in this matter; and that, I think, was in 1945; but I can find it if you would like to get the date.

Q. It may be that we should want to look at that.

You had in mind in appearing for the Corporation as you did in the reorganization proceedings, that you were appearing as an attorney for the Corporation generally for the purposes indicated by the statute? [1509] A. Indicated by what?

Q. By the statute.

A. Oh, yes. Yes, for whatever came within the scope of that reorganization proceeding.

Q. You received as such attorney regularly the notices of hearings issued out of the reorganization court?

A. Yes. Yes, when I began, I might add, because of the fact that the Corporation had not been directly represented in the prior hearings before the Interstate Commerce Commission, I wrote a letter to the judge and to the parties in interest, calling attention to that fact, and asking whether I would be permitted on behalf of the Corporation to appear at the hearing on the plan, and to file objections, to which he answered in the affirmative; and then about the same time, on behalf of the Western Pacific Railroad Corporation, we

(Deposition of Marcus C. Sloss.)

asked leave to intervene in the proceeding, which leave was granted. If my memory is correct, Mr. Goodrich took the same course on behalf of the Western Pacific Railroad Company, which was also an unsecured creditor.

Mr. Goodrich: That is correct.

Mr. Adams: I have no further questions.

Re-Examination

By Mr. Clark:

Q. Judge, did you ever at any time give any advice whatsoever to the Corporation respecting any federal tax matter? [1510]

A. No, I did not.

Q. And at any time were any facts brought to your attention which made you feel that it was incumbent upon you to take any action or steps on behalf of the Corporation in any tax matter?

A. No. I don't know that this is a qualification of that answer; but, of course, one of the matters which were gone into very thoroughly in connection with the hearings both in the District Court and in the Circuit Court of Appeals and in the Supreme Court, was the matter of the earnings record of the Company, not only before the institution of the proceeding, but during it—even after the decision in the District Court, with the purpose of showing that the property had a greater value than was attributed to it by the Interstate Commerce Commission. And it may be—I have no

(Deposition of Marcus C. Sloss.)

definite recollection of it—that in looking over those statements of receipts and disbursements, there were items of taxes paid or taxes accrued; but I viewed it just as I viewed any other item of expense, without going into the detail or the supporting data; and I viewed it as an item of expenditure.

Mr. Clark: That is all from us.

Mr. Adams: We have no further questions.

Mr. Clark: Mr. Dickerson?

Mr. Dickerson: No questions.

The Witness: If you will permit me, I have that letter [1511] here with me, in case you would like to look at it.

Mr. Adams: Oh, yes. I hadn't appreciated that you had your files with you.

A. Yes. May I volunteer this testimony? I don't think it will do anybody any good or any harm.

Mr. Clark: Yes.

A. But for completeness, I find in my files a carbon copy of a letter dated June 15th, 1945, addressed to Robert E. Coulson, Esq., 40 Wall Street, New York, N. Y.

"Dear Colonel Coulson:

"In accordance with the order of Judge St. Sure dated May 21st, 1945, the Western Pacific Railroad Company has paid Sloss & Turner $7,000.00, being the amount allowed for services during the period following the decision of the Circuit Court

an adequate and effective presentation of the case for the equity be made in the San Francisco court.

Yours very truly,

Original signed by

/s/ T. M. SCHUMACHER,

President."

Mr. Adams: Now I should like to call Mr. Levy.

Mr. Levy: Are you referring to me, Mr. Adams?

Mr. Adams: No, the witness is ready to testify, I believe.

Mr. Levy: I was prepared.

Mr. Adams: I think you were forewarned, as well.

Mr. Levy: Nevertheless it was quite a shock.

WILLIAM G. LEVY

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court, please?

A. William G. Levy, L-e-v-y.

Direct Examination

By Mr. Adams:

Q. Where is your place of business, Mr. Levy?

A. 526 Mission Street.

Q. That is the office of the Western Pacific Railroad Company? A. That is correct.

(Testimony of William G. Levy.)

Q. And what is your office in the railroad company?

A. I am the auditor of the freight and passenger accounts.

Q. You have been engaged in business for the railroad company—that is, been an employee of the company—for a little over 25 years?

A. That is right.

Q. How long have you been the auditor of freight and passenger business?

A. Since July, 1948. [1517]

Q. And before that you had been assistant auditor of freight and passenger revenues?

A. Assistant auditor of freight and passenger accounts.

Q. And how long have you held that position?

A. Since September, 1937.

Q. And prior to that time you held various positions in the auditing department of the railroad your duties and responsibilities as auditor of freight and passenger revenue accounts?

A. That is correct.

Q. Now will you please describe the nature of your duties and responsibilities as auditor of freight and passenger revenues?

A. I am in charge of the department where we audit all of the freight and passenger revenues derived from the agents' accounts and inter-line accounts and also government accounts.

Q. Is your department a section of the auditing department? A. Yes, it is.

(Testimony of William G. Levy.)

Q. And who are your immediate superiors?

A. Mr. Gosney, the general auditor, and Mr. Strachan, the assistant general auditor.

Q. Now are you familiar with the handling of government accounts?

A. I am. That is one of the——

Q. That work is under your jurisdiction?

A. Yes, it is.

Q. Are you famiilar with the terms "cut-backs" and "refunds"? A. Yes, I am. [1518]

Q. Please state what your understanding of these terms is as regards government freight accounts.

A. Well, the government pays our bills prior to audit. They have been doing that for a good many years. Then when they get around to auditing it—it is quite a ways behind—they detect what they believe are overcharges, and they file claims with us for them. In some instances we make the refunds promptly, but in other cases when we do not, the government makes deductions from a current bill that they happen to be paying, and that deduction is termed a "cut-back."

Q. Now were you asked by Mr. Gosney to prepare an analysis of the cut-backs and refunds made since May, 1944, on government freight traffic that terminated on the Western Pacific system for the purpose of determining the total amount of such cut-backs relating to traffic moving in each of the years '42, '43 and the first four months of '44?

(Testimony of William G. Levy.)

A. Yes, I was.

Q. And when were you asked to make that analysis?

A. In the latter part of August, 1948.

Q. And did you make it? A. Yes, I did.

Q. When was it completed?

A. Early in October, '48.

Q. Was this analysis made by employees of the railroad company in your department under your personal supervision? [1519]

A. Yes, it was.

Q. Please describe how the work was done.

A. Well, I designated certain persons from the office to gather the information from the regular records and other persons to sort it according to the years, and finally operators to tabulate the figures to get the final results.

Q. Now I hand you a carbon copy of a tabulation entitled, "Re-Distribution of the Debits to Freight Revenue made during the Period 1944 to July 1948, inclusive, resulting from Government Cut-backs and Refunds on Government Shipments Terminated on the Western Pacific, Segregated to Year in which Traffic Moved," and I also hand you, Mr. Levy—strike that. I am handing you this carbon copy (handing to witness).

I have furnished counsel with copies of this sheet.

Is that a copy of the report which you rendered upon this subject? A. Yes, it is.

(Testimony of William G. Levy.)

Mr. Adams: Now, if your Honor please, I will ask, in lieu of marking the carbon copy, that, with the consent of counsel, a ribbon copy, which has been made from the carbon copy, be marked as Defendant's 51 for identification.

(Analysis prepared by the witness referred to above was then marked Defendant's Exhibit No. 51 for identification.)

Mr. Clark: Have you an extra copy there, Mr. Adams?

Mr. Adams: Yes, and I will ask that a copy of this be handed [1520] up to the Court.

(Copy of report handed to the Court through the Clerk.)

Q. (By Mr. Adams): Mr. Levy, do you believe the figures shown on the report are correct?

A. I do.

Q. Do they include any cut-backs or refunds that were made after July 31, 1948?

A. No, they do not.

Q. Can you tell me approximately the total amount of refunds and cut-backs that have been made since July 31, 1948, with regard to traffic terminating on the Western Pacific system?

A. They amounted to $322,251.64.

Q. And what, approximately, was the Western Pacific's share of that amount?

A. I estimate that would be $109,000.

Q. Are you continuing to receive claims for re-

(Testimony of William G. Levy.)

funds and cut-backs from day to day with respect to government traffic handled during the war years?

A. We are.

Q. Can you make any estimate of the total amount of refunds and cut-backs which may eventually be made with regard to wartime traffic?

Mr. Phleger: I object to that on the ground it calls for the conclusion of the witness.

Mr. Adams: I submit it, your Honor. [1521]

The Court: Sustained.

Q. (By Mr. Adams): Now, Mr. Levy, referring to Defendant's 51 for identification, the schedule, are any of the amounts shown in that schedule still in dispute? A. Yes, there are.

Q. In other words, some of the amounts which you had in this schedule are in dispute?

A. Yes, there are a good many items on which we rebilled the government to protect our claims, but most of those have either been withdrawn or settled. However, there is the amount of $355,300.41, which we have not yet withdrawn as to these claims and of that amount I estimate that——

Mr. Phleger: Well, now, I ask that——

Mr. Adams: Go right ahead. I ask that the witness' answer not be interrupted.

Mr. Clark: He wasn't asked to estimate anything.

Mr. Phleger: I submit the answer is not responsive.

Mr. Adams: The objection was interpolated in

(Testimony of William G. Levy.)

the middle of the witness' answer. I wonder if the answer may not be completed, and then would be a proper time for the objection, after the question has been answered.

The Court: Well, can't the witness answer it a little more briefly, and then if it is necessary to make an explanation you may ask the witness. That gives your opponent an opportunity to object; otherwise he has to interrupt. [1522]

Mr. Adams: Surely.

Q. Now a moment ago, Mr. Levy, you mentioned the amount $355,300.41, as being the aggregate of the amount still in dispute, which related to Defendant's 51 for identification?

A. That is right.

Q. Now approximately what part of that $355,300.41 is the Western Pacific's share?

A. I estimate it to be $120,000.

Q. Now taking the figures on Defendant's 51 for identification, which aggregate $2,036,186.84, are those amounts the Western Pacific's share of cut-backs and refunds? A. They are.

Q. And they do not include the share of such cut-backs and refunds chargeable to connecting carriers? A. They do not.

Mr. Adams: I will offer Defendant's 51 for identification as Defendant's Exhibit 51, your Honor.

Mr. Phleger: Your Honor, I would like at this moment to make an objection, if this witness is

(Testimony of William G. Levy.)

not prepared to testify as to the years in which these payments were paid out. Otherwise, it is totally misleading, and I think is only a part of the story. It purports to say the year in which the transportation occurred, and we think we are entitled to know the year in which the payments or cut-backs were made. Now is this witness going to be prepared to testify to that? [1523]

Mr. Adams: Are you, Mr. Levy?

A. You are talking now about which figure?

Q. This same statement.

A. The statement of $2,000,000?

Q. Yes, this $2,000,000 statement shows the amounts of cut-backs and refunds on the debits between '44 and '48, which are related back to the years by determining the times when the traffic moved, is that right? A. That is right.

Q. Now then, what Mr. Phleger wants to know is, can you then translate these figures back again to the years in which the debits took place?

A. I can.

The Court: You mean the payments took place?

Mr. Adams: Or, as is stated here, the debits to freight revenue made. The same thing.

A. I can say they were all made subsequent to April, 1944.

Q. And they were made during the period May, '44, to July, '48? A. That's right.

Mr. Adams: So much shows here.

Mr. Phleger: I still object, because it is our

(Testimony of William G. Levy.)

position, and I think it is quite evident, that when a cut-back or refund credit, tax advantage was taken of it, and if the cut-back occurred in the last eight months of 1944, then this defendant received just as much advantage taxwise as if it had been allowed [1524] in this year, and so on, so that unless we know the years in which the tax advantage was taken, we have but part of the story. Now, as I understand it, the exhibits put in evidence by Mr. Cockburn simply gave the gross tax effect in those years and gave no credit whatever for the tax advantage which in fact had been received, and we think we are entitled to have evidence of that, if this is going in. [1525]

* * *

The Court: Wouldn't you then, in order to make that picture complete, have to show what the tax was in the years in which these refunds and cutbacks were advantaged by the corporation and then credited back in the hypothetical case? Otherwise it would not be a due reflection.

Mr. Levy: That is exactly what the government required in the Atchison ruling, and they so stated expressly.

Mr. Adams: The Atchison ruling is before your Honor. Of course, as far as the government is concerned, you are not going to get your deduction twice. That has been ruled more than once, and what opposing counsel are suggesting here is one way in which to determine the net tax savings. They say we can't have our deductions twice, but

(Testimony of William G. Levy.)

they put us against the proposition that we are not allowed to calculate anything on a hypothesis because, in order to hypothesize at all, you have to hypothesize something that is different from what took place. Now, I think it is true if you want to carry your tax calculations in and out and through in subsequent years, you are going to have different [1526] consequences, and then you are going to have consequences that pile on consequences, because that is the way the tax laws work. But, I take it, that this evidence as it stands is evidence of the amount of the cut-backs during those years. Now, as is suggested by opposing counsel, we need another specification of these figures—I think I am right; I will ask Mr. Levy—that we did not get the tabulations of the particular years from which they were taken when they were taken to these years.

Q. Is that right, Mr. Levy?

A. Will you repeat that question?

Q. (By Mr. Adams): Did you in making these calculations which carry all these figures back to the years when the traffic happened, did you also note the years in which the payments were finally received? In other words, in which the cut-backs finally operated? A. No, we did not. [1527]

* * *

Mr. Adams: Before Mr. Levy addresses the court, may I ask the witness one question because of the suggestion in the last remarks of counsel

(Testimony of William G. Levy.)

that it would be easy to get the figures he would like to get? I would like to ask the witness how much work would be involved in picking the items making up these figures and positioning them with respect to the years in which the debit to freight revenue were made.

The Witness: It would be quite a job. It would take about—— [1532]

* * *

The Court: How else could you find out what the effect was of the payments which were made unless you recalculated all the income tax returns in the years in which these payments were actually made?

Mr. Adams: Let me see if I can get this clear with Mr. Levy.

Q. Mr. Levy, what you did to get this figure showing the amounts with respect to the time when the traffic was handled was to look at all the bills and get identification one by one of the traffic handled any time with relation to the cut-back or refund, is that right? A. That is right.

Q. Now, then, what you will have to do to get a figure after the time when the cut-back was taken into your accounts—how will you do that?

A. I just have to rearrange the very same records from which these figures were secured according to the date on which the deductions were made from our earnings. [1534]

* * *

(Testimony of William G. Levy.)

Mr. Adams: Your Honor, as to the offer of Defendant's 51 [1537] for identification in evidence, I have concluded to submit the offer without a request for leave to supplement, and take a ruling upon it as the record stands.

The Court: Well, I will reserve ruling on the admission of this exhibit until I have an opportunity to look at all the evidence in the case.

Mr. Adams: I have no further questions of Mr. Levy.

The Clerk: The exhibit will remain marked as 51 for identification, your Honor?

The Court: That is right. I will reserve ruling on the admission of the exhibit.

Any questions?

Mr. Phleger: No questions.

Mr. Clark: Nothing from us.

The Court: You may be excused.

(Witness excused.)

Mr. Adams: Your Honor, at this time I have some documents to offer for the record, and I will state briefly the purpose as I produce the documents. In support of the showing that the plaintiff corporation had no use in itself for its stock loss, we offer photostatic copies of the corporation income and declared value excess profits tax returns of the corporation for the year 1945, and the corporation income tax return of the corporation for the year 1946. I had made request that the plaintiff produce the originals, but I take it it would

be satisfactory [1538] to produce photostatic copies. They might be Defendant's Exhibit 52.

Mr. Phleger: I object to them upon the ground they are incompetent, irrelevant and immaterial.

Mr. Clark: Same objection, your Honor.

Mr. Phleger: Just because we are poor, it is not a matter of evidence. It hasn't anything to do with it.

The Court: Well, there is no objection as to the return itself?

Mr. Phleger: No, not on the ground of competency.

The Court: All right, let it be marked.

Mr. Clark: What is the number on it?

The Clerk: 52.

Mr. Adams: 52A and B?

The Court: For 1945 and 1946, did you say, or '44 and '45?

Mr. Adams: No, '45 and '46. And I direct attention in the '45 return to the amount shown under the net operating loss deduction of $42,403,256.08, being the remainder of that big loss after portions of it had been taken up in the prior returns.

The Clerk: The return for '45 will be marked 52A and the return for '46, 52B.

(Return for 1945 and return for year 1946 were marked 52A and 52B in evidence, respectively.)

Mr. Adams: Now, your Honor, I desire to read a resolution of the Board of Directors of the West-

ern Pacific Railroad Corporation [1539] at a meeting held September 5, 1935, my purpose being to show the fact that the plaintiff corporation recommended the appointment of Mr. Schumacher as one of the two trustees. I will read the resolution.

Mr. Phleger: Just a moment. We——

Mr. Adams: Just a moment; from page 927 of the record.

The Court: You say you admit that?

Mr. Phleger: We don't think it is material, but we will admit the fact.

Mr. Adams: May I read it?

Mr. Phleger: We won't agree to the admissibility, but we will admit the fact.

Mr. Adams: The fact being that the Board of Directors of the corporation on that date adopted a resolution as owner and holder of all the capital stock of the Western Pacific Railroad Company, recommending the appointment of Mr. Schumacher as one of the two trustees of the property of the Western Pacific Railroad Company, to be appointed at a hearing.

Mr. Phleger: Yes.

Mr. Adams: Very well, your Honor.

Now, I desire to offer as Defendant's 53 a photostatic copy of a letter of November 28, 1943, addressed by A. R. Baldwin, then an officer of the Western Pacific Railroad Corporation in New York, to C. M. Levey, president of the Western Pacific Railroad Company. [1540]

Mr. Clark: That is not '43, is it?

Mr. Adams: '23.

Mr. Clark: 1923?

Mr. Adams: Yes, right. And I will read briefly from it:

"I am enclosing herewith two statements showing the taxable income as reported to the Commissioner of Internal Revenue by the Western Pacific Railroad Corporation on consolidated returns for the years 1921 and 1922, and proposed allocation of the taxes to the various companies, the income of which is included in the returns. The total tax for 1921, $31,813.09, was originally paid by the Western Pacific Railroad Company; and of the tax for 1922, $114,929.64, three-quarters has been paid by the Western Pacific Railroad Corporation, which company will pay the remaining one-quarter, which will be due December 15, 1923. The method of allocation, vis., prorating the entire amount among the companies showing taxable income, is, so far as we are able to determine, the practice followed by other companies making consolidated returns."

Mr. Phleger: Object to that on the ground it is irrelevant, incompetent and immaterial. It is over 20 years before the events here in litigation.

Mr. Adams: Well, the showing previously made being that the practice there described was since continuously followed. [1541]

The Court: Well, you have already in evidence an exhibit which factually shows the manner in which the returns were filed. What good does it do to put that letter in?

Mr. Adams: Particularly because the author, who describes the arrangement, refers to it as being in accordance with the general practice among railroads.

Mr. Clark: Which has already been proved, your Honor.

The Court: I don't see the competency of that, either.

Mr. Adams: I don't want to argue it, your Honor.

The Court: I think you have everything in the record that you need so far as the factual situation is concerned, in this very voluminous exhibit which gives all the facts as to what was done. I think this unnecessarily encumbers the record. I am inclined to be as liberal as is possible, but I think there is no need to put in a letter of 1923 in this litigation, because whatever is in evidence is admitted in evidence, and I am supposed to look at it, and so an alert lawyer is going to call attention to some conspicuous phrase in some document in 1923 when this case gets up into the Circuit Court, the record will show now that in my opinion, it just doesn't serve any useful purpose so far as the issues in this case, and I will sustain the objection.

The Clerk: Marked for identification, your Honor?

The Court: Oh, yes, of course.

(Letter dated November 28, 1923, referred to above was then [1542] marked Defendant's Exhibit 53 for identification only.)

Mr. Adams: Your Honor, I offer as Defendant's Exhibit 54 a series of letters, and I will state the nature of the letters and my purpose in offering them. The nature of the letters is this: It is correspondence between counsel to the corporation and Mr. Curry, first as secretary and treasurer and later as president of the corporation, concerning stockholders' meetings. It is offered in response to Plaintiff's Exhibit 19, which is a schedule of the corporation's stockholders' meetings, 1935 through 1948. It would not be offered at all were it not for the fact that that schedule is in the record now.

The Court: That schedule merely lists the dates of stockholders' meetings.

Mr. Adams: The point of the schedule, as I understand it, is to show that there were numerous meetings at which no quorum was present. The point of these letters is to show that in the letters consideration is given from time to time to the desirability of sending out proxies; the fact being that with proxies entirely outside of the James holdings, a meeting could have been held. Those gentlemen, the corporation officers, and the counsel, considered the matter and decided against it. We think that if the plaintiff's exhibit 19 is to stand in the record as indicative of anything, that we are entitled to put in the responsive showing.

The Court: You mean as to why the stockholders' meetings [1543] were not held?

Mr. Adams: Precisely.

The Court: If that is the point of the correspondence, I think it would have bearing.

Mr. Adams: It is offered for that purpose.

The Court: Well, are you going to offer a lot of letters? What do they say? What do they talk about in those letters?

Mr. Adams: Well, take the first one, in order, which is addressed to counsel by the secretary and the treasurer of the corporation, and it asks:

"I should like to have your opinion as to how this year's meeting should be handled. That is, will we pursue the same course as we did last year, sending out notices only, or should we proceed in the regular way? If we do the latter, it will entail considerable labor and expense, and it will be necessary on next Wednesday's meeting of the Board to name a proxy committee, approve form of proxy, and a proxy statement."

The Court: And what is the answer to that letter, or is that what you are [redacted]?

Mr. Adams: Yes, that letter is April 23, 1940, counsel's letter in reply—or August 23, rather, counsel's letter in reply of August 28, of the same subject matter on the same question says: [1544]

"It is our judgment that you should this year pursue the same course you pursued last year; that is, issue the notice in the usual form, but do not name a proxy committee or request proxies.

The Court: Now what counsel was that?

Mr. Adams: Mr. Nicodemus.

The Court: Well, I don't suppose that your opponents are going to object to this.

Mr. Adams: It is offered only in response to

their showing about the stockholders' meetings in the absence of quorums.

The Court: And all the letters are along the same line?

Mr. Adams: Yes, your Honor.

The Court: Is there no objection?

Mr. Clark: We haven't seen them.

Mr. Phleger: I have no objection.

Mr. Adams: They are 700 to 714.

Mr. Clark: If that is the only purpose, there is no objection. I don't know what is in them.

The Court: Well, Mr. Adams has stated the gist of them. I assume that is what they are offered for.

Mr. Clark: Well, if that is the only purpose, there is certainly no objection.

The Court: Well, do you want them marked as one exhibit?

Mr. Adams: Yes, if your Honor please, Defendant's 54, [1545] consisting of a document now marked Railroad Company Defendants' 700, and those following, to 714 inclusive.

(Railroad Company's Exhibits 700 to 714 referred to above were thereupon received in evidence and marked Defendant's Exhibit No. 54.)

Mr. Adams: Now I have a set of letters which I can identify for counsel as Railroad Defendant's 410, 411, 413, 414, 417—417 includes a lawyer's memorandum—Interveners' 224 and 228; and I will state the nature of these letters.

Plaintiffs put in the exhibit Plaintiff's 45, which is an opinion rendered by Mr. Polk to the corpora-

tion with respect of Delaware franchise tax. The interveners put in on the same subject Interveners' Exhibits 5, 6, 7 and 8. We offer these documents, your Honor, which are dated in the years 1944 and 1945, and are correspondence between Mr. Curry, or rather, by Mr. Curry and by Mr. Nicodemus, dealing with that subject matter in response to the apparent effort of our adversaries to show treatment of this subject by Mr. Polk. We offer these to show that the subject was dealt with between the corporation and its own counsel, Mr. Nicodemus, at the same time.

The Court: Are counsel familiar with the correspondence?

Mr. Phleger: Yes. We have no objection to it at all.

Mr. Clark: Limited to that purpose, we have no objection, your Honor.

The Court: Very well.

Mr. Adams: Defendants' 55?

The Clerk: Defendants' 55.

(Railroad Defendants' Exhibits on deposition 410, 411, 413, 414, 417, and Interveners' Exhibit 224 and 228 were received in evidence and marked Defendants' Exhibit 55.) [1547]

Mr. Adams: Now, your Honor, we make an offering in response to the issue suggested upon yesterday's examination, concerning whether or not the plaintiff corporation knew that it had a right to file a separate return. The document which I now offer consists of the following: Interveners' 275,

a letter from the General Auditor in San Francisco to Mr. Curry asking if it were the intention of the corporation to file a consolidated return——

Mr. Clark: For what year, please?

Mr. Adams: I read you the date of the letter, didn't I? The date of the letter is February 8, 1941, and it is for the year 1940. Mr. Curry's letter of February 10, '41, stating:

"I have given this matter careful thought and deliberation, and feel that in accordance with the provisions of Section 730(a), the most equitable arrangement would be for us to dispense with the filing of a consolidated return in this particular instance."

Interveners' 279, a telegram of March 6, 1941, addressed by Mr. DeGraff to Mr. Curry:

"Do you wish me to prepare tentative declared value excess profits tax returns for each of the companies?"

Mr. Curry's telegram to Mr. DeGraff, Interveners' 280—these are all deposition numbers—of March 7, 1941, reading [1548] in part as follows:

"Find in looking into matter our accountant, who resigned in February, misunderstood just what is required. Holding company will file consolidated return as in previous years."

Interveners' Exhibit 80, telegram from Mr. Curry to Mr. DeGraff of March 1, 1945, reading in part as follows:

"By March 15 we will file here tentative consolidated returns for corporation for entire year in-

cluding its subsidiaries, to May 1, and you will file in San Francisco tentative consolidated return of company and its subsidiaries from May 1 to end of year, and consolidated return of Western Realty and its subsidiary from May 1 to end of year. As you know, one-fourth estimated tax liability must be paid at that time. These tentative returns are not binding, so if, after further calculation, it is found more advantageous to file separate returns, we will do so before June 15."

The Court: What year is that?

Mr. Adams: That is a telegram dated March 1, 1945, and refers to the returns for the year 1944.

I offer these documents as Defendants' 56.

Mr. Rhleger: Your Honor, I don't think these are material, but I do point out the fact that here is counsel dumping in a [1549] lot of exhibits like that. Mr. Curry was here on the stand, and he testified that all these type of wires were prepared for his signature, and he just signed them. I think it is highly improper at this stage of the trial to start in dumping in letters and telegrams sent by witnesses who have appeared and testified on the very subject. This should have been brought in on cross-examination of Mr. Curry.

Mr. Clark: Your Honor, I think Mr. Adams will concede that that last telegram he read from, with respect to the '44 returns, was established on deposition to have been prepared by Miss Valouch under Mr. Polk's advice.

Mr. Adams: As to the latter, I don't know, but

I am quite confident it was prepared by Miss Valoueh.

Mr. Clark: Yes, although signed by Mr. Curry.

Mr. Adams: Well, Mr. Curry testified about all this practice. I have no purpose to contradict Mr. Curry's testimony in any respect, but what I do say is this, your Honor: The issue to which this response was directed was raised yesterday, presented to us yesterday, when a point was made that there was some kind of a difference between advising that it was preferable to file consolidated returns from a tax standpoint and advising that you had a right to file separate returns. That is the reason these things come in.

The Court: I think the testimony is limited to just whether or not the witness Polk had given advice, and there [1550] was some difficulty in getting that question squarely put and answered; but that was the extent of the examination on that subject, just as to whether or not he had made that statement to them. I do recall that the Court stated that that didn't close the door to you to show that there was an understanding on that subject on the part of the parties.

Mr. Adams: This is the current record that we offer in writing, and in response to that question.

Mr. Clark: We have no objection to it, your Honor.

Mr. Phleger: Well, it will be stipulated, will it, that with respect to the last telegram, that it was written by Miss Valouch under the direction of Mr. Polk and signed by Mr. Curry?

Mr. Adams: Whatever the record shows; and

Mr. Curry's deposition I will agree to. I have no recollection of any statement one way or the other relating to this particular telegram to Mr. Polk. If you have a recollection of that, please bring the record up, Mr. Phleger. We will agree on the deposition statement.

Mr. Clark: Well, it will take some time for us to find that pinpoint in the Curry deposition. I may be able to find it within a very few minutes.

The Court: Well, the correspondence may be admitted. I think the objection is not as to the admissibility, but really to the weight of these documents. [1551]

The Clerk: Exhibit 56.

(Interveners' Exhibits 275, 276, 279, 280, 80, on deposition, were received in evidence and marked Defendants' Exhibit 56.)

Mr. Adams: Now further with respect to the tax matters, and having reference among other things to the testimony of Mr. Cockburn on the repositioning of the loss of the Deep Creek Railroad Company, and having reference also to the current record of the disposition of tax questions by Mr. Curry, I offer two letters, Railroad Exhibits 249 and 255, each of these being from Mr. Curry to Mr. DeGraff, and to indicate what I have in mind, I will read briefly from one of them.

Mr. Clark: Just a moment, please.

Mr. Adams: The dates are July 14, 1942, and August 25, 1942.

Are you ready?

Mr. Clark: Just a moment. Yes.

Mr. Adams: Exhibit 249 says, the second paragraph:

"With reference to the losses sustained account abandonment of Deep Creek Railroad, it has occurred to us that this loss might be considered by the Internal Revenue Bureau as a 1939 loss; in view of the fact that the Interstate Commerce Commission issued certificate permitting this abandonment July 1, 1939." [1552]

And in 255, from the second paragraph:

"From the information contained in our records, it appears this loss should be charged off in 1939, as it is our understanding the Revenue Bureau has ruled such losses should be written off the year the securities have been ascertained as worthless. However, due to the large amount involved, we would not want to take it out of 1940 unless we are certain that there is no possible reason for keeping it in that year."

Mr. Phleger: I submit these are totally and wholly immaterial and irrelevant. They are written in 1942 about tax transactions in '39.

Mr. Clark: They are also the type of letter, your Honor, that Mr. Curry testified was prepared by Miss Valouch in each instance, regarding tax matters, and he is not here to give us the benefit of that testimony, if there is any effect to be argued from that.

Mr. Adams: Your Honor, we have said before, and I think it is a fair statement, that the current written record at the time is the best evidence. I do

not offer this in any wise as contradicting any testimony that Mr. Curry gave. I offer it as current evidence of the things that he dealt with at the time.

Mr. Phleger: Well, then, it was certainly proper cross-examination [1553] of Mr. Curry; it is directed to showing that Mr. Curry, I suppose, was a very able tax man.

Mr. Adams: No, no, that is not a proper statement.

Mr. Phleger: Now, the appropriate time to have submitted this was when Mr. Curry was here.

Mr. Adams: I won't argue it further.

The Court: Well, is there very much materiality to this?

Mr. Adams: Your Honor has heard all the material that I consider significant.

The Court: This is the last document?

Mr. Adams: No, your Honor, I have two or three more.

The Court: Well, I can't see any particular materiality to it, but what bothers me more is that counsel may feel that it is a subject that they might want to cover, and Mr. Curry is gone—or is he still here?

Mr. Phleger: I think he is leaving tonight or tomorrow morning. We wouldn't counter it. It is wholly immaterial and irrelevant. That is the only point; it is just making a bigger record here, and we think it is wholly unnecessary.

Mr. Adams: We haven't caught up to the other party's numbers yet.

The Court: Well, I understand from Mr. Adams that we are getting to the end of the rope, so I think I will let it in.

The Clerk: 57. [1554]

(RR. Defendants' Exhibits 249 and 255 were received in evidence and marked Defendants' Exhibit 57.)

Mr. Adams: Now, your Honor, I offer as Defendants' Exhibit 58 a document now marked Railroad Defendant's Exhibit 950, being a copy of a letter dated December 17, 1945, addressed by Mr. Elsey to Mr. Wood, or to Wood, Walker & Company, 63 Wall Street, New York, and containing the following. The letter is written in answer to an inquiry from that company.

"With respect to the stock of the Western Pacific Railroad Company, I think that perhaps the best explanation is that contained in our 1944 annual report under the heading of 'Taxes,' which is quoted below."

And then follows the complete quotation of the statement under the heading of "Taxes," contained in the 1944 report.

We offer this as evidence of notice to the director Willis Wood, who was one of the directors of the plantiff corporation at the time of this letter, and in view of the fact, your Honor, that his deposition here read in evidence indicates that his recollection was not clear or definite with regard to this matter, and he had some recollection that he did not know about it long after the date of this letter.

Mr. Phleger: Your Honor, that is a letter to the statistical department of a firm of which Mr. Wood was a limited partner, and he has testified in his deposition, which has been introduced in evidence, that he had no notice and received no [1555] notice from it.

The Court: This is a letter that went to what firm?

Mr. Adams: Mr. Willis Wood's firm, he being a limited partner in that firm. You recall the testimony that he had been a partner in a variety of investment houses, and this is the latest one, Wood, Walker & Company, in which he is now a limited partner. The gentleman is some 77 or 78 years of age at this time. This is the gentleman who had been for a good many years a member of the official body of the New York stock exchange.

I am just offering it to prove notice, your Honor, because these gentlemen's recollection of what they knew about this, in this case, was quite obscure.

The Court: Well, this elderly gentleman who was a limited partner in this firm in this period—I am now supposed to draw from this letter some evidence that he had notice?

Mr. Adams: Certainly. What this letter proves is that the very document that would give him notice went to his company. It was available, and we think that it is material in showing that, regardless of the inference your Honor draws further from it——

The Court: Well, I will sustain the objection.

Mr. Adams: May it be marked, if your Honor please, for identification as Defendants' Exhibit 58?

The Court: Yes. [1556]

(Letter dated September 17, 1945, Elsey to Wood, Walker & Company, was marked Defendants' Exhibit 58 for identification.)

Mr. Adams: Now next, your Honor, I desire to offer Railroad Defendant's Exhibits 795, 796 and 797. These are, respectively, schedules as respects Russell M. Van Kirk, deceased, of all purchases and sales of Western Pacific Railroad Corporation preferred stock; J. S. Farlee & Company, confirmation of all purchases and sales of preferred stock to April 10, 1948; and J. S. Farlee & Company, confirmation of purchases—wait. No, that is part of the same one. And Western Pacific Railroad Corporation preferred stock given by Russell M. Van Kirk to Mrs. Russell M. Van Kirk, and owned and held by her. These documents are offered, as were the similar schedules, with respect to the intervener Offerman, to which your Honor sustained an objection.

Mr. Clark: And to which we now object, your Honor, upon the same ground, that it is incompetent, irrelevant and immaterial.

Mr. Adams: Now may I say, your Honor will recall at that time we had some argument, and I don't want to repeat it at all, in which reference was made to the Comstock case, among other things. I have since looked at some cases with respect of a right of stockholders to intervene. That is what

these cases specifically are; they come up on motion to intervene, and there is authority, specifically on the proposition that the [1557] courts may hear and consider the investment position, the date year of acquisition and all the factors that are covered in these schedules, because these schedules, as your Honor well knows, are designed to show how late these gentlemen in this company came into this corporation and at what prices. I offer the schedules without imposing duplicate argument upon the Court; but I do think we are entitled to them, as I did think at the time.

Mr. Clark: We will object to them, your Honor, upon the ground it is incompetent, irrelevant and immaterial.

The Court: I will make the same ruling as I did in connection with the other exhibit; 59 for identification.

Mr. Adams: 59 for identification will consist of these three documents, your Honor.

The Court: Very well.

(Railroad Company's Exhibits 795, 796 and 797 on deposition were marked Defendants' Exhibit 59 for identification.)

Mr. Adams: Now, your Honor, I offer the Form 174 Revised, which is one of these monthly operating results, and general statistics, printed papers of the Western Pacific Railroad Company for the month of November, 1943. This is offered for a very limited purpose; the plaintiffs put in Exhibit 74 and 75 with regard to the 1943 income tax accruals,

and I don't remember which of these exhibits it is, or both of them, but they contain estimates of the amount of accrued tax liability [1558] in the amount of about $8,250,000. Then the record shows that the accruals, as at the end of the year and before they were reversed, amounted to $7,000,000. So there is an unexplained gap of a million and a half dollars. To meet that unexplained gap between those two papers, I offer this document, which shows that in November estimated back pay accrued on account of wage increase was entered in an amount of nearly a million dollars and had a corresponding effect on the tax accruals. That is the sole purpose, and if counsel will accept my statement, I needn't offer the document.

Mr. Phleger: I will accept the statement.

Mr. Clark: Accepted.

Mr. Adams: Now, then, your Honor, I should like to read from the minutes of a special meeting of the board of directors of the plaintiff corporation held at the residence of Mr. T. M. Schumacher in New York on Wednesday, August 13, 1947, and state the directors that were present at that meeting, who were: Mr. Curry, W. W. Hatton, E. C. Nicodemus, Jr., A. Perry Osborn, T. M. Schumacher, M. C. Valouch, and Willis D. Wood.

Now, at the page marked 103 of the minute book, of the minutes of that meeting, there appears the following:

"The Board considered at length the question of withdrawing the offer of settlement in view of the

fact that the Railroad Company refused to stipulate a withdrawal of its technical defenses. [1559] After full consideration, it was the judgment of the Board that any withdrawal of the offer of settlement would be prejudicial to this corporation and its stockholders."

I think counsel will agree with my further statement that the minutes of the meeting also contain a copy of the stipulation which was thereafter executed, and of counsel's opinion with regard to that stipulation.

Mr. Phleger: I object to it as incompetent, irrelevant and immaterial. It took place long after this suit was filed.

Mr. MacKinnon: The competency is conceded of all these documents.

Mr. Phleger: Yes, you are quite right. There is no objection on the ground of competency, but it is irrelevant and immaterial.

Mr. Adams: The relevance of the portion I read, your Honor, is this—it is relevant on two grounds and in two respects: In one respect, it shows certainly that this independent board of directors seriously considered a refusal to go along with the then pending offer of settlement. It is a curious coincidence that it happened that that was the date that the Commissioner acceped it, but this board didn't know that when it took this action.

Mr. Clark: Didn't know that?

Mr. Adams: It couldn't possibly be known until the [1560] second day.

Mr. Clark: Because the second Krigbaum letter, of course, was known.

Mr. Adams: Counsel of course can make his argument when his time comes, and I should not, perhaps, be arguing, but I was asked to reply to a statement with regard to the relevance of the offer I have just made, and I have stated one ground of relevance.

Now, another ground of relevance is this, your Honor: This is significant of the nature of the claim that is presented here to your Honor. It is significant that here, even at that date, with a settlement available that everyone knew was a very fine settlement to this transaction, these gentlemen, who hadn't a dime in the interest, only a claim in litigation, seriously gave consideration to throwing that settlement overboard unless the defendant corporation would waive the defense of the bar of reorganization.

Now, we think that is significant in this case, and we offer the material I have just read in support of that.

The Court: Well, what is the significance of it? You say you think it is significant?

Mr. Adams: It is significant of the nature of the equity that is brougth before your Honor, that is in fact predicated upon a force position.

The Court: You mean that the Court should consider against [1561] the plaintiffs the fact that they were rather forceful about asserting their point?

Mr. Adams: Oh, no, your Honor; the thing they considered doing is the thing that, in my judgment, is indefensible.

The Court: Well, sometimes litigants, with resourceful attorneys, are very successful in holding a heavy cudgel over the heads of their opponents, if they want to get some result out of it. What has that got to do with the essential merits of this? It is just a little atmosphere to the thing that you don't like, because you think they were too tough about it. But that hasn't anything to do with the merits of the controversy itself. I don't see that it has any relevance in the matter.

Mr. Adams: Well, it certainly is material, is it not, your Honor, to establish the fact of the independence of this board of directors, it being still suggested that they were dominated and controlled?

The Court: Well, at that time counsel were here on both sides of the case in my court, presenting these very stipulations for approval, and for an order of court; so they were dealing then at arm's length. There wasn't any question about that. They were in here in court.

Mr. Adams: That is right.

Mr. Clark: In fact, the interveners came in and asked for an injunction on this very thing. [1562]

The Court: I will sustain the objection to the relevancy.

Mr. Adams: Very well, your Honor. I need not offer the document, since the offer I read was all the offer I intended to make.

Now, I have one further document. So I hope that is successful. The document is Railroad Company Defendant's Exhibit 120, and is a copy of the by-laws of the plaintiff corporation as amended to July 28, 1942; and being at the time it was produced, upon the taking of the depositions, the latest amendment. These by-laws describe the functions of the various officers, to which Mr. Curry has had reference from time to time in the course of his testimony.

The Court: Any objection to the by-laws of the corporation?

Mr. Phleger: No.

Mr. Clark: None from us, your Honor.

The Clerk: No. 60.

(Railroad Company Defendant's Exhibit 120, corporation by-laws, was received in evidence and marked Defendants' Exhibit 60.)

* * *

Mr. Matthew: If the Court please, it will take but a moment. I just want to suggest a stipulation that the final [1563] order of March 28, 1946, in the reorganization proceeding was served upon all parties to the reorganization proceeding as well as counsel, and the publication was also made in accordance with the terms of the order. That appears in the record.

Mr. Phleger: Subject to check, that is all right. Isn't that recited in the final order itself, that notice was given?

Mr. Matthew: Oh, yes, as far as that is con-

cerned. I am talking about service of the final order itself. There is ample evidence—it also appears that the notice of the hearing upon the petition was likewise given in regular course, but I simply want to establish the fact that the final order was served in the regular course.

Mr. Phleger: If you say that it was, we will agree that it was.

Mr. Matthew: I think we need no stipulation to further orders because counsel will agree that they were received in regular course.

Mr. Adams: We rest.

Mr. MacKinnon: The defendant Western Realty Company rests, your Honor.

(Defendants rest.)

Mr. Phleger: The plaintiff will now offer in evidence as Plaintiff's Exhibit 81 the Federal corporation income and declared value excess profits tax return of the defendant [1564] railroad and affiliated companies for the calendar year 1945, and as 81-B the excess profits tax return for the same year, 1945, and as Plaintiff's next exhibit, 82, the corporation income tax return of the Western Pacific Railroad Company and affiliated companies for the calendar year 1946; and as the next exhibit, the corporation income tax return for the Western Pacific Railroad Company and affiliated companies for the calendar year 1947.

(The documents referred to were marked respectively Plaintiff's Exhibits 81-A, 81-B, and 82 and 83.)

* * *

The Court: Very well.

Mr. Phleger: The plaintiff rests.

Mr. Clark: Your Honor, we have only one formal matter [1565] on the part of the interveners, and that is according to the record at page 716 I did not get the concession which was agreed on substantially on pre-trial relative to the stock holdings and dates of acquisition of the intervening stockholders. The stipulation I asked for appears at page 716. The record does not indicate that anyone responded except Mr. Adams, who had some qualification of it, so I will now ask for the agreement and the concession I asked for, namely, that the intervener Henry Offerman now owns 4,080 shares of the preferred stock of the plaintiff corporation; that he held 3,903 shares at the time the deposition in this case was taken, and has been a stockholder of the plaintiff since July 7, 1942; that the intervener J. S. Farlee & Company, Inc., is now the owner of 10,000 shares of preferred stock of the plantiff corporation, and at the time of the depositions—this is in answer to Mr. Adams' suggestion at the time I first asked for this concession—Farlee owned 9,320 shares and had been a stockholder since January 7, 1944; and that Meredith H. Metzger, formerly Meredith H. Van Kirk, who was substituted for her deceased husband by order of this Court on January 28, 1949, is the owner of 11,385 shares of the preferred stock of the plaintiff, 8,200 shares of which were distributed to her from the estate of her deceased husband, and that he had

been a stockholder, that is, Russell M. Van Kirk, of the plaintiff corporation since February 23, 1944. Now, may I have that concession from you, Mr. Phleger? [1566]

Mr. Phleger: Yes.

Mr. Clark: And Mr. MacKinnon?

Mr. MacKinnon: I am looking for the pre-trial minutes because I do not remember what was said. May I see the transcript? I will abide by whatever I agreed to abide by.

Mr. Clark: We offered a stipulation, if your Honor please, at the pre-trial, a written stipulation in which these figures and dates appear. The stipulation contained some other matters, it having been incorporated between Mr. Phleger's office and mine in the one stipulation, and with respect to this stockholders' matters, Mr. MacKinnon and Mr. Adams said that they would take at the trial our statement as to the amount of stock that was held and the dates of acquisition. They have had access to the certificates and opportunity to examine them on deposition. There is no question about the fact at all.

Mr. Adams: Your Honor, as I believe I stated at the pre-trial—and I am speaking from memory—I accept Mr. Clark's statement with regard to the present ownership of the number of shares held, but as I believe I further stated at the pre-trial, no concession on my part or agreement which I have made for the substitution of Mrs. Metzger, formerly Mrs. VanKirk, as a party is to relieve

her from the defenses good as against her husband. That was the understanding. On that understanding I will accept Mr. Clark's statement with regard to the number of shares of stock held by each of the interveners whose names he [1567] has called off.

Mr. Clark: And the dates of acquisition, Mr. Adams? And the dates I gave for the original acquisition?

Mr. Adams: I think they are correct, and I assume they check with the schedule.

Mr. Clark: They do, and I checked them.

Mr. MacKinnon: I will accept whatever I agreed to on pre-trial, your Honor. I have tried but I cannot find what I agreed to. Nobody has the minutes. I am not questioning their stockholdings.

The Court: Let us end it. Will you stipulate that you will accept Mr. Clark's statement subject to check?

Mr. MacKinnon: Certainly, subject to check.

The Court: If we do not hear from you to the contrary, you have agreed to it.

Mr. MacKinnon: Absolutely.

Mr. Clark: The interveners rest, your Honor.

Mr. MacKinnon: At this time I make a motion, as I made a motion at the end of the interveners' case, to dismiss the complaint and I am prepared to argue it at length or to save your Honor's burden of hearing it, whichever you desire, because I think the interveners have failed completely in making any case here, and I say that particularly in view of the reckless charges—the reckless

charges—and I am using the word advisedly, of these interveners with respect to Mr. Coulson, the James [1568] Foundation of New York, because there isn't an iota of evidence of conspiracy which they charge in their complaint. There is not an iota of evidence that the James Foundation of New York dominated or controlled this picture. There is not an iota of evidence that Col. Coulson dominated or controlled the stock situation for his benefit or for the benefit of the James Foundation. Those charges are reckless charges.

The Court: Mr. MacKinnon, you have made the motion. I wonder whether you cannot reserve your argument until we have some discussion and determine generally how this case is going to be submitted.

Mr. MacKinnon: Whatever you please, your Honor.

The Court: Do you gentlemen want to brief this case? I suppose you do. Or do you want to argue it, too? [1569]

* * *

PLAINTIFF'S EXHIBIT No. 6

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[X] Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of New York
County of New York—ss.

Name of taxpayer or purchaser of stamps, Western Pacific Railroad Corporation.

Business address: 37 Wall Street, New York 5, New York.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 2d N. Y.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1942, to December 31, 1942.

3. Character of assessment or tax, Corporation income and declared value excess profits tax.
4. Amount of assessment, $4,201,821.54; dates of payment 3/15—6/15—9/14—12/15/43.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded, $4,201,821.54.
7. Amount to be abated (not applicable to income or estate taxes) .....
8. The time within which this claim may be legally filed expires, under Section 322(b)(1) of the Internal Revenue Code, on March 15, 1946.

The deponent verily believes that this claim should be allowed for the following reasons:

(See statement attached.)

WESTERN PACIFIC RAILROAD CORPORATION,

/s/ M. J. CURRY,
President.

Sworn to and subscribed before me this 9th day of March, 1945.

MARY C. VALOUCH,
Notary Public, Westchester County.

Collector's Stamp.

[Stamped]: Received Collector of Internal Revenue, 2nd Dist. of New York, Mar. 9, 1945.

Western Pacific Railroad Corporation.
Year 1942

Statement Accompanying Claim for Refund

The taxpayer is entitled, under the provisions of Section 23(s) of the Internal Revenue Code, to a net operating loss deduction in the amount of $55,093,108.70, computed in accordance with the provisions of Section 122 of the Code. Said net operating loss deduction is the amount of the reported net operating loss for the year 1943, which, in accordance with the provisions of Section 122, is a net operating loss carry-back for years beginning after December 31, 1940.

The details of the facts producing the net operating loss, the net operating loss carry-back and the net operating loss deduction are shown in full on the Federal tax return filed by the taxpayer for the calendar year 1943, which said return and its supporting schedules by this reference are made a part of this claim for refund.

The taxpayer requests the right, at the time this claim is reached for consideration, to file any further additional evidence deemed appropriate in the consideration of this claim, and it is further respectfully requested that before action is taken with respect thereto, an opportunity for hearing be granted the taxpayer.

Wherefore, the taxpayer alleges that it is entitled under the provisions of Section 23(s) of the Code to a net operating loss deduction in the above-stated amount computed under the provisions of Section

122(c) of the Code; that by reason thereof, there is no taxable net income for the year 1942; and that the tax paid for said year in the amount of $4,201,821.54 constitutes an overpayment, claim for the refund of which, together with interest as provided by law, is hereby made.

[Endorsed]: Filed Feb. 1, 1949.

PLAINTIFF'S EXHIBIT No. 7

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26508

THE WESTERN PACIFIC RAILROAD CORPORATION,

Plaintiff,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Defendants.

RUSSELL M. VAN KIRK, HENRY OFFERMAN and J. S. FARLEE & CO., INC., a Corporation,

Interveners.

STIPULATION AND AGREEMENT BETWEEN PLAINTIFF AND DEFENDANTS RELATING TO AGREEMENT WITH THE BUREAU OF INTERNAL REVENUE

1. The Bureau of Internal Revenue has accepted a proposal for the settlement of corporation income and excess profits tax liability on behalf of the

Plaintiff's Exhibit No. 7—(Continued)

parties hereto, copies of which said proposal and acceptance are annexed hereto marked Exhibit A.

2. It is stipulated and agreed as follows:

(a) That the approval and acceptance of such settlement by the plaintiff and the defendants shall be without prejudice to the interests, claims or defenses asserted by the parties hereto, respectively, in the subject matter of this action and without prejudice to the position of the said parties inter se with respect thereto, and that all the interests and claims asserted by the said parties are to be determined with relation to, and as limited to, the net amount of alleged tax saving involved in this action as diminished by the settlement.

(b) More particularly, the claim for refund of taxes paid for the year 1942 shall not be deemed to have been abandoned by said settlement, but on the contrary said refund claim shall be deemed to have been diminished in the proportion in which the aggregate of the tax savings involved in this action shall have been diminished by the settlement, and as so diminished to have been allowed, paid to the plaintiff as the agent for the affiliated group designated in Regulations 104 and 110, and by the plaintiff paid into court, and the tax savings for the year 1943 and for the first four months of 1944 shall be deemed to have been diminished in like proportion. Nothing herein contained shall obligate any party hereto to make any deposit or payment into court.

(c) By acquiescence in such settlement none of

Plaintiff's Exhibit No. 7—(Continued)

the parties hereto waives any of its interests, claims or defenses in the above-entitled action, as against any other party, but all such interests, claims and defenses shall relate to the amount of tax savings as diminished by said settlement, and all parties stipulate and agree that the aggregate amount of the tax savings involved in or claimed in said action has been diminished by said settlement by the amount of $4,201,821.54.

(d) Nothing herein contained shall be deemed to be or constitute a recognition or admission on the part of any party of the validity, merit or equity of the claims of any other party to said tax savings as reduced, or to any part thereof, or a waiver, surrender, or relinquishment in any manner or to any extent of the defenses or any thereof of any party to the claims of any other party in and to such tax savings, as reduced.

(e) In the event the said tax liabilities of the parties hereto shall not be finally settled in accordance with said agreement with the Bureau of Internal Revenue, this stipulation shall be of no force or effect whatsoever, and all the parties shall be released herefrom with like effect as if this stipulation had never been made.

Dated September 3, 1947.

/s/ LeROY R. GOODRICH,
/s/ F. C. NICODEMUS, JR.,

Attorneys for Plaintiff, The Western Pacific Railroad Corporation.

Plaintiff's Exhibit No. 7—(Continued)

ALLAN P. MATTHEW,

JAMES D. ADAMS,

ROBERT L. LIPMAN,

BURNHAM ENERSEN,

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

Attorneys for Defendants, The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

PILLSBURY, MADISON & SUTRO,
FELIX T. SMITH.

EVERETT A. MATHEWS,
WHITMAN, RANSOM, COULSON & GOETZ.

By EVERETT A. MATHEWS,
Attorneys for Defendant The Western Realty Company.

Plaintiff's Exhibit No. 7—(Continued)

EXHIBIT A

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

February 11, 1947
(Copy)

The Honorable Joseph D. Nunan, Jr.,
Commissioner of Internal Revenue
Washington, D. C.

Attention: Mr. Frank Eddingfield

Re: The Western Pacific Railroad Corporation and Affiliated Corporations

1942, 1943 and 1944 Federal Income Taxes

Dear Sir:

The Western Pacific Railroad Corporation and its affiliated subsidiaries filed consolidated returns for the calendar years 1942 and 1943 and the said Western Pacific Railroad Corporation filed a consolidated return for the calendar year 1944 including therein its said subsidiaries for the period from January 1, 1944, to April 30, 1944, during which period affiliation existed.

On the said return for 1942 a consolidated tax liability of $4,201,821.54 was reported and duly assessed and paid. On the said return for 1943 there was reported a net loss and no taxable income. On the said return for 1944, based on a carryover of the unused 1943 net loss, there was reported no tax-

Plaintiff's Exhibit No. 7—(Continued)

able income and no tax liability. A claim for refund of the tax so paid for 1942, based on a carryback of the said 1943 net loss, was filed and is now pending in your office.

The taxpayer on behalf of itself and its aforesaid affiliated subsidiaries hereby offers to settle and determine the tax liabilities of the said corporations for the said taxable years 1942, 1943 and 1944 in the amounts shown on the returns filed as aforesaid. This proposal of settlement does not relate to or affect the tax liability of the said subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated. The within proposal is made without prejudice to any rights or claims of the parties, if the proposal is not accepted by you.

As part of this proposal The Western Pacific Railroad Corporation, on behalf of itself and its aforesaid affiliated subsidiaries agrees that, if this proposal is accepted, it will consent to a rejection of the said claim for refund of the 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is further agreed by the said The Western Pacific Railroad Corporation on behalf of itself and its aforesaid affiliated subsidiaries that if this proposal is accepted it will execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement.

Plaintiff's Exhibit No. 7—(Continued)

Authority for the submission of the within proposal of settlement by the undersigned is contained in a Power of Attorney heretofore filed in your office.

Respectfully,

THE WESTERN PACIFIC
RAILROAD CORPORATION,

JAMES K. POLK,
Attorney-in-Fact.

EXHIBIT C

Treasury Department
Washington 25

Aug. 13, 1947

The Western Pacific Railroad Corporation
and Affiliated Companies

c/o Mr. James K. Polk
40 Wall Street
New York 5, New York

In re: Years—1942, 1943 and 1944

Gentlemen:

Reference is made to your letter dated February 11, 1947, regarding the examination of income and profits tax returns for the years indicated above.

You are advised that all the administrative action in connection therewith, based upon the record supplied this office by the internal revenue agent in

Plaintiff's Exhibit No. 7—(Continued)

charge, has been completed and the returns placed in the closed files.

Very truly yours,

/s/ E. I. McLARNEY,
Deputy Commissioner.

EXHIBIT D

Treasury Department
Washington 25

Aug. 26, 1947

The Western Pacific Railroad Corp.
c/o Mr. J. K. Polk
40 Wall Street
New York 5, New York

In re: Claims for refund of $4,201,821.54 $7,454.73 and $161,449.48 for the year 1942

Gentlemen:

In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

/s/ E. I. McLARNEY,
Deputy Commissioner.

[Endorsed]: Filed Sept. 5, 1947.

[Endorsed]: Filed Feb, 1, 1949. (Plaintiff's Exhibit No. 7.)

PLAINTIFF'S EXHIBIT NO. 8

In the Southern Division of the United States District Court for the Northern District of California

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER APPROVING PLAN OF REORGANIZATION FOR DEBTOR

These proceedings coming on for hearing on the modified plan of reorganization for the Debtor, approved by the Interstate Commerce Commission in its Report and Order entered June 21, 1939, and certified to this Court by said Commission on September 28, 1939, together with a transcript of the proceedings before said Commission and a copy of its said Report and Order approving said modified plan, and the Court having considered the entire record in these proceedings, including the transcript of the proceedings before said Commission certified to this Court and the evidence adduced and arguments presented at the hearing before this Court on Januray 22 to 25, 1940, and the Court having heretofore on August 15, 1940, filed its opinion herein,

Plaintiff's Exhibit No. 8—(Continued)

The Court Finds:

1. The findings of fact made by the Interstate Commerce Commission in its Original Report of October 10, 1938, as modified by its Supplemental Report of June 21, 1939, are supported by the evidence, and as supplemented by the stipulation of the parties filed herein on December 20, 1939, are adopted as findings by this Court.

2. The Plan of Reorganization, approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939:

(a) Includes provisions modifying and altering the rights of creditors of the Debtor;

(b) Provides for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property, in light of its earnings experience and all other relevant facts, there should be adequate coverage of such fixed charges by the probable earnings available for the payment thereof;

(c) Provides adequate means for the execution of the Plan; and

(d) In all other respects complies with the provisions of Subsection (b) of Section 77.

Plaintiff's Exhibit No 8—(Continued)

3. Said Plan of Reorganization.

(a) Is fair and equitable;

(b) Affords due recognition to the rights of each class of creditors and stockholders;

(c) Does not discriminate unfairly in favor of any class of creditors or stockholders;

(d) Will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and

(e) Provides for payment of all costs of administration and all other allowances made or to be made by this Court.

4. By order entered August 15, 1940, this Court fixed the amount to be paid by the Debtor, or any corporation acquiring its assets, for fees and expenses incident to the reorganization through October 31, 1939. Said amounts are reasonable and within maximum limits heretofore fixed by the Interstate Commerce Commission and said order constitutes full disclosure of the approximate amounts to be paid by the Debtor, or such other corporation, for such fees and expenses so far as they could be ascertained at the date of said hearing before this Court on January 22 to 25, 1940. Such additional amount as may be required to be paid by the Debtor or such other corporation for services performed and expenses incurred (includ-

Plaintiff's Exhibit No. 8—(Continued)

ing reasonable attorneys' fees) after October 31, 1939, in connection with the proceeding and plan of reorganization, and in connection with the carry-out of said plan, if the same is finally confirmed, cannot be ascertained at this time, but such amounts will be subject to the approval of this Court within maximum limits hereinafter to be fixed by the Interstate Commerce Commission.

5. By order entered August 20, 1935, this Court divided the creditors and stockholders of the Debtor into classes and the classes of creditors hereinafter referred to are those fixed by said order.

Wherefore, It Is Ordered:

First: The objections to the Plan of Reorganization approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939, and the claims for equitable treatment heretofore filed herein by or on behalf of the Debtor, the Institutional Bondholders Committee, the Trustee under the Debtor's General and Refunding Mortgage, A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation and The Western Realty Company are hereby severally overruled and denied.

Second: Said Plan of Reorganization is hereby in all respects approved.

Third: The findings made by the Interstate

Plaintiff's Exhibit No. 8—(Continued).

Commerce Commission that the interests of the following classes of creditors:

(a) The Debtor's equipment obligations to be assumed by the Reorganized Company, being classes 6, 7, 8 and 9;

(b) Claims against the Debtor entitled to priority over any mortgage of the Debtor, current liabilities and obligations incurred by the Trustees of the Debtor during this reorganization proceeding, and expenses of reorganization allowed by this Court within the maximum limits fixed by the Interstate Commerce Commission, which shall be paid in cash or assumed by the Reorganized Company, and which are unclassified;

(c) Executory contracts of the Debtor which have been affirmed or have not been disaffirmed by the Trustees of the Debtor and not terminating prior to the conclusion of this reorganization proceeding which are to be assumed by the Reorganized Company and which are unclassified;

(d) Executory contracts made by the Trustees of the Debtor with the approval of this Court which by their terms do not terminate at or prior to the conclusion of this reorganization proceeding, which are to be assumed by the Reorganized Company, and which are unclassified; and

(e) All taxes levied, assessed or accrued

Plaintiff's Exhibit No. 8—(Continued)

against the Debtor or its property or against any subsidiary and remaining unpaid at the date of the confirmation of the plan, which are to be assumed and paid by the Reorganized Company with the same relative priority that they now have with respect to other obligations of the Debtor;

will not be adversely and materially affected by said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to any of such classes for acceptance or rejection.

Fourth: The findings of the Interstate Commerce Commission that, at the time of the finding, the interests of unsecured creditors of the Debtor and the equity of the holders of the Debtor's Preferred Stock and the Debtor's Common Stock have no value, and that the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the Debtor under said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to said unsecured creditors or shareholders for acceptance or rejection.

Fifth: The only classes of creditors to whom said Plan of Reorganization shall be submitted for acceptance or rejection are:

(a) Class (1)—holders of claims evidenced by The Western Pacific Railroad Company

Plaintiff's Exhibit No. 8—(Continued)

First Mortgage 5% Bonds due March 1, 1946, issued under the First Mortgage of The Western Pacific Railroad Company dated June 26, 1916, and the interest coupons appurtenant thereto;

(b) Class (3)—Debtor's secured promissory notes issued to A. C. James Co., dated March 28, 1932, and May 31, 1932, respectively, bearing interest at the rate of 5% per annum and due March 28, 1935, and May 31, 1935 (respectively, together with the accrued and unpaid interest thereon;

(c) Class (4)—Debtor's secured promissory notes to Reconstruction Finance Corporation, dated March 1, 1932, June 29, 1932, August 1, 1932, August 30, 1932, and March 25, 1933, respectively bearing interest at the rate of 6% per annum, and due March 1, 1935, June 29, 1935, August 1, 1935, August 30, 1935, and March 25, 1936, respectively, together with accrued and unpaid interest thereon:

(d) Class (5)—Debtor's secured promissory notes to The Railroad Credit Corporation, dated June 29, 1932, and March 25, 1933, respectively, bearing interest at the rate provided for in the Marshalling and Distributing Plan, 1931, of The Railroad Credit Corporation, each note payable on demand, together with accrued and unpaid interest thereon.

Plaintiff's Exhibit No. 8—(Continued)

Sixth: T. M. Schumacher and Sidney M. Ehrman, Trustees of the Debtor, be, and they are hereby directed to send a certified copy of this Order and a certified copy of the opinion of this Court filed herein on August 15, 1940, to the Interstate Commerce Commission for use in submitting said Plan of Reorganization hereby approved to the holders of said claims and interests found to be entitled to vote thereon.

Dated: August 15, 1940.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Feb. 1, 1949.

PLAINTIFF'S EXHIBIT NO. 10

In the District Court of the United States for the Northern District of California, Southern Division

No. 26591-S

In Proceedings for the Reorganization of a Railroad

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER CONFIRMING PLAN OF REORGANIZATION

These proceedings coming on for further hearing pursuant to the order of this Court entered herein on September 22, 1943, and upon the notice provided to be given by said order, for the purpose of determining whether or not the plan of reorganization heretofore approved by the order of this Court entered herein on August 15, 1940, shall be confirmed, and this Court having considered the record in these proceedings and having heard all parties in interest desiring to be heard in support of or in opposition to the confirmation of said plan of reorganization and being fully advised in the premises,

The Court Finds:

1. Due notice of said hearing has been given

Plaintiff's Exhibit No. 10—(Continued)

in accordance with said order of this Court entered herein on September 22, 1943.

2. This Court has jurisdiction of the subject matter of these proceedings and of all of the parties in interest.

3. On July 15, 1943, in conformity with subsection (e) of Section 77 of the Bankruptcy Act, as amended, said plan of reorganization was duly submitted by the Interstate Commerce Commission for acceptance or rejection to the creditors of Classes 1, 3, 4 and 5. In view of the findings of the Interstate Commerce Commission contained in its order dated June 21, 1939, in Finance Docket No. 10913, and the findings of this Court contained in said order entered herein on August 15, 1940, submission of said plan of reorganization to any other class of creditors or to any class of stockholders is not necessary under subsection (e) of Section 77 of the Bankruptcy Act, as amended.

4. On September 15, 1943, the Interstate Commerce Commission duly filed herein its certificate dated September 4, 1943, in which it duly certified to the Judge of this Court the results of said submission.

5. Said plan of reorganization has been duly accepted by or on behalf of creditors of each class to which submission is required under subsection (e) of Section 77 of the Bankruptcy Act, as

Plaintiff's Exhibit No. 10—(Continued)

amended, holding more than two thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan of reorganization, submission of said plan of reorganization to any class of stockholders not being required under said subsection (e), and such acceptances have not been made or procured by any means forbidden by law.

6. The United States is not a creditor of the Debtor on claims for taxes or customs duties, unless it be on claims for the payment of which said plan of reorganization duly provides.

7. All requirements for the confirmation of said plan of reorganization pursuant to Section 77 of the Bankruptcy Act, as amended, have been duly complied with, and said plan of reorganization should be confirmed.

8. This Court has this day filed herein an opinion containing a statement of the Court's conclusions and reasons for confirming said plan of reorganization.

9. Article R of said plan of reorganization, among other things, provides:

"The plan shall be carried out under the supervision of a reorganization committee consisting of three persons, all to be approved by the court, who shall be designated, one by the bondholders committee, one by the Reconstruction Finance Corporation,

Plaintiff's Exhibit No. 10—(Continued)

and one by the Railroad Credit Corporation and the A. C. James Company jointly."

In conformity with said Article R, Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson have been duly designated for membership on said reorganization committee, said Frederick H. Ecker having been designated by Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Committee representing a Group of Institutional Holders of the First Mortgage Bonds of the Debtor, said Frank C. Wright having been designated by Reconstruction Finance Corporation, and said Robert E. Coulson having been designated by The Railroad Credit Corporation and A. C. James Co. jointly. This Court is satisfied that said Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson should be approved as members of said reorganization committee.

Wherefore, It Is Ordered:

First: Said plan of reorganization heretofore approved by the order of this Court entered herein on August 15, 1940, is hereby confirmed.

Second: The designation of Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson as members of the reorganization committee provided for in Article R of said plan of reorganization is hereby approved. Said reorganization committee shall have the powers of and authority provided for in said plan of reorganization and shall have full

Plaintiff's Exhibit No. 10—(Continued)

power and authority, under and subject to the supervision and control of this Court, to put into effect and carry out said plan of reorganization and the orders of this Court relative thereto, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. This Court hereby reserves the power, subject to the provisions of Section 77 of the Bankruptcy Act, as amended, and said plan of reorganization, further to define, extend, amend, or otherwise change the powers and duties of said reorganization committee and to enter orders approving or disapproving any action on their part. As provided in Article B of said plan of reorganization, the members of said reorganization committee shall not be liable for any action taken by them in good faith or by any person employed by them in good faith, except for their respective individual malfeasance or willful neglect. To the extent necessary to give effect to the provisions of this paragraph, the members of said reorganization committee shall be indemnified and held harmless against any loss or expense, by the Trustees of the properties of the Debtor until the properties of the Debtor shall have been surrendered by said Trustees and thereafter by the Debtor or such other corporation as may acquire said properties pursuant to said plan of reorganization.

Third: Jurisdiction of these proceedings and of all parties in interest is hereby retained for the pur-

Plaintiff's Exhibit No. 10—(Continued)

pose of entering such other and further orders as this Court may determine to be necessary.

Fourth: As used in this order, the term "parties in interest" shall include the Debtor, all parties to these proceedings, all indenture trustees, and all creditors and stockholders of the Debtor.

Dated: October 11, 1943.

/s/ A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Feb. 1, 1949.

PLAINTIFF'S EXHIBIT NO. 11

Agreement by and Between

The Western Pacific Railroad Corporation,

The Chase National Bank of The City of New York,

Central Hanover Bank & Trust Company,

James Foundation of New York, Inc., and

Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, As the Reorganization Committee of The Western Pacific Railroad Company.

Dated November 22, 1943.

Agreement by and between The Western Pacific Railroad Corporation, a Delaware Corporation, hereinafter called the "Holding Company," The Chase National Bank of the City of New York,

Plaintiff's Exhibit No. 11—(Continued)

Central Hanover Bank & Trust Company and James Foundation of New York, Inc., hereinafter called collectively the "Secured Creditors," and Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, hereinafter called collectively the "Reorganization Committee,"

Witnesseth:

The Subject Matter of the Agreement

The Holding Company is indebted to each of the Secured Creditors for money loaned upon a promissory note or promissory notes now in default, against each of which notes certain securities were delivered as collateral by the Holding Company. The aggregate of the indebtedness of the Holding Company to all the Secured Creditors for principal and interest, as of September 30, 1948, is $10,547,423.85 which is approximately $5,650,863.00 in excess of the then market value (approximately $4,896,560.00), of all the collateral then held by the Secured Creditors. Annexed hereto and designated as Schedules A, B and C, respectively, are statements as to the aforesaid indebtedness of the Holding Company to each of the Secured Creditors and the collateral now or heretofore held by the Secured Creditors as security therefor.

The Holding Company desires to secure the release and discharge of its aforesaid indebtedness to each Secured Creditor, principal and interest, in

Plaintiff's Exhibit No. 11—(Continued)

so far as such indebtedness cannot be satisfied by the collateral held by such Secured Creditor (not including as part of such collateral the preferred and common stock of the Railroad Company hereinafter mentioned); and the Secured Creditors severally desire to apply such collateral in satisfaction of the indebtedness, and to secure the release by the Holding Company of any claims it may have arising out of the previous disposition by them of collateral.

The Holding Company owns all of the outstanding preferred and common stock of The Western Pacific Railroad Company, a California corporation (hereinafter called the "Railroad Company"). The Railroad Company is now in reorganization under Section 77 of the Bankruptcy Act, and the plan of reorganization thereof, approved by the Interstate Commerce Commission by its order of June 21, 1939 (hereinafter called the "Plan"), was duly confirmed by order of the United States District Court, Northern District of California, Southern Division, on October 11, 1943. Said preferred and common stock of the Railroad Company was declared to be without equity or value by an express finding of the Interstate Commerce Commission in its said order of June 21, 1939, which finding was duly adopted by the aforesaid Court, and under the Plan said stock is required to be cancelled. The certificates representing said preferred and common stock of the Railroad Company are in the possession

Plaintiff's Exhibit No. 11—(Continued)

of The Chase National Bank of the City of New York, which claims a lien thereon.

Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson are the members of the Reorganization Committee of the Railroad Company, constituted pursuant to subdivision R of the Plan, and approved as such Reorganization Committee by order of the United States District Court, Northern District of California, Southern Division, on October 11, 1943.

Subject to the jurisdiction of the aforesaid Court, the Reorganization Committee is under the duty of determining the method of carrying out the Plan under the supervision of the Committee. Action by the holders of the preferred and common stock of the Railroad Company may become necessary with respect to the various corporate steps incident to carrying out the Plan and making the same effective. The Reorganization Committee is desirous and the Holding Company is willing that the aforesaid stock of the Railroad Company be held at the disposal of the Reorganization Committee for the purpose of carrying out the Plan and making the same effective and that in connection therewith the Holding Company, as the sole stockholder of the Railroad Company, take such action as the Reorganization Committee may from time to time request.

Plaintiff's Exhibit No. 11—(Continued)

Agreements

I.

The Holding Company agrees to assign, set over and transfer to each of the Secured Creditors, severally and respectively, the securities pledged to such Secured Creditor and still held by it as shown by the statement as to the indebtedness to such Secured Creditor annexed hereto (Schedule A, B or C, as the case may be), and the Holding Company also agrees to release to each Secured Creditor, all rights and interests which the Holding Company has, or might claim to have in and to said collateral, including any rights or interests which the Holding Company has or might claim with respect to collateral heretofore sold by such Secured Creditor as shown by the aforesaid statement. Each Secured Creditor agrees to assume such Federal and State stamp taxes, if any, as may be payable with respect to said transfer to it of pledged securities.

Each Secured Creditor agrees to cancel and surrender to the Holding Company the collateral notes held by such Secured Creditor and more specifically described in the statement as to the indebtedness to such Secured Creditor annexed hereto (Schedule A, B or C, as the case may be), and to release and discharge the indebtedness represented by said notes, principal and interest, in full.

Each Secured Creditor consents to the assignment or transfer to the other Secured Creditors and each of them, of the securities to be transferred by the

Plaintiff's Exhibit No. 11—(Continued)

Holding Company to such Secured Creditors, pursuant hereto, and waives any inequalites in connection with the satisfaction of the indebtedness of the Holding Company to the Secured Creditors, respectively, that may result from the carrying out of this agreement.

.The agreements herein contained on the part of the Secured Creditors to be performd are several and none of the Secured Creditors shall be liable for the performance by the other Secured Creditors of their respective agreements; nor shall any partnership or joint relationship between said Secured Creditors be construed to flow from the execution of this instrument.

II.

The Holding Company, as the owner of all the outstanding preferred and common stock of the Railroad Company, agrees to cooperate with the Reorganization Committee in carrying out the Plan and making the same effective by whatever method, in conformity with the Plan, the Reorganization Committee may determine upon, and (in furtherance of this general commitment and not in limitation thereof) the Holding Company particularly agrees that (a) upon written request of the Reorganiztaion Committee, the Holding Company will assign, transfer and deliver or cause to be assigned, transferred or delivered to the Reorganization Committee or the nominee or nominees of the Reorganization Committee, all of the preferred and

Plaintiff's Exhibit No. 11—(Continued)

common stock of the Railroad Company, if the aforesaid United States District Court shall determine such assignment and transfer to be necessary or desirable for the purpose of carrying out the Plan or making the same effective; provided, however, that if any Federal or State stock transfer taxes shall lawfully be applicable to such transfer, provision for the payment of such taxes shall be made by the Reorganization Committee and the Holding Company shall not be obligated for the payment thereof; and (b) from time to time until the preferred and common stock of the Railroad Company has been transferred, as aforesaid, or, if no such transfer be made, until such stock is surrendered for cancellation in accordence with the Plan, the Holding Company, upon written request of the Reorganization Committee, will take such action as the owner of the aforesaid stock of the Railroad Company (whether by voting said stock at meetings of stockholders of the Railroad Company or by the execution and delivery of appropriate authorizations, consents or other written instruments) as may be necessary to authorize such corporate action by the Railroad Company (including, without limitation thereto, the amendment of its Articles of Incorporation and By-Laws and the execution and delivery of the mortgages provided for in the Plan), as the Reorganization Committee may deem necessary or convenient for the purpose of carrying out the Plan and making the same effective.

Plaintiff's Exhibit No. 11—(Continued)

Any action taken by the Holding Company, as the owner of the preferred and common stock of the Railroad Company, pursuant to the agreement in this paragraph contained, and the making of any provision by the Reorganization Committee as to the payment of Federal and State stock transfer taxes, if any such taxes shall lawfully be applicable to the above mentioned transfer, are subject to the approval of the United States District Court, Northern District of California, Southern Division, in the proceeding pending in that Court for the reorganization of The Western Pacific Railroad Company (No. 26591-S).

If the finding of the Interstate Commerce Commission that the preferred and common stock of the Railroad Company is without equity or value shall be annulled, set aside or reversed, whether by Act of Congress or otherwise, or if, for any reason, the Plan shall not be carried out, then the Holding Company and each of the Secured Creditors shall be entitled to be restored to the same rights, claims and privileges with respect to such preferred and common stock as existed immediately preceding the execution of this agreement, and this agreement shall not be deemed to affect or prejudice any such rights, claims or privileges and the physical possession of the certificates for said preferred and common stock (provided said certificates shall not theretofore have been surrendered to the reorganized company or its agent for actual cancella-

Plaintiff's Exhibit No. 11—(Continued)

tion) shall be returned to The Chase National Bank of the City of New York.

Each of the Secured Creditors hereby consents to the making by the Holding Company of the agreements set forth in this Article II and to any action taken by the Holding Company in conformity therewith; and The Chase National Bank of the City of New York agrees to release and deliver over the certificates representing the preferred and common stock of the Railroad Company now in its possession to the Holding Company when delivery of the same becomes necessary or appropriate to carry out said agreements.

III.

The agreements hereinabove contained shall not be effective until the agreements by the Holding Company, as owner of the outstanding preferred and common stock of the Railroad Company, in Article II hereof shall be approved by the requisite vote of the stockholders of the Holding Company, pursuant to the provisions of its Certificate of Incorporation and By-Laws; provided, however, that the Holding Company agrees to take such action immediately as may be necessary or appropriate to secure the requisite approval by vote of its stockholders. Performance of the agreements contained in Article I hereof shall be rendered by the Holding Company and each Secured Creditor, respectively, immediately upon such approval by vote of the stockholders of the Holding Company.

In Witness Whereof, each of the parties hereto

Plaintiff's Exhibit No. 11—(Continued)

has executed this agreement as of the 22nd day of November, 1943.

THE WESTERN PACIFIC
RAILROAD CORPORATION,

By M. J. CURRY,
President.

[Corporate Seal]

Attest:

JOHN F. WIENKEN,
Secretary.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

By W. ARTHUR GROTZ,
Second Vice Pres.

[Corporate Seal]

Attest:

WM. MOHRMANN.
A. C.

CENTRAL HANOVER BANK
& TRUST COMPANY,

By R. G. COOMBE,
Vice-Pres.

[Corporate Seal]

Attest:

C. R PARKER, JR.,
Ass't. Sec.

Plaintiff's Exhibit No. 11—(Continued)

JAMES FOUNDATION OF
NEW YORK, INC.,

By WILLIAM W. CARMAN,
President.

[Corporate Seal]

Attest:

CHARLES E. ANDREWS,
Asst. Secy.

REORGANIZATION COMMITTEE OF THE WESTERN PACIFIC RAILROAD COMPANY,

F. H. ECKER.

FRANK C. WRIGHT,

ROBERT E. COULSON.

Plaintiff's Exhibit No. 11—(Continued)

State of New York,
County of New York—ss.

On this 24th day of November, 1943, before me personally came M. J. Curry, to me known, who being by me duly sworn, did depose and say that he resides in New Rochelle, N. Y.; that he is President of The Western Pacific Railroad Corporation, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of the said corporation, and that he signed his name thereto by like authority.

[Notarial Seal]

/s/ MARY C. VALOUCH,
Notary Public,
Westchester County.

Commission expires March 30, 1945.

State of New York,
County of New York—ss.

On this 24th day of November, 1943, before me personally came W. Arthur Grotz, to me known, who being by me duly sworn, did depose and say that he resides in Ridgewood, N. J.; that he is 2nd

Plaintiff's Exhibit No. 11—(Continued)

Vice Pres. of The Chase National Bank of the City of New York, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said corporation, that the seal affixed to the said instrument is such corporate seal that it was so affixed by authority of the Board of Directors of the said corporation, and that he signed his name thereto by like authority.

[Notarial Seal]

/s/ HENRY P. SCHOERRY,

Notary Public,

Nassau County.

Commission expires March 30, 1944.

State of New York,
County of New York—ss.

On this 24th day of November, 1943, before me personally came R. G. Coombe, to me known, who being by me duly sworn, did depose and say that he resides in Greenwich, Conn.; that he is Vice Pres. of Central Hanover Bank & Trust Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of the Board of

Plaintiff's Exhibit No. 11—(Continued)

Directors of the said corporation, and that he signed his name thereto by like authority.

[Notarial Seal]

/s/ DAVID McPHERSON,
Westchester Co. Notary.

Commission expires March 30, 1945.

State of New York,
County of New York—ss.

On this 24th day of November, 1943, before me personally came William W. Carman, to me known, who being by me duly sworn, did depose and say that he resides in Summit, N. J.; that he is President of James Foundation of New York, Inc., one of the corporations described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of the Trustees of the said corporation, and that he signed his name thereto by like authority.

[Notarial Seal]

/s/ JAMES YUILLE,
Notary Public,
Westchester County.

Commission expires March 30, 1945.

Plaintiff's Exhibit No. 11—(Continued)

State of New York,

County of New York—ss.

On this 23rd day of November, 1943, before me personally came Frederick H. Ecker, to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same as a member and by the authority of the Reorganization Committee of The Western Pacific Railroad Company.

[Notarial Seal]

/s/ ALBERT V. ZIELFELDT,

Notary Public,

Bronx County.

Commission expires March 30, 1945.

State of New York,

County of New York—ss.

On this 24th day of November, 1943, before me personally came Frank C. Wright, to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same as a member and by the authority of the Reorganization

Plaintiff's Exhibit No. 11—(Continued)

Committee of The Western Pacific Railroad Company.

[Notarial Seal]

/s/ DORIS C. THOMAS,

Notary Public, Queens Co.

Commission expires March 30, 1945.

State of New York,

County of New York—ss.

On this 23rd day of November, 1943, before me personally came Robert E. Coulson, to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same as a member and by the authority of the Reorganization Committee of The Western Pacific Railroad Company.

[Notarial Seal]

/s/ BEATRICE C. CUNNINGHAM,

Notary Public,

New York County.

Commission expires March 30, 1944.

Plaintiff's Exhibit No. 11—(Continued)

Schedule A

Collateral Notes Bearing Interest at 5% Per Annum, Executed and Delivered by The Western Pacific Railroad Corporation to The Chase National Bank of the City of New York

Collateral Notes bearing interest at 5% per annum, executed and delivered by The Western Pacific Railroad Corporation to The Chase National Bank of the City of New York:

Date	Amount	Status as of Sept. 30, 1943
May 31, 1932	$4,186,000.00	$1,715,689.36
Dec. 8, 1941	4,521.00	4,521.00
Feb. 9, 1942	7,190.20	7,190.20
Mar. 10, 1943	1,642.16	1,642.16
Total principal indebtedness	$4,199,353.36	$1,729,042.72
Accrued and unpaid interest to September 30, 1943		1,991,179.90
Additional indebtedness for advances during 1943		1,546.35
Total indebtedness, principal and interest, as of September 30, 1943		$3,721,768.97

Collateral held by The Chase National Bank of the City of New York, on September 30, 1943, as security for said collateral notes:

	Face Amount	Approximate Market Value as of Sept. 30, 1943
The Denver and Rio Grande Western Railroad Company, General Mortgage Sinking Fund, 5% Gold Bonds, due 1955	$2,792,000.00	$ 153,560.00
The Denver and Rio Grande Western Railroad Company, Refunding and Improvement Mortgage, 6% Gold Bonds, Series A, due 1974	800,000.00	*320,000.00
	$3,592,000.00	$ 473,560.00

* Not traded. Estimated by comparison with other bonds of the same Company which receive comparable treatment under the Plan of Reorganization of that Company.

Plaintiff's Exhibit No. 11—(Continued)

Schedule A—(Continued)

Securities sold by The Chase National Bank of the City of New York, prior to September 30, 1943, pursuant to the terms of the aforementioned collateral notes:	Face Amount	
The Western Pacific Railroad Company, First Mortgage, 5% Gold Bonds, Series A, due 1946	$4,464,000.00	Sold prior to Sept. 30, 1943
The Denver and Rio Grande Western Railroad Company, General Mortgage Sinking Fund, 5% Gold Bonds, due 1955	959,875.00	"
The Denver and Rio Grande Western Railroad Company, 6% Cumulative Preferred Stock $100 par value	2,070,000.00	"
	$7,493,875.00	

Schedule B

Statement of Indebtedness of The Western Pacific Railroad Corporation to Central Hanover Bank & Trust Company and of Collateral Previously Held by Central Hanover Bank & Trust Company

Collateral Notes executed and delivered by The Western Pacific Railroad Corporation to Central Hanover Bank & Trust Company:	Principal Amount	Status as of Sept. 30, 1943
Note, dated May 25, 1932, at 5% on $675,000 from January 31, 1934 to January 31, 1935, and on $635,000 from January 31, 1935 to February 1, 1935, and at 4½% on $635,000 from February 1, 1935 to January 31, 1942, at 4½% on $623,751.14 from January 31, 1942, payable on demand	$ 623,751.14	Principal paid by application of Proceeds of sale of collateral
Note, dated Dec. 1, 1941 at 4½%, payable on demand	671.00	"
Note, dated Jan. 30, 1942 at 4½%, payable on demand	1,067.16	"
Total Principal	$ 625,489.30	

Plaintiff's Exhibit No. 11—(Continued)
Schedule B—(Continued)

Collateral sold by Central Hanover Bank & Trust Company prior to Sept. 30, 1943:

	Face Amount	
The Western Pacific Railroad Company, First Mortgage, 5% Gold Bonds, Series A, due 1946	$1,242,000.00	Sold prior to Sept. 30, 1943
The Rio Grande Western Railway Company, First Consolidated Mortgage, 4% Gold Bonds, due 1949	364,000.00	"
The Denver & Rio Grande Railroad Company, First Consolidated Mortgage, 4% Gold Bonds, due 1936	10,000.00	"
Total	$1,616,000.00	

Summary

Total net proceeds from sale of collateral	$ 726,484.03	
Total principal amount of notes	625,489.30	
Balance	$ 100,994.73	
Accrued unpaid interest as of March 24, 1943	$ 269,151.03	
Balance of proceeds from sale of collateral applied to accrued unpaid interest	100,994.73	
Balance accrued unpaid interest, September 30, 1943		$168,156.30

Plaintiff's Exhibit No. 11—(Continued)

Schedule C

Statement of Indebtedness of The Western Pacific Railroad Corporation to James Foundation of New York, Inc. and of Collateral Held by James Foundation of New York, Inc. as Security Therefor, As of September 30, 1943

Collateral notes bearing interest at 5% per annum, executed and delivered by The Western Pacific Railroad Corporation to Curtiss Southwestern Company, a Delaware Corporation, in 1931 and 1932, duly assigned and transferred by Curtiss Southwestern Company to the Estate of Arthur Curtiss James and by the Estate of Arthur Curtiss James to James Foundation of New York, Inc.:		
Date	Amount	Status as of Sept. 30, 1943
July 1, 1931	$1,475,000.00	$1,475,000.00
July 27, 1931	920,000.00	920,000.00
Aug. 28, 1931	1,100,000.00	1,100,000.00
Nov. 25, 1931	880,000.00	880,000.00
Jan. 25, 1932	103,850.00	103,850.00
Total principal indebtedness	$4,478,850.00	$4,478,850.00
Accrued and unpaid interest to September 30, 1943		2,156,193.94
Additional indebtedness for advances during 1940, 1941 and 1942		22,454.64
Total indebtedness, principal and interest, as of September 30, 1943		$6,657,498.58
Collateral held by James Foundation of New York, Inc., on September 30, 1943, as security for said collateral notes:	Face Amount	Approximate Market Value as of Sept. 30, 1943
The Western Pacific Railroad Company First Mortgage, 5% Gold Bonds, Series A, due 1946	$5,980,000.00	$4,186,000.00
The Denver and Rio Grande Western Railroad Company, Refunding and Improvement Mortgage, 6% Bonds, Series A, due 1974	200,000.00	*80,000.00
The Western Realty Company, Common Stock, 3,065 shares, par value	300,500.00	**157,000.00
	$6,480,500.00	$4,423,000.00

* Not traded. Estimated by comparison with other bonds of the same Company which receive comparable treatment under the Plan of Reorganization of that Company.
** Appraised value as of February 15, 1943.

[Endorsed]: Filed Feb. 1, 1949.

PLAINTIFF'S EXHIBIT No. 12

Filed August 23, 1944.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

The Western Pacific Railroad Company,

Debtor.

PETITION OF REORGANIZATION COMMITTEE FOR AN ORDER APPROVING USE OF THE DEBTOR COMPANY IN CARRYING OUT AND MAKING EFFECTIVE THE PLAN, APPROVING PROPOSED AMENDMENTS TO THE ARTICLES OF INCORPORATION AND PROPOSED NEW BY-LAWS OF DEBTOR COMPANY AND APPROVING FORMS OF PREFERRED AND COMMON STOCK CERTIFICATES AND DIRECTING ACTION WITH RESPECT THERETO

Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, being all the members of the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, hereby represent to the Court and petition as follows:

1. The plan of reorganization of the debtor (hereinafter called "the plan"), confirmed by order of

Plaintiff's Exhibit No. 12—(Continued)

this Court on October 11, 1943, provides in subdivision R that "The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company or by transferring said properties to a new corporation organized for the purpose," and "The method of carrying out the plan shall be determined by the reorganization committee in its discretion," subject to the approval of the Court. Under subdivision R of the plan your petitioners are empowered also to determine, subject to the approval of the Court, the form and, except as otherwise provided in the plan, the provisions of the charter, by-laws and stock certificates of the reorganized company.

2. The debtor company, The Western Pacific Railroad Company, is a corporation already organized and existing under the laws of the State of California, and has certain rights, privileges and franchises in the states of California, Nevada and Utah, and has the record title to the railroad facilities and properties involved in the bankruptcy proceeding; and the use of the debtor company in carrying out the plan will result in substantial economies and will otherwise facilitate the reorganization. After considering all factors, your petitioners have determined, acting on advice of counsel, that the debtor company should be used in carrying out the plan and that a new corporation should not be organized.

3. Pursuant to the petition of the Reorganization Committee filed herein December 1, 1943, the

Plaintiff's Exhibit No. 12—(Continued)

Court on December 17, 1943, entered an order authorizing and directing transfer of the preferred and common stock of the debtor company to the Reorganization Committee, at a time and place to be fixed in the discretion of the Committee by its request in writing to The Western Pacfic Railroad Corporation, a Delaware corporation which previously owned such stock, and approving action of the Committee in connection with a certain agreement for securing control of such stock. The transfer by The Western Pacific Railroad Corporation of the preferred and common stock of the debtor company was duly approved by the requisite vote of the stockholders of The Western Pacific Railroad Corporation, pursuant to the provisions of its Certificate of Incorporation and By-laws on April 20, 1944. Thereafter, on the first day of May, 1944, your petitioners, pursuant to said order of December 17, 1943, made request of The Western Pacific Railroad Corporation for the transfer of said stock in accordance with the authorizaton of its stockholders and on the same date said stock was duly transferred to your petitioners. Said transfer has been made of record on the books of the debtor company, except as to directors' qualifying shares, certificates for which, duly endorsed in blank, are held by the Reorganization Committee, by the issuance of new preferred and common stock certificates to your petitioners.

4. In order that the debtor company may be used in carrying out and making effective the plan, it

Plaintiff's Exhibit No. 12—(Continued)

will be necessary to amend its Articles of Incorporation and to adopt new By-laws to provide for the new preferred and common stock authorized under the plan and for other changes required by said plan. Your petitioners, subject to the approval of the Court, have approved a proposed Certificate of Amendment of the Articles of Incorporation of the debtor company and proposed new By-laws of the debtor company. Copies of said proposed Certificate of Amendment and By-laws in typewritten form are annexed hereto as Exhibits "A" and "B", and are hereby submitted to the Court for approval as to substance and, also, as to form, subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable.

5. Your petitioners, subject to the approval of the Court, have also approved in draft form the face of a proposed certificate for shares of the Preferred Stock, Series A, provided under the plan, and the face of a proposed certificate for shares of the Common Stock, likewise so provided, copies of which are annexed hereto as Exhibts "C" and "D," respectively, and are hereby submitted to the Court for approval as to substance and general form. Your petitioners have also approved the reproduction, on the reverse side of each of said stock certificates, of the full text of Article VII of the Articles of Incorporation of the debtor company, after amendment, as shown in the proposed Certificate of Amendment; Exhibit "A", annexed hereto. Inasmuch as the re-

Plaintiff's Exhibit No. 12—(Continued)

verse side of each of said stock certificates will include only the usual form of assignment and the text of said Article VII, which is subject to the approval of the Court as a part of said Exhibit "A"; it is deemed unnecessary to submit the forms of the reverse sides of said certificates in draft form.

6. Your petitioners propose, in the event the Court approves the exhibits hereto annexed, to take appropriate action, as the record holders of the present preferred and common stock of the debtor company for the adoption of the proposed By-laws for the debtor company and the proposed amendment to its Articles of Incorporation and to arrange for the preparation of new preferred and common stock certificates, in temporary form, if your petitioners shall determine this to be necessary or advisable, and in permanent engraved form. Your petitioners also propose to request the then directors of the debtor company to take such appropriate action as is required of directors in connection with the adoption of said amendments. It is proposed that the adoption of said amendments to the Articles of Incorporation shall be subject to the further order of the Court as to the time of the filing of the Certificate of Amendment with the Secretary of State of California which will be required in order to make the amendments completely effective.

Wherefore, your petitioners pray for the order of this Court:

(a) Approving the determination of your petitioners that the existing debtor company, The West-

Plaintiff's Exhibit No. 12—(Continued)

ern Pacific Railroad Company, be used in carrying out and making effective the plan of reorganization;

(b) Approving the proposed Certificate of Amendment of the Articles of Incorporation of the debtor company, a copy of which in typewritten form is attached hereto as Exhibit "A", as to substance and, also, as to form, subject to such minor changes as the Reorganization Committee, upon advise of counsel, may deem advisable;

(c) Approving the proposed By-laws for the debtor company, a copy of which in typewritten form is attached hereto as "Exhibit B", as to substance and, also, as to form, subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

(d) Approving the substance and the general form of the proposed face of the certificate for shares of Preferred Stock, Series A, which is attached hereto as "Exhibit C";

(e) Approving the substance and the general form of the proposed face of the certificate for shares of common stock, which is attached hereto as "Exhibit D";

(f) Authorizing and directing petitioners, as the Reorganization Committee of the debtor company and as stockholders of record of the debtor company, to take or cause to be taken such action as may be necessary or appropriate for the adoption of said proposed amendments to the Articles of Incorporation and said proposed By-laws of the debtor com-

Plaintiff's Exhibit No. 12—(Continued)

pany, and for the preparation of complete certificates as described herein for the preferred and common stock contemplated under the plan of reorganization, in temporary form if the petitioners shall determine this to be necessary or advisable, and in permanent form;

(g) Authorizing the directors of the debtor company then in office to take such action, as and when requested by the Reorganization Committee, as may be necessary and appropriate in connection with the adoption of said amendements to the Articles of Incorporation.

(h) Granting such other and further relief as may be proper in the premises.

Respectfully submitted,

WHITMAN, RANSOM,
COULSON & GOETZ

PILLSBURY, MADISON
& SUTRO

Counsel for Petitioners.

[Verification omitted in printing]

[Endorsed]: Filed Feb. 1, 1949.

PLAINTIFF'S EXHIBIT No. 13

Filed Sept. 25th, 1944.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

The Western Pacific Railroad Company,

Debtor.

ORDER APPROVING USE OF THE DEBTOR COMPANY IN CARRYING OUT AND MAKING EFFECTIVE THE PLAN, APPROVING PROPOSED AMENDMENTS TO THE ARTICLES OF INCORPORATION AND PROPOSED NEW BY-LAWS OF DEBTOR COMPANY AND APPROVING FORMS OF PREFERRED AND COMMON STOCK CERTIFICATES AND DIRECTING ACTION WITH RESPECT THERETO

The petition filed August 23, 1944 by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, for an order approving the use of the debtor company in carrying out and making effective the plan, approving proposed amendments to the articles of incorporation and proposed new by-laws of the debtor company and approving forms of preferred and common stock certificates and di-

Plaintiff's Exhibit No. 13—(Continued)

recting action with respect thereto, duly came on to be heard and was heard on the 25th day of September, 1944, and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court, dated and filed August 23, 1944, and that all of the allegations and representations contained in the petition are true.

The Court further finds and concludes:

(a) That the corporate existence of the debtor and its authority to do business in the states of California, Nevada and Utah has been duly maintained and preserved and that the preferred and common stock of the debtor is held of record by the petitioners herein so as to make said company available for use as the reorganized company in carrying out and making effective the plan of reorganization;

(b) That the use of the debtor company as the reorganized company under the plan of reorganization, as determined and proposed by the petitioners herein, will result in substantial economies and otherwise facilitate the reorganization and should be approved;

(c) That the proposed Certificate of Amendment of the Articles of Incorporation of the debtor company and the amendments to said Articles contained therein are consistent with the plan of reorganization and appropriate for its purposes, and should be approved;

Plaintiff's Exhibit No. 13—(Continued)

(d) That the proposed new By-laws of the debtor company are consistent with the plan of reorganization and appropriate for its purposes, and should be approved;

(e) That the proposed forms of certificates for shares of new Preferred Stock, Series A, and shares of new common stock, as described in said petition, to which are attached as exhibits draft forms of the faces of said certificates, are consistent with the plan or reorganization and appropriate for its purposes, and should be approved; and

(f) That the action proposed to be taken by the petitioners herein, as the record holders of the stock of the debtor company and as the Reorganization Committee under the plan of reorganization, and by the directors of said company then in office, should be authorized.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

(1) That the use of the existing debtor company in carrying out and making effective the plan of reorganization, as determined and proposed by the petitioners herein, be and hereby is approved;

(2) That the Certificate of Amendment of the Articles of Incorporation of the debtor company and the amendments to said Articles contained

Plaintiff's Exhibit No. 13—(Continued)

therein, being Exhibit A attached to said petition, be and hereby are approved as to the substance and provisions thereof and as to form, subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

(3) That the By-laws for the debtor company, being Exhibit B attached to said petition, be and hereby are approved as to the substance and provisions thereof and as to form, subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

(4) That the form of certificate for shares of Preferred Stock, Series A, being the form described in said petition, the face of which in draft form was submitted therewith as Exhibit C, be and hereby is approved as to the substance and provisions thereof and as to general form, subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

(5) That the form of certificate for shares of common stock, being the form described in said petition, the face of which in draft form was submitted therewith as Exhibit D, be and hereby is approved as to the substance and provisions thereof and as to general form, subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

Plaintiff's Exhibit No. 13—(Continued)

(6) That the petitioners herein, as the Reorganization Committee under the plan of reorganization and the stockholders of record of the debtor company, be and hereby are authorized and directed to take or cause to be taken such action as may be necessary or appropriate for the adoption of the aforesaid amendments to the Articles of Incorporation and new By-laws of the debtor company and for the preparation of complete certificates as described in said petition for the preferred and common stock contemplated under the plan or reorganization, in temporary form if petitioners shall determine these to be necessary or advisable and in permanent form; and

(7) That the directors of the debtor company then in office be and hereby are authorized to take such action as and when requested by the petitioners herein as said Reorganization Committee, as may be necessary or appropriate in connection with the adoption of the aforesaid amendments to the Articles of Incorporation of the debtor company.

Dated, September 25, 1944.

A. F. St. SURE,
District Judge.

[Endorsed]: Filed Feb. 1, 1949.

PLAINTIFF'S EXHIBIT No. 14

[Plaintiff's Exhibit No. 14 is identical to Exhibits 1, "A", "B", "C", "D", "E", and "F" attached to the Answer and Counterclaim of Defendants Western Pacific Railroad Co., et. al. See printed pages 36 to 108 of Volume 1.]

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PLAINTIFF'S EXHIBIT No. 15

Whereas, heretofore in a proceeding in the United States District Court for the Northern District of California, Southern Division, for the reorganization of a railroad under Section 77 of the Bankruptcy Act, as amended, entitled "In the Matter of The Western Pacific Railroad Company, Debtor", No. 26591-S, a Plan of Reorganization of The Western Pacific Railroad Company was approved and confirmed, and, pursuant to the provisions of said Plan of Reorganization, an order was entered on September 25, 1944, by said Court approving the use of the said debtor company, The Western Pacific Railroad Company, a corporation organized and existing under the laws of the State of California, as the reorganized company in carrying out said plan;

Whereas, the Interstate Commerce Commission, under date of October 24, 1944, in Docket #10913, made a report and order which, among other things, approved and authorized the assumption by said The Western Pacific Railroad Company of obligations and liabilities as provided in said plan;

Plaintiff's Exhibit No. 15—(Continued)

Whereas, pursuant to said Plan of Reorganization and to the order entered in said proceeding on November 27, 1944, T. M. Schumacher and Sidney M. Ehrman, as Trustees of the property of said The Western Pacific Railroad Company, duly appointed in said proceeding (hereinafter called the "Trustees"), have, by deed dated December 9th, 1944, remised, released, transferred, conveyed and quitclaimed to the undersigned, said The Western Pacific Railroad Company, all of the property, real, personal and mixed, of every kind and nature, vested in, held, possessed, used or controlled by said Trustees;

Now, Therefore, pursuant to the provisions of said order entered November 27, 1944, and in consideration of the said release, transfer and conveyance by the Trustees, the undersigned The Western Pacific Railroad Company, for itself, its successors and assigns, makes this Agreement with said Trustees, for the benefit of said Trustees and of all other parties in interest in the above-entitled proceedings, under which agreement the undersigned does hereby:

1. Assume and agree to perform all contracts, leases and agreements made or entered into by the debtor in possession or by said Trustees and remaining in effect on December 31, 1944, and all contracts, leases and agreements of the debtor in effect on August 2, 1935, either assumed or not disaffirmed by said Trustees, which remain in effect on December 31, 1944, and expenses of reorganization allowed by

Plaintiff's Exhibit No. 15—(Continued)

the Court within the maximum fixed by the Interstate Commerce Commission;

2. Assume any and all outstanding current liabilities and obligations incurred by said Trustees and without limitation thereto, any and all liabilities or obligations of the debtor in possession or said Trustees with respect to claims for personal injury or death, for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business, including liabilities and obligations hereafter arising up to midnight December 31, 1944.

3. Without limitation of the generality of the foregoing agreements in paragraphs 1 and 2 hereof, specifically undertake to defend at its own sole cost and expense all suits and proceedings, of whatsoever character, now or hereafter instituted against the Trustees, or either of them, arising out of the possession, use or operation of the debtor's properties by the Trustees or of their conduct of the debtor's business, and to assume the conduct of all suits and proceedings, of whatsoever character, heretofore or hereafter brought by the Trustees in the discharge of their duties and responsibilities as such, and, generally, to indemnify the Trustees and save them harmless against all expense, liability, loss, judgments, claims and demands arising out of such suits

Plaintiff's Exhibit No. 15—(Continued)

or proceedings. It is the intent of the covenants in this paragraph 3 contained that The Western Pacific Railroad Company shall assume responsibility for all such suits and proceedings to which the Trustees, or either of them, are or shall become parties, to the same effect as if The Western Pacific Railroad Company instead of the Trustees had been party thereto in the first instance.

4. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to perform the obligations of the Trustees in respect of the following:

(a) $1,235,000 unpaid balance, principal amount of Three Per Cent. Equipment Trust Certificates, Series of 1937, issued February 1, 1937, under Agreement of same date between J. T. Harrigan and F. E. Egly, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(b) $1,855,000 unpaid balance, principal amount of One and Three Quarters Per Cent Equipment Trust Certificates, Series of 1941, issued August 1, 1941, under Agreement of same date, between M. J. Suydam and F. W. Walter, Vendors, with Central Hanover Bank and Trust Company, Trustee, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor.

(c) Conditional Sale Agreement, dated as of

Plaintiff's Exhibit No. 15—(Continued)

May 25, 1943, between Lima Locomotive Works, Incorporated, and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating ot the purchase on monthly installment plan of six steam freight locomotives.

(d) Conditional Sale Agreement, dated as of June 21, 1943, between Electro-Motive Division, General Motors Corporation and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of three 5400 H. P. diesel electric freight locomotives.

(e) Conditional Sale Agreement, dated as of June 1, 1944, between The Chase National Bank of the City of New York and T. M. Schumacher and Sidney M. Ehrman, Trustees of the Property of The Western Pacific Railroad Company, Debtor, relating to the purchase on monthly installment plan of six 5400 H. P. diesel electric freight locomotives.

5. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, specifically assume and agree to pay in cash the face amount of any and all outstanding first mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment; such coupons being those which the Court by orders of March 11, 1936 and March 20,

Plaintiff's Exhibit No. 15—(Continued)

1936, authorized The Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor:

6. Without limitation of the generality of the foregoing agreements in Paragraphs 1 and 2 above, assume the liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945, whether or not proof thereof was made in the said proceeding and without prejudice by reason of such proof not having been made.

This agreement shall become effective on December 29, 1944, at 12:01 A. M., Pacific War Time.

In Witness Whereof, the undersigned has caused this instrument to be executed in its behalf by its President and its corporate seal to be hereunto affixed this 14th day of December, 1944.

THE WESTERN PACIFIC
RAILROAD COMPANY,

[Corporate Seal] By CHARLES ELSEY,
President.

Attest:

C. L. DROIT,
Secretary.

[Endorsed]: Filed Feb. 1, 1949.

THE WESTERN PACIFIC RAILROAD CORPORATION
Schedule of Preferred and Common Stockholders of Record
September 11, 1935 -- September 16, 1947

Name	September 11, 1935	March 10, 1936	September 15, 1937	September 14, 1938	September 13, 1939	September 11, 1940	September 17, 194
Arthur Curtiss James	100 C	100 C	100 C	100 C	100 C	100 C	
Curtiss Southwestern Corporation	3,100 C 100 P	3,100 C 100 P	3,100 C 100 P	3,100 C 100 P	3,100 C 100 P	3,100 C 100 P	3,10
Curtiss Southwestern Company	40,000 C 30,000 P	40,000 C 30,000 P	40,000 C 30,000 P	40,000 C 30,000 P	40,000 C 30,000 P	40,000 C 30,000 P	40,0 30,0
A. C. James Co.							
H.W.Carman & W.S. Trust Co. Exrs.							
Estate of Arthur Curtiss James, Deceased							
James Foundation of New York, Inc.							
Directors and Officers							
Robert S. Brewster	100 C 100 P	100 C 100 P	100 C 100 P	100 C 100 P			
T. N. Schumacher	10 C	10 C	10 C	10 C	10 C	10 C	1
Arthur Curtiss James (see above)							
E. Hayward Ferry	10 C	10 C	10 C	10 C	10 C	10 C	1
William M. Kingsley	100 C	100 C	100 C	100 C	100 C	100 C	1
William W. Carman	100 P	100 P	100 P	100 P	10 C	10 C	1
M. J. Curry	10 C	10 C	10 C	10 C	10 C	10 C	1
Arthur W. Loasby	10 C	10 C					
Finley J. Shepard	10 C	10 C	10 C	10 C	10 C	10 C	1
Robert E. Coulson	10 C	10 C	10 C	10 C	10 C	10 C	
Alexander Berger	77 C 6267 P	67 C 6267 P	67 C 5267 P	67 C 5267 P	67 C 5267 P		
Willis D. Wood	100 C	100 C	100 C	100 C	100 C	100 C	1
J. K. Olyphant, Jr.			100 C	100 C	100 C	100 C	1
A. Perry Osborn			10 C	10 C	10 C	10 C	1
R. Marshall Price			10 C	10 C	10 C	10 C	1
John F. Wienken							
William W. Watton							
C. C. Sheehan							
M. C. Valcuch							
F. C. Nicodemus, Jr.							
H. Brun Campbell						19 C	
Total Outstanding, Preferred	381250	381250	381250	381250	381250	381250	3812
Total Outstanding, Common	574501	574501	574501	574501	574501	574501	5745

C = Common Shares
P = Preferred Shares

Source: Certified list of Common and Preferred Stockholders prepared by Transfer Agent of The Western Pacific Railroad Corporation for use at stockholders' meetings.

1077

Name	September 1, 1940	September 17, 1941	September 16, 1942	November 27, 1943	September 13, 1944	September 12, 1945	September 11, 1946	September 16, 1947
Arthur Curtiss James	100 C							
Curtiss Southwestern Corporation	3,100 C 100 P	3,100 C 100 P	3,100 C 100 P	3,100 C	3,100 C	3,100 C	3,100 C	3,100 C
Curtiss Southwestern Company	40,000 C 30,000 P	40,000 C 30,000 P	40,000 C 30,000 P	40,000 C 26,666 P	40,000 C 26,666 P	40,000 C 26,666 P	40,000 C 26,666 P	40,000 C 26,666 P
A. C. James Co.								
H.W.Carman & W.S. Trust Co. Exrs.								
Estate of Arthur Curtiss James, Deceased								
James Foundation of New York, Inc.								
Directors and Officers								
Robert S. Brewster								
T. N. Schumacher	10 C	10 C	10 C	10 C	10 C	10 C	10 C	10 C
Arthur Curtiss James (see above)								
E. Hayward Ferry	10 C	10 C	10 C	10 C				
William M. Kingsley	100 C	100 C	100 C	100 C	100 C	100 C	100 C	100 C
William W. Carman	10 C	10 C	10 C	10 C	10 C	10 C	10 C	10 C
M. J. Curry	10 C	10 C	10 C	10 C	10 C	10 C	10 C	10 C
Arthur W. Loasby								
Finley J. Shepard	10 C	10 C	10 C	10 C	10 C	10 C	10 C	10 C
Robert E. Coulson	10 C	10 C	10 C	10 C				
Alexander Berger								
Willis D. Wood	100 C	100 C	100 C	100 C	110 C	110 C	110 C	10 C
J. K. Olyphant, Jr.	100 C	100 C	100 C					
A. Perry Osborn	10 C	10 C	10 C	10 C	10 C	10 C	10 C	10 C
R. Marshall Price	10 C	10 C	10 C	10 C	10 C	10 C	10 C	10 C
John F. Wienken			10 P	10 C	10 C	10 C	10 C	10 C
William W. Watton				10 P	10 P	10 P	10 P	10 P
C. C. Sheehan					10 C	10 C	10 C	10 C
M. C. Valcuch						10 C	10 C	10 C
F. C. Nicodemus, Jr.								10 P
H. Brun Campbell	19 C	19 C	19 C	19 C	10 C			
Total Outstanding, Preferred	381250	381250	381250	381250	381250	381250	381250	381250
Total Outstanding, Common	574501	574501	574501	574501	574501	574501	574501	574501

U.S. DIST. CT. N.D. CAL.
No. 26508-G
Plf's EX. 17
FILED FEB 1 1949
C. W. CALBREATH, Clerk
By L.R. Chirgwin DEPUTY CLERK

Defendants
EXHIBIT 50
2/1 1948 E.C.

96

PLAINTIFF'S EXHIBIT No. 18

IIBIT No. 18

Securities of Western Pacific Railroad Company

Railroad Company

No. 1

Owned by	1935	1936	1937	1938	1939	1940	1941	1942	940	1941	1942	1943	1944	1945	1946	1947
					1st Mortgage 5% Bonds due 1946				ds due 1946							
Arthur Curtiss James	$148,000	$647,000	$2,284,000	$2,964,000	$3,000,000	$3,000,000			0,000							
Curtiss Southwestern Company	14,000	14,000	14,000	14,000	14,000	14,000			4,000							
Curtiss Southwestern Corporation					1,000,000	1,000,000	$1,000,000	$1,000,000	0,000	$1,000,000	$1,000,000					
A. C. James Co.						None										
Estate of Arthur Curtiss James							3,014,000	3,014,000		3,014,000	3,014,000					
James Foundation of New York Inc.												$2,880,000	$8,860,000	Exchanged for new securities 12/29/44		
					3 Year 5% Collateral Notes				ral Notes							
A. C. James Co.	$4,999,800	$4,999,800	$4,999,800	$4,999,800	$4,999,800	$4,999,800	$4,999,800	$4,999,800	9,800	$4,999,800	$4,999,800	$4,999,800	$4,999,800	Exchanged for new securities 12/29/44		
Collaterized by:—																
$6,249,500 W.P.R.R. Co. 5% Genl. & Ref. Bonds due 1957																
Less 2,000,000 Delivered to Railroad Credit Corpn. 3/24/33 on which A.C.J. Co. held second lien																
$4,249,500																
					4½% Income Mortgage (Convertible) Bonds due 2014				tible) Bonds due 2014							
James Foundation of New York Inc.														$3,544,000		
A. C. James Co.														163,680		
					5% Preferred Stock				Stock							
James Foundation of New York Inc.														$53,160	$55,727	$55,727
A. C. James Co.														2,567		
					Common Stock				ck							
James Foundation of New York Inc.														$41,376 1/5	$153,165 1/5	$153,165 1/5
A. C. James Co.														37,635		

[Endorsed]: Filed Feb. 1, 1949.

PLAINTIFF'S EXHIBIT No. 21

The Western Pacific Railroad Corporation

Schedule of Officers

August 1, 1935 to February 9, 1948

Name	8/1/35	1936	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947	2/9/48
T. M. Schumacher President	X	X	X	X	X	X	X	R-2/1/42						
M. J. Curry Secretary	X	X	X	X	X	X	X	R-2/1/42						
M. J. Curry Treasurer	X	X	X	X	X	X	X	X	X	X	X	X	X	X
M. J. Curry President								E-2/1/42	X	X	X	X	X	X
J. F. Wienken Secretary								E-2/1/42	X	X	R-5/1/45			
M. C. Valouch Vice-Pres.-Secretary											E-5/1/45	X	X	X

E—Elected

R—Resigned

[Endorsed]: Filed Feb. 1, 1949.

PLAINTIFF'S EXHIBIT No. 22

The Western Pacific Railroad Corporation
Schedule of Directors.
August 1, 1935 to February 9, 1948

Name	8/1/35	1936	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946	1947	2/9/48
R. S. Brewster	X	R-11/17/36												
T. M. Schumacher	X	X	X	X	X	X	X	X	X	X	X	X	X	X
A. C. James	X	X	X	X	R-12/31/39									
E. H. Ferry	X	R-10/6/36												
W. M. Kingsley	X	X	X	X	X	X	X	D-9/7/42						
W. W. Carman	X	X	X	X	X	X	X	R-2/1/42						
M. J. Curry	X	X	X	X	X	X	X	X	X	X	X	X	X	X
A. W. Loasby	X	D-11/24/36												
F. J. Shepard	X	X	X	X	X	X	X	D-8/22/42						
R. E. Coulson	X	X	X	X	X	X	X	R-2/6/42						
A. Berger	X	X	X	X	X	D-4/11/40								
W. D. Wood	X	X	X	X	X	X	X	X	X	X	X	X	X	X
J. K. Olyphant, Jr.			E-1/7/37	X	X	X	R-12/18/41							
A. P. Osborn			E-1/7/37	X	X	X	X	X	X	X	X	X	X	X
R. M. Price			E-1/7/37	X	X	X	D-4/7/41							
H. B. Campbell					E-7/5/40	X	X	X	X	X	R-5/1/45			
J. F. Wienken								E-4/29/42	X	X	X	R-4/25/46		
W. W. Hatton								E-9/23/42	X	X	X	X	X	X
C. C. Sheehan										E-2/15/44	X	R-10/10/46		
M. C. Valouch											E-5/1/45	X	X	X
F. C. Nicodemus, Jr.												E-10/10/46	X	X

E—Elected
R—Resigned
D—Deceased.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 23

The Western Pacific Railroad Corporation
Schedule of Payments Made to Officers, Counsel and Employees
August 1, 1935 to December 31, 1946

Name	Aug. 1, 1935-12/31/35	1936	1937	1938	1939	1940	1941	1942	1943	1944	1945	1946
T. M. Schumacher, President	$10,416.65	$25,000.00	$25,000.00	$25,000.00	$15,000.00	$15,000.00	$15,000.00					
M. J. Curry, President-Treasurer								$4,125.00	$1,875.00			
M. J. Curry, Secretary-Treasurer	2,250.00	5,400.00	5,400.00	5,400.00	3,300.00	3,300.00	3,300.00	275.00				
M. J. Curry—Expenses	225.68	531.08	433.47	353.92	378.28	366.21	216.13	7.85	47.96	$115.83	$ 78.19	$ 79.15
H. Brua Campbell, Counsel*	2,083.30	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	2,500.00	1,041.65			6,000.00
H. Brua Campbell, Counsel—exp.*											1,935.82	
John F. Wienken, Secretary								916.63	416.65			
John F. Wienken					87.50	525.00	525.00	43.75			250.00	
C. E. Andrews	1,083.30	2,600.00	2,600.00	2,600.00	741.84							
W. C. Mittelberg	937.50	2,250.00	2,250.00	2,250.00	920.00							
J. M. Pugh					358.17	750.00	750.00					
M. C. Valauch	312.50	750.00	810.00	810.00	340.00	340.00	340.00	340.00	141.65			
Lillian O'Neill					260.00	260.00	260.00	260.00	108.30			
C. C. Sheehan	250.00	600.00	660.00	660.00	240.00	240.00	240.00	240.00	100.00			
Thomas Keeley (D&RGW reorg.)						112.62						
Whitman, Ransom, Coulson & Goetz (tax matter)				1,335.96								
Sloss & Turner (WPRR reorg.)							431.35		62.20			
W. V. Hodges (D&RGW reorg.)									750.00	750.00		
Leroy Goodrich											428.40	3,000.00
Marshall, All, Carey & Doub												6,000.00

* Payments made to Pierce & Greer and F. C. Nicodemus, Jr. included in this item.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 24

The Western Pacific Railroad Corporation

Schedule of Payments Made to Pierce and Greer, or H. Brua Campbell

January 1, 1942 — December 31, 1945

	1942	
February	Services for January, 1942	$ 208.33
February	Services for February, 1942	208.33
March	Services for March, 1942	208.33
April	Services for April, 1942	208.33
May	Services for May, 1942	208.33
June	Services for June, 1942	208.33
July	Services for July, 1942	208.33
August	Services for August, 1942	208.33
September	Services for September, 1942	208.33
October	Services for October, 1942	208.33
November	Services for November, 1942	208.33
December	Services for December, 1942	208.33
	Total	$2,499.96
	1943	
January	Services for January, 1943	$ 208.33
October	Services for February–May 1943, incl.	833.33
		$1,041.66
	1944	
	None	
	1945	
August	Expenditures re: reorganization proceedings	$1,935.82

PLAINTIFF'S EXHIBIT No. 26

The Western Pacific Railroad Company

Ballot

(For straight voting)

Special Meeting of Stockholders, March 26, 1945.

The undersigned hereby vote(s) 134,738 shares of stock for the following-named persons to serve as directors until the annual meeting of stockholders:

Wakefield Baker	J. A. Folger
Edward H. Bell	Harry C. Hagerty
Edward G. Buckland	Charles B. Henderson
J. Reuben Clark, Jr.	J. W. Mailliard, Jr.
Robert E. Coulson	E. W. Mason
Charles Elsey	

Proxies filed

JAMES FOUNDATION OF NEW YORK, INC.,

A. C. JAMES CO.

By /s/ ROBERT E. COULSON

ROBERT E. COULSON

Proxy or Proxies.

Note: If a stockholder votes personally, his signature must be placed on the first line. If the ballot is cast by proxy or proxies, the name of the stockholder must be signed on the first line and the name(s) of the proxy or proxies on the next line or lines. If several stockholders are represented by proxy or proxies, such proxy or proxies may write

"Proxies filed" on the first line and sign on the next line or lines.

The Western Pacific Railroad Company

Ballot

(For straight voting)

Annual Meeting of Stockholders, June 27, 1945.

The undersigned hereby vote(s) 134,738 shares of stock for the following-named persons to serve as directors until the next annual meeting of stockholders:

Wakefield Baker	J. A. Folger
Edward H. Bell	Harry C. Hagerty
Edward G. Buckland	Charles B. Henderson
J. Reuben Clark, Jr.	J. W. Mailliard, Jr.
Robert E. Coulson	E. W. Mason
Charles Elsey	

Proxies filed

JAMES FOUNDATION
OF NEW YORK, INC.

A. C. JAMES CO.

By /s/ ROBERT E. COULSON
Proxy or Proxies.

Note: If a stockholder votes personally, his signature must be placed on the first line. If the ballot is cast by proxy or proxies, the name of the stockholder must be signed on the first line and the name(s) of the proxy or proxies on the next line or

lines. If several stockholders are represented by proxy or proxies, such proxy or proxies may write "Proxies filed" on the first line and sign on the next line or lines.

The Western Pacific Railroad Company

Ballot

(For straight voting)

Annual Meeting of Stockholders, June 26, 1946.

The undersigned hereby vote(s) 208,892 shares of stock for the following-named persons to serve as directors until the next annual meeting of stockholders:

Wakefield Baker	Harry C. Hagerty
Edward H. Bell	Charles B. Henderson
J. Reuben Clark, Jr.	Stuart Jenkins
Robert E. Coulson	J. W. Mailliard, Jr.
Charles Elsey	E. W. Mason
James A. Folger	

Proxies filed

JAMES FOUNDATION OF NEW YORK, INC.

By /s/ ROBERT E. COULSON

Proxy or Proxies.

Note: If a stockholder votes personally, his signature must be placed on the first line. If the ballot is cast by proxy or proxies, the name of the stockholder must be signed on the first line and the name(s) of the proxy or proxies on the next line or

lines. If several stockholders are represented by proxy or proxies, such proxy or proxies may write "Proxies filed" on the first line and sign on the next line or lines.

The Western Pacific Railroad Company

Ballot

(For straight voting)

Annual Meeting of Stockholders, June 25, 1947.

The undersigned hereby vote(s) 208,892 shares of stock for the following-named persons to serve as directors until the next annual meeting of stockholders:

Wakefield Baker	Harry C. Hagerty
Edward H. Bell	Charles B. Henderson
J. Reuben Clark, Jr.	Stuart Jenkins
Robert E. Coulson	J. W. Mailliard, Jr.
Charles Elsey	H. A. Mitchell
James A. Folger	

Proxies filed from

JAMES FOUNDATION OF NEW YORK, INC.

By /s/ ROBERT E. COULSON and STUART JENKINS,
Proxy or Proxies.

Note: If a stockholder votes personally, his signature must be placed on the first line. If the ballot is cast by proxy or proxies, the name of the stockholder must be signed on the first line and the name(s) of the proxy or proxies on the next line or

lines. If several stockholders are represented by proxy or proxies, such proxy or proxies may write "Proxies filed" on the first line and sign on the next line or lines.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 27

Statement No. 1

Sheet 4 of 4 Sheets

Summary

Statements of M. J. Curry, Asst. Treas. Covering Balances, Receipts and Expenditures of W.P. RR. Co. Funds by New York Office for Period—March 15, 1943, to May 1, 1945

	Balances and Receipts	
On hand Mar. 1, 1943	$ 2,224.96	
Received Mar. 16, 1943, to Dec. 17, 1943	40,700.00	$ 42,924.96
Received Jan. 14, 1944, to Dec. 19, 1944		50,800.00
Received Jan. 22, 1945, to Apr. 19, 1945		14,500.00
Receipts other than W.P. RR. Co. Remittances		348.85
Total Balance and Receipts		$108,573.81

	Disbursements	
Expended March to Dec. 1943	$40,836.11	
Expended January to Dec. 1944	51,474.69	
Expended January to May 1945	14,872.82	
Total Expended by M. J. Curry		$107,183.62
Unexpended Balance Returned to E. C. Bates, Treas., June 1945		$ 1,390.19

Office of General Auditor
San Francisco, California
March 31, 1948

[Endorsed]: Filed Feb. 2, 1949.

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT NO. 1

STATEMENT SHOWING FUNDS SUPPLIED BY THE WESTERN PACIFIC RAILROAD COMPANY TO MR. M. J. CURRY, ASSISTANT TREASURER, FOR USE IN MAKING THE DISBURSEMENTS OF HIS NEW YORK OFFICE AND A DETAIL OF EXPENDITURES MADE FROM SUCH FUNDS BY MR. CURRY.

SHEET 1 OF 4 SHEETS

PERIOD MARCH 16, 1943 TO MAY 1, 1943

	MARCH (A)	APRIL	MAY	JUNE	JULY	AUGUST	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTALS
1943														
M. J. CURRY, ASST. TREAS:														
Balance of Funds on hand and received: Bal. on hand March 1, 1943	$2,224.96													$ 2,224.96
Remittances - E. C. Bates, Treas. San Francisco to M. J. Curry, Asst. Treas. New York City date remitted	3-16-43	4-15-43	5-21-43	6-24-43	7-16-43	8-16-43	-24-43	7-16-43	8-16-43	9-14-43	10-15-43	11-18-43	12-17-43	
Amount of Remittance	3,500.00	3,000.00	4,000.00	4,500.00	4,400.00	4,500.00	.500.00	4,400.00	4,500.00	4,500.00	4,000.00	4,500.00	4,000.00	40,700.00
Collections from Individuals and Companies for transfers and exchanges of W.P. R.R. Co. First Mortgage Bonds														180.00
Unspent on hand and received by M. J. Curry - Mar. 1, 1943 to Dec. 31, 1943														$43,074.96
PAY MONTHLY STATEMENTS OF M. J. CURRY, ASST. TREAS. COVERING DISBURSEMENTS IN NEW YORK OFFICE:														
W. E. Schmeckebier - Salary	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	.250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	$12,500.00
" - Expenses	328.00	153.00	-	146.00	445.15	121	146.00	448.15	121.00	141.00	213.00	152.00	152.00	1,928.15
M. J. Curry - Salary	600.00	600.00	600.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	8,925.00
" - Expenses	-	-	-	-	-		-	-	-	-	-	-	-	-
W. Rowe Campbell - Salary	416.66	416.66	416.66	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	5,624.98
" - Expenses	-	-	-	-	-		-	-	-	-	-	-	-	-
Mary C. Valcuch - Salary	191.66	191.66	191.66	219.99	220.00	220.00	219.99	220.00	220.00	220.00	220.00	220.00	220.00	2,114.97
" - Expenses	40.00	34.80	100.00	50.50	87.00	26.35	50.50	87.00	26.35	87.00	-	21.00	412.70	
J. H. Wienken - Salary	186.25	186.25	186.25	239.58	239.58	236.25	239.58	239.58	239.58	239.58	239.58	239.58	239.58	2,144.85
William O'Neill - Salary	148.33	148.33	148.33	169.99	170.00	170.00	169.99	170.00	170.00	170.00	170.00	170.00	170.00	1,634.98
Catherine Sheehan - Salary	148.00	148.00	148.00	166.00	236.88	82.50	65.00	236.88	82.50	166.00	166.00	166.00	166.00	1,881.32
Do Pi Mfg. Co. - Stat'y.	-	-	7.38	-	-		-	-	-	2.75	-	-	-	10.11
Albert Goldman - Postage	25.00	25.00	225.00	113.46	-	25.00	13.46	-	25.00	25.00	25.00	25.00	25.00	513.46
Stewart-Heneken & Will - Fidelity Bond - M. J. Curry	12.50	-	-	-	-		-	-	-	-	-	-	-	12.50
Telephone Expense - W.P. R.R. Corp.	97.06	-	-	-	-		-	-	-	-	-	-	-	97.06
Chase National Bank - Office Rent	376.67	188.34	188.34	376.67	376.67	376.67	376.67	376.67	376.67	376.67	376.67	376.67	376.67	3,390.04
" " - Electricity	36.21	17.79	18.21	40.15	33.61	31.21	40.15	33.61	31.21	32.81	33.48	36.94	36.17	314.82
Mygenic Phone Service	2.10	2.10	2.10	2.10	2.10	2.10	2.10	2.10	2.10	2.10	2.10	2.10	2.10	21.00
Central Hanover B. T. Co. - Paying Int.	110.11	-	-	-	-	104	-	-	104.30	-	-	-	-	214.41
" " " - Cremation Coupons	-	-	-	39.30	-		39.30	-	-	-	-	-	-	39.30
W. U. Telegraph Expense	13.86	8.67	8.46	18.88	28.13	3.52	18.88	28.13	3.52	4.96	21.60	2.48	4.00	106.45
Goldsmith Bros. Stat'y.	3.28	4.60	1.31	25.48	16.36	-	25.48	16.36	-	-	-	10.87	6.47	68.55
Peerless Towel Sup. Co. - Towels	8.30	-	16.60	8.30	8.30	10.	8.30	8.30	10.30	8.30	8.30	8.30	10.10	86.80
Guyo. Spgs. Water Co. - Water	5.76	-	12.18	5.76	5.10	6.4	5.76	5.10	6.41	6.41	5.76	6.41	5.76	59.55
American Bank Note Co. - Numbering Bonds	4.09	4.08	9.18	12.24	3.06	9.1	12.24	3.06	9.91	18.87	3.06	12.43	9.08	86.78
United Serv. Prtg. Corp. - Stat'y.	-	5.56	4.04	12.12	23.24	8.3	12.12	23.24	5.56	-	3.03	-	25.00	78.56
F. K. Brewer & Co. - Stat'y.	-	9.91	9.00	7.89	10.36	7.0	7.89	10.36	7.88	1.16	-	8.39	6.17	60.76
Pierce & Greer - Expenses	-	8.00	-	-	-		-	-	-	-	-	-	-	8.00
Std. & Poors Corp. R.R. Securities Service	-	45.45	-	45.45	-		45.45	-	-	-	45.45	-	-	136.35
Remington Rand - Equip. Repair	-	2.05	-	-	-		-	-	-	-	-	-	-	2.05
Int'l. Ry. Pub. Co. Official Guide	-	-	3.75	-	-		-	-	-	3.75	-	3.75	-	11.25
Langton Co. - Photostats	-	-	14.95	-	-		-	-	-	-	-	-	-	14.95
New York Telephone Co.-Service	-	-	149.20	99.07	51.56	56.	99.07	51.56	56.49	75.42	58.22	72.45	96.83	659.24
Ace Mailing Service - Mailing Service	-	-	387.86	1.94	-		1.94	-	-	-	-	-	-	389.79
Railway Express Agency	-	-	-	28.52	-		28.52	-	-	-	-	-	-	28.52
Chase Nat. Bank - Services Eq. Tr. 5/1/29	-	-	-	204.63	-		04.63	-	-	-	-	-	-	204.63
Pioneer Warehouses - Whse. Rent	-	-	-	42.00	42.00		42.00	42.00	-	-	42.00	-	-	126.00
Royal Typewriter Co. - Equip. Repairs	-	-	-	2.38	-		2.38	-	-	-	-	-	-	2.38
Simmons-Boardman Pub. Co. - Sub. Ry. Age	-	-	-	-	6.00		-	6.00	-	-	-	-	-	6.00
Royal Typewriter Co. - Ribbons	-	-	-	-	11.11		-	11.11	-	-	-	-	-	11.11
Whaley-Eaton Co. - Sub. to American Letters	-	-	-	-	28.00		-	28.00	-	-	-	-	-	28.00
Moody's Investors - Services	-	-	-	-	36.36		-	36.36	-	-	-	36.36	-	72.72
City of New York - Occupancy Tax	-	-	-	-	3.00		-	3.00	-	-	-	-	-	3.00
Lybrand Ross Bros. & Montgomery - C.P.A. Service	-	-	-	-	-	200	-	-	200.00	-	-	-	-	200.00
Wall Street Journal - Advertising	-	-	-	-	-	138	-	-	138.00	-	-	-	-	138.00
New York Times - "	-	-	-	-	-	317	-	-	317.40	-	-	-	-	317.40
A. N. Marquis Co. - Subscript. Who's Who	-	-	-	-	-	10	-	-	10.38	-	-	-	-	10.38
Supt. of Documents - Govt. Manual, etc.	-	-	-	-	-		-	-	1.00	-	-	-	1.75	2.75
W.P.R.R. Railroad - Business Car Supplies	-	-	-	-	-	208	-	-	208.01	-	-	-	-	208.01
Wall Street Journal - Subscription	-	-	-	-	-		-	-	-	18.00	-	-	-	18.00
Int'l. Ry. Equip. Pub. Co. - Pocket List RR Officials	-	-	-	-	-		-	-	-	3.00	-	-	-	3.00
Photolithograph Division - Plates	-	-	-	-	-		-	-	-	1.72	-	-	-	1.72
" " " - Stationery	-	-	-	-	-		-	-	-	-	2.81	-	-	2.81
" " " - Equip. Repairs	-	-	-	-	-		-	-	-	-	-	17.08	-	17.08
Treas. of U.S.A. - Reorganization Expense	-	-	-	-	-		-	-	-	-	22.05	-	-	22.05
Traffic Service Corpn. - Subscriptions	-	-	-	-	-		-	-	-	-	18.00	-	-	18.00
Christmas Contribution to Bldg. Employees	-	-	-	-	-		-	-	-	-	-	-	98.00	98.00
TOTALS	$3,968.89	$3,416.78	$4,033.48	$4,987.32	$4,996.81	$5,220	27.32	$4,996.81	$5,220.94	$4,398.68	$4,879.14	$4,414.79	$4,497.78	$44,317.10

EXHIBIT 222 B 4/6/48 RR

Less Taxes included in salary payments above, withheld and paid to U. S. Treasury by W.P. RR. Co. San Francisco - Railroad Retirement Tax $ 416.18
- Federal Income Tax 3,434.60 3,850.78
$41,466.32

Gross disbursed by M. J. Curry

Less amounts included in above disbursements, Recovered by M. J. Curry, as follows:
Refund RR. Prop'n. of office rent covering space for transfer Agent, commencing June 1, 1943 @ $75.00 per Mo. $ 525.00
Refund of deposit by U.S. Post Office as guarantee of postage due on business reply envelopes 100.00
Telephone tolls chargeable to other individuals 8.84 633.84
Net Disbursed by M. J. Curry $ 2,832.85

Per M. J. Curry, Asst. Treas. Statement Bal. on hand Dec. 31, 1943

NOTE: (A) Since total expenditures for March 1943 are inseparable as to periods, Mar. 1 to 15 and Mar. 16 to 31, total expenditures for month are shown.
(B) Remittance made by check, drawn on W.P. RR. Co. Funds in Bank of California, San Francisco, in favor of M. J. Curry, Asst. Treas., and transmitted by U.S. Mail to M. J. Curry, for deposit to credit of W.P. RR. Co. with Chase National Bank of New York.

108

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT NO. 1.
SHEET 2 OF 4 SHEETS

STATEMENT SHOWING FUNDS SUPPLIED BY THE WESTERN PACIFIC RAILROAD COMPANY TO MR. M. J. CURRY, ASSISTANT T... MR. M. J. CURRY, ASSISTANT TREASURER,
FOR USE IN MEETING THE EXPENSES OF ITS NEW YORK OFFICE AND A DETAIL OF EXPENDITURES MADE FROM SUCH FUNDS BY ...TURES MADE FROM SUCH FUNDS BY MR. CURRY.

PERIOD MARCH 15, 1945 TO MAY 1, 1945

731

YEAR 1944		JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
M. J. CURRY, ASST. TREAS. STATEMENT																	
Bal. on hand Jan. 1, 1944		$2,238.85															$ 2,238.85
Remittances - E. C. Bates, Treas., San Francisco to M. J. Curry, Asst. Treas., New York - Date Remitted		1-14-44	2-18-44	3-20-44	4-19-44	5-29-44	6-19-44	7-24-44	8-12-44	6-19-44	7-24-44	8-12-44	9-14-44	10-20-44	11-20-44	12-19-44	
- Amount of Remittance		4,000.00	4,000.00	4,500.00	4,500.00	5,000.00	4,000.00	4,000.00	4,500.00	4,000.00	4,000.00	4,500.00	3,800.00	4,000.00	4,500.00	4,000.00	50,800.00
Receipt by M. J. Curry from Bank of Manhattan, of unclaimed Cashiers check paid for in 1916 by Western Pacific Railway Co.																	198.95
Total Rec'd. by M. J. Curry - 1944																	$53,237.70
PER MONTHLY STATEMENTS OF M. J. CURRY - ASST. TREASURER																	
COVERING N. Y. OFFICE DISBURSEMENTS																	
F. M. Schumacher	- Salary	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	1,250.00	$15,000.00
"	- Expenses	160.00	208.00	187.00	214.00	-	362.00	223.00	-	352.00	223.00	-	67.00	513.00	-	283.00	2,187.00
M. J. Curry	- Salary	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	975.00	11,700.00
N. Bruce Campbell	- Salary	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	625.00	7,500.00
Mary C. Valouch	- Salary	220.00	220.00	375.16	238.36	238.36	238.36	238.36	238.36	238.36	238.36	238.36	238.36	238.36	238.36	238.36	2,960.60
"	- Expenses	23.50	46.25	23.25	23.00	75.00	108.00	54.00	-	108.00	54.00	-	75.00	97.00	-	43.10	566.10
John F. Wienken	- Salary	239.58	239.58	411.07	257.96	257.96	257.96	257.96	257.96	257.96	257.96	257.96	257.96	257.96	257.96	257.96	3,211.87
Lillian O'Neill	- Salary	170.00	170.00	369.32	188.36	188.36	188.36	188.36	188.36	188.36	188.36	188.36	188.36	188.36	188.36	188.36	2,404.56
Catherine Sheehan	- Salary	166.00	166.00	364.32	183.36	183.36	183.36	183.36	183.36	183.36	183.36	183.36	183.36	183.36	183.36	183.36	2,344.56
Simmons-Boardman Pub. Co.	- Ry. Age	-	-	-	-	.50	-	-	-	-	-	-	-	-	-	-	.50
Western Union Teleg. Co.	- Messages	7.06	5.41	-	6.46	4.00	-	6.79	5.7	-	-	-	-	-	-	-	35.32
Weber-Harley Co.	- Calendar	2.53	-	-	-	-	-	-	-	-	6.79	5.70	-	6.44	-	6.82	48.58
Pioneer Warehouses	- Rent	42.00	-	-	42.00	-	-	42.00	-	-	-	-	-	-	-	-	2.53
Crystal Springs Water Co.	- Water	6.41	5.76	5.76	5.76	7.08	5.11	5.77	5.7	-	42.00	-	-	42.00	-	-	168.00
Peerless Towel Supply Co.	- Towels	8.30	8.30	8.30	8.30	8.30	8.30	8.30	8.3	5.11	5.77	5.76	7.07	5.76	5.10	5.10	70.44
Hygenic Phone Service		2.10	2.10	2.10	2.10	2.10	2.10	-	4.2	8.30	8.30	8.30	8.30	8.30	9.30	-	92.30
Commerce Clearing House	- Tax Service	80.80	-	-	-	-	-	-	-	2.10	-	4.20	2.10	2.10	2.10	2.10	25.20
Consol. Stamp Mfg. Co.	- Dater	6.06	-	7.27	-	-	-	-	-	-	-	-	-	-	-	-	80.80
Goldsmith Bros.	- Stationery	6.16	-	8.40	2.82	3.89	4.84	-	3.0	-	-	-	-	-	-	-	13.33
American Bank Note Co.	- Number Bds.	30.41	9.14	8.08	3.06	10.87	-	1.00	7.1	4.84	-	3.06	-	1.40	-	3.42	33.69
Standard & Poors Corp.	- Service	45.45	-	45.45	-	-	45.45	-	-	-	1.00	7.12	1.00	4.09	-	-	74.77
New York Telephone Co.	- Service	61.32	85.79	136.30	125.04	75.89	41.97	63.95	59.3	45.45	-	-	-	45.45	-	-	181.80
Chase Nat'l. Bank - Office Rent		376.67	376.67	376.67	376.67	406.67	406.67	406.67	406.6	41.97	63.95	59.38	66.11	52.58	53.18	60.32	881.80
" " " - Electric Service		38.09	32.83	33.26	40.20	41.94	38.08	39.51	39.8	405.67	405.67	405.67	405.67	405.67	405.67	405.67	4,752.04
Central Hanover Bank & Trust Co	- Services Paying Interest	-	98.51	-	-	-	-	-	92.6	38.08	39.51	39.80	38.96	35.90	32.19	36.77	447.53
" " "	- Cremation Coupons	-	-	-	-	-	-	-	-	-	-	92.69	-	-	-	-	191.20
H. K. Brewer Co.	- Stationery	-	12.32	-	24.47	12.51	22.74	4.24	6.4	-	-	-	-	-	106.40	-	106.40
Nat'l. Ry. Publication Co.	- Official Guide	-	3.75	-	-	3.75	-	-	-	22.74	4.24	6.42	18.06	1.76	5.16	4.65	112.33
De Pi Mfg. Co.	- Stationery	-	2.73	-	-	-	-	4.75	-	-	-	-	3.75	-	3.75	-	18.00
Albert Goldman, P.M.	- Stamps	-	28.00	50.00	25.00	50.00	60.00	-	25.0	-	4.75	-	2.73	-	-	-	10.21
Stewart, Hencken & Will	- Fid. Bond - M. J. Curry	-	-	12.50	-	-	-	-	-	60.00	-	25.00	25.00	25.00	50.00	25.00	360.00
Addressograph Divn.	- Equip. Repair	-	-	8.22	-	-	-	-	-	-	-	-	-	-	-	-	12.50
Mutual Ribbon & Carb. Co.	- Carbons	-	-	3.03	-	-	-	-	-	-	-	-	-	-	-	-	8.22
Langton Co.	- Negatives	-	-	21.21	-	-	-	-	-	-	-	-	-	-	-	-	3.03
Rand McNally Co.	- Atlas & Guide	-	-	39.90	-	-	-	-	-	-	-	-	-	-	-	-	21.21
United Service Print. Corp.	- Stats.	-	-	5.56	19.19	7.58	4.55	-	-	-	-	-	-	-	-	-	39.90
Remington Rand	- Equip. Repairs	-	-	-	2.05	-	-	-	-	4.55	-	-	12.12	-	-	4.55	53.55
Royal Typewriter Co.	- Ribbons	-	-	-	11.11	-	-	-	-	-	-	-	-	-	-	-	2.05
Addressograph Divn.	- Plates	-	-	-	3.44	-	-	-	-	-	-	-	-	-	-	-	11.11
Fendick Press	- Stationery	-	-	-	-	-	14.39	-	-	-	-	-	-	-	-	-	3.44
Langton Co.	- Photostats	-	-	-	-	-	7.42	41.01	13.2	14.39	-	-	-	-	-	-	14.39
Remover Office Equip. Co.	- Cabinet	-	-	-	-	-	5.05	-	-	7.42	41.01	13.28	2.73	-	-	-	64.44
Whaley-Eaton Serv.	- Amer. Letters	-	-	-	-	-	-	25.00	-	5.05	-	-	-	-	-	-	5.05
Moodys Investors	- Industrials	-	-	-	-	-	-	36.36	-	-	25.00	-	-	-	-	-	25.00
Wall St. Journal	- Back Copy	-	-	-	-	-	-	.25	-	-	36.36	-	-	36.36	-	-	72.72
City of New York	- Occupancy Tax	-	-	-	-	-	-	3.00	-	-	.25	-	-	-	-	-	.25
Wall St. Journal	- Subscription	-	-	-	-	-	-	-	9.5	-	3.00	-	-	-	-	-	3.00
Railway Age Pub.	- Subscription	-	-	-	-	-	-	-	6.0	-	-	9.50	-	-	-	-	9.50
CB&Q RR.	- Business Car Supplies	-	-	-	-	-	-	-	245.6	-	-	6.00	-	-	-	-	6.00
U.S. Chamber of Comm.	- Nations Bus.	-	-	-	-	-	-	-	-	-	-	245.64	-	-	-	-	245.64
Albert Frank-Guenther Law Services		-	-	-	-	-	-	-	-	-	-	-	9.50	-	-	-	9.50
Ry. Equip. & Pub. Co.	- Pocket List RR Officials	-	-	-	-	-	-	-	-	-	-	-	3.85	-	-	-	3.85
Burroughs Add. Mach. Co.	- Ribbon	-	-	-	-	-	-	-	-	-	-	-	3.00	-	-	-	3.00
Traffic Service Corpn.	- Subscription	-	-	-	-	-	-	-	-	-	-	-	-	1.66	-	-	1.66
Building Employees	- Contributions	-	-	-	-	-	-	-	-	-	-	-	-	3.75	-	-	3.75
Supt. of Documents	- Statistical Abst.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	75.00	75.00
New York County Clerk	- Notarial Fee	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1.75	1.75
Railway Express Agency	- Exp. Chgs.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	6.25	6.25
		-	-	-	-	-	-	-	-	-	-	-	-	-	-	3.46	3.46
TOTALS		$4,831.44	$4,867.14	$5,322.18	$4,682.41	$4,427.12	$4,840.71	$4,682.64	$4,655.0	$4,840.71	$4,682.64	$4,655.83	$4,489.99	$5,006.26	$4,390.89	$4,685.00	$56,281.86

EXHIBIT 222 C 4/6/48 E.C

Less Taxes included above, withheld and paid by WP RR. Co. S.F.
Railroad Retirement Tax — $ 471.81
Federal Income Tax — 3,404.76 — $ 3,876.57
Gross disbursed by M. J. Curry — $52,374.80
Less Prop'n. of Office Rent paid by D&RGW RR. @ $75.00 per Mo. — 900.00
Net Disbursed by M. J. Curry, 1944 — $51,474.89
Balance at December 31, 1944 — $ 1,763.01

NOTE: Remittances, except May 1944, made by check drawn on W.P. RR. Co. funds in Bank of California, San Francisco, in favor of M. J. Curry, Asst. Treas., and transmitted by U. S. Mail to M. J. Curry for deposit to credit of W.P. RR. Co. with Chase Nat'l. Bank of New York.
May 1944 Remittance made by check drawn on funds of W.P. RR. Co. in American Trust Co. of San Francisco, and telegraphed by them direct to Chase Nat'l. Bank of New York for deposit to credit of W.P. RR. Co.

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109

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT SHOWING FUNDS SUPPLIED BY THE WESTERN PACIFIC RAILROAD COMPANY TO MR. M. J. CURRY, ASSISTANT TREASURER, FOR USE IN MEETING THE EXPENSES OF ITS NEW YORK OFFICE AND A DETAIL OF DISBURSEMENTS MADE FROM SUCH FUNDS BY MR. CURRY.

PERIOD MARCH 15, 1945 TO MAY 1, 1945

YEAR 1945		JANUARY	FEBRUARY	MARCH	APRIL	MAY (A)	TOTALS	MARCH	APRIL	MAY (A)	TOTALS
PER M. J. CURRY, ASST. TREAS. STATEMENT OF FUNDS RECEIVED											
Bal. on hand Jan. 1, 1945		$1,763.01					$ 1,763.01				$ 1,763.01
(B) Remittances - E. C. Bates, Treas., San Francisco, to M. J. Curry, Asst. Treas. New York											
Date Remitted		1-22-45	2-21-45	3-19-45	4-19-45			3-19-45	4-19-45		
Amount of Remittance		4,000.00	3,800.00	3,800.00	3,800.00	-	14,800.00	3,800.00	3,800.00	-	14,800.00
Total Rec'd. by M. J. Curry, 1945							$16,563.01				$16,563.01
PER DETAIL FROM MONTHLY STATEMENTS OF M. J. CURRY, ASST. TREAS. COVERING N. Y. OFFICE DISBURSEMENTS											
T. H. Schumacher	- Salary	1,250.00	1,250.00	1,250.00	1,250.00	-	$ 5,000.00	1,250.00	1,250.00	-	$ 5,000.00
	- Expenses	67.00	-	347.00	-	151.75	565.75	347.00	-	151.75	565.75
M. J. Curry	- Salary	975.00	975.00	975.00	975.00	-	3,900.00	975.00	975.00	-	3,900.00
J. P. Weinken	- Salary	257.96	257.96	257.96	257.96	-	1,031.84	257.96	257.96	-	1,031.84
Mary C. Valouch	- Salary	238.36	238.36	238.36	238.36	-	953.44	238.36	238.36	-	953.44
	- Expenses	-	-	69.00	21.00	-	90.00	69.00	21.00	-	90.00
Lillian O'Neill	- Salary	188.36	188.36	188.36	188.36	-	753.44	188.36	188.36	-	753.44
Catherine Sheehan	- Salary	183.36	183.36	183.36	183.36	-	733.44	183.36	183.36	-	733.44
Chase National Bank	- Office Rent	406.67	406.67	406.67	406.67	406.67	2,028.35	406.67	406.67	406.67	2,028.35
	- Electricity	38.93	40.06	39.21	42.44	37.91	198.54	39.21	42.44	37.91	198.54
Traffic World	- Subscription	3.75	-	-	-	-	3.75	-	-	-	3.75
Goldsmith Bros.	- Stationery	4.65	9.74	-	9.80	-	24.19	-	-	-	24.19
H. K. Brewer & Co.	- Stationery	2.22	7.43	2.43	3.19	-	15.27	2.43	3.19	-	15.27
Hygenic Phone Service	- Services	2.10	2.10	2.10	2.10	2.10	10.50	2.10	2.10	2.10	10.50
Crystal Spgs. Water Co.	- Water	5.76	5.10	5.76	5.76	10.87	33.25	5.76	5.76	10.87	33.25
Pearless Towel Supply Co.	- Towels	17.60	8.30	8.30	8.30	8.30	50.80	8.30	8.30	8.30	50.80
Western Union Telegraph Co.	- Services	4.09	-	3.00	4.09	6.94	18.12	3.00	4.09	6.94	18.12
New York Telephone Co.	- Services	85.76	80.73	87.76	78.05	74.89	342.19	82.76	78.05	74.89	342.19
Albert Goldman P.M.	- Postage	25.00	25.00	25.00	25.00	-	100.00	25.00	25.00	-	100.00
Standard & Poors Corp.	- Services	45.45	-	-	-	15.15	60.60			15.15	60.60
Pioneer Warehouses	- Whse. Rent	42.00	-	-	42.00	-	84.00	-	-	-	84.00
Commerce Clearing House	- Tax Service	80.80	-	-	-	-	80.80	-	42.00	-	80.80
United Service Prtg. Corp.	- Stationery	-	8.06	4.55	4.55	-	15.16	-	-	-	15.16
Weber-Harley Co.	- Stationery	-	3.79	-	-	-	3.79	4.55	4.55	-	3.79
Nat'l. Ry. Pub. Co.	- Official Guide	-	3.75	-	-	3.75	7.50	-	-	3.75	7.50
A.N. Marquis Co.	- Who's Who	-	10.65	-	-	-	10.65	-	-	-	10.65
The Signature Co.	- Services	-	200.00	-	-	20.00	220.00	-	-	20.00	220.00
Central Hanover Bank & Trust Co.	- Services Paying Interest	-	86.89	-	-	-	86.89	-	-	-	86.89
Pioneer Warehouses	- Cartage	-	-	-	-	10.30	10.30	-	-	10.30	10.30
Langton Co., Inc.	- Photostats	-	-	115.14	-	-	115.14	115.14	-	-	115.14
Wall Street Journal	- Subscription	-	-	5.00	-	-	5.00	5.00	-	-	5.00
Addressing Mach. & Equip. Co.	- Ribbon	-	-	1.06	-	-	1.06	1.06	-	-	1.06
Stewart-Hencken & Will	- Fid. Bond-M. J. Curry	-	-	12.50	-	-	12.50	12.50	-	-	12.50
Rand McNally & Co.	- Guide	-	-	-	39.90	-	39.90	-	39.90	-	39.90
Langton Co., Inc.	- Stationery	-	-	-	2.43	.76	3.19	-	2.43	.76	3.19
TOTALS		$3,245.32	$3,880.89	$4,191.32	$3,797.32	$748.39	$16,629.34	$4,191.32	$3,797.32	$748.39	$16,629.34
Less Taxes included in above, withheld and paid by W.P. RR. Co. San Francisco:											
Railroad Retirement Tax						$ 151.80				$ 151.80	
Federal Income Tax						1,224.80	1,376.60			1,224.80	1,376.60
Gross disbursed by M. J. Curry							$15,252.74				$15,252.74
Less Propn. of office rental paid by D&RGW RR. @ $75.00 per month							375.00				375.00
Less Collections from individuals for personal telephone tolls							4.93				4.93
Net disbursed by M. J. Curry, 1945							$14,872.82				$14,872.82
M. J. Curry - Asst. Treas. Bal. at 5-31-45							$ 1,390.19				$ 1,390.19
Rec'd. by Treas. E. C. Bates - San Francisco, from Asst. Treas. M. J. Curry, New York, June 1945							$ 1,390.19				$ 1,390.19

NOTES: (A) Expenditures shown above for May 1945, cover expense of maintaining New York Office for purpose of paying bills incurred prior thereto and closing office.

(B) Remittances made by check, drawn on W.P. RR. Co. funds in Bank of California, San Francisco, in favor of M. J. Curry, Asst. Treas. and transmitted by U. S. Mail to M. J. Curry for deposit to credit of W.P. RR. with Chase Nat'l. Bank of City of New York.

EXHIBIT 222-D 1/6/48 E.G.

STATEMENT NO. 2

STATEMENT SHOWING ALL PAYMENTS MA
MR. M. J. CURRY, OR MISS MAR

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT SHOWING ALL PAYMENTS MADE BY THE WESTERN PACIFIC RAILROAD COMPANY TO EITHER MR. T. M. SCHUMACHER, MR. M. J. CURRY, OR MISS MARY VALOUCH IN ADDITION TO THOSE PAYMENTS INCLUDED IN STATEMENT NO. 1

PERIOD MARCH 18, 1943 TO MARCH 31, 1948

(1733)

		JANUARY	FEBRU		JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTAL
YEAR 1945																	
T. M. Schumacher	- Pension			- Pension					$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$ 8,000.00
M. J. Curry	- Pension			- Pension					247.74	51.34	89.54	89.54	89.54	89.54	89.54	89.54	836.32
Mary C. Valouch	- Severance Pay			- Severance Pay				$1,239.75	-	-	-	-	-	-	-	-	1,239.75
TOTAL - 1945								$1,239.75	$1,247.74	$1,051.34	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$10,076.07
YEAR 1946																	
T. M. Schumacher	- Pension	$1,000.00	$1,00	- Pension	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$12,000.00
M. J. Curry	- Pension	89.54	8	- Pension	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	1,074.48
TOTAL - 1946		$1,089.54	$1,08		$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$13,074.48
YEAR 1947																	
T. M. Schumacher	- Pension	$1,000.00	$1,00	- Pension	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$1,000.00	$12,000.00
M. J. Curry	- Pension	89.54	8	- Pension	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	89.54	1,074.48
TOTAL - 1947		$1,089.54	$1,08		$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$1,089.54	$13,074.48
YEAR 1948																	
T. M. Schumacher	- Pension	$1,000.00	$1,00	- Pension	$1,000.00	$1,000.00	$ -										$ 2,000.00
M. J. Curry	- Pension	89.54	8	- Pension	89.54	89.54	89.54										268.62
TOTAL TO MARCH 31, 1948		$1,089.54	$1,08	31, 1948	$1,089.54	$1,089.54	$ 89.54										$ 2,268.62
TOTAL ADDITIONAL AND SUBSEQUENT PAYMENTS				L AND SUBSEQUENT PAYMENTS													$38,493.66

Office of General Auditor
San Francisco, California
March 31, 1948

EXHIBIT 222 E
3/6/48 E.G.

EXHIBIT 222 E
3/6/48 E.G.

THE WESTERN PACIFIC RAILROAD COMPANY

LIST OF CORPORATE OFFICERS AND TERMS THEREOF, JANUARY 1, 1935 TO FEBRUARY 12, 1948

	Year 1935	Year 1936	Year 1937	Year 1938	Year 1939	Year 1940	Year 1941	Year 1942	Year 1943	Year 1942	Year 1943	Year 1944	Year 1945	Year 1946	Year 1947	Year 1948 to Date
President	Charles Elsey	Same	Same	Same	Same	Same	Same	Same	Same	Same	Same	Same	Same	Same	Same	Same
Chairman of the Board	A. C. James	Same	Same	Same	Same	(No Chairman of				(No Chairman of Board elected)						
Chairman of the Exec.Comm.	T.N.Schumacher	Same	Same	Same	Same	Same	Same	Same	Same	T.N. to	Same	Same	T.N.Schumacher to 12/28/44	(No Chairman of Executive Committee elected)		
Vice Pres. & General Mgr.	E. W. Mason	Same	Same	Same	Same	Same	Same	Same	Same		Same	Same	Same	Same	E. W. Mason to 6/30/46 H.A.Mitchell from 7/1/46	H.A.Mitchell	Same
Vice President-Traffic	J. F. Hogan	Same	Same	J. F. Hogan to 8/29/38 Vacant from 8/29/38	Vacant	Vacant	Vacant to 12/1/41 H.E.Poulterer from 12/1/41	H.E.Poulterer	Same		.Poulterer	Same	Same	Same	Same	Same	Same
Vice President, Asst.Secty. & Asst.Treasurer	E. J. Curry	Same	Same	Same	Same	Same	Same	Same	Same		Same	Same	Same	E. J. Curry to 4/30/45 No successor elected.	--	--	--
Vice President	--	--	--	--	--	--	--	--	--		--	--	--	--	E. W. Mason from 7/1/46 to 12/31/46	--	--
Vice President	--	--	--	--	--	--	--	--	--		--	--	--	W. Holt from 3/26/45	Same	Same	Same
Vice President	--	--	--	--	--	--	--	--	--		--	--	--	F.F.Voorhees from 3/26/45	Same	Same	Same
Secretary	W. G. Bruen	Same	W.G.Bruen to 8/9/37 C.L.Droit from 8/9/37	C. L. Droit	Same	Same	Same	Same	Same		Same	Same	Same	Same	Same	Same	Same
Assistant Secretary	C. L. Droit	Same	C.L.Droit to 8/9/37 Logan Paine from 8/9/37	Logan Paine	Same	Same	Same	Same	Same		Same	Same	Same	Same	Same	Same	Same
Assistant Secretary	--	--	--	--	--	--	--	--	--	Mary from	--	--	Mary Valouch from 12/4/44	Mary Valouch to 4/30/45	--	--	--
Assistant Secretary	--	--	--	--	--	--	--	--	--		--	--	--	L. H. Lash from 3/26/45	Same	Same	Same
Assistant Secretary	--	--	--	--	--	--	--	--	--		--	--	--	R.R.Thissing from 3/26/45	Same	Same	Same
Treasurer	E. C. Bates	Same	Same	Same	Same	Same	Same	Same	Same		Same	Same	Same	Same	Same	Same	Same
Assistant Treasurer	--	--	--	--	--	--	--	--	R.E.Larson from 12/6/43		--	R.E.Larson from 12/6/43	Same	Same	Same	Same	Same
General Auditor	D.C.DeGraff	Same	Same	Same	Same	Same	Same	Same	Same		Same	Same	Same	Same	D.C.DeGraff to 6/27/46 C.P.Russell from 6/27/46	C.P.Russell	Same
Assistant to President	--	--	--	--	--	--	--	[illegible] from 1/1/42	Same		[illegible] from 1/1/42	Same	Same	Same	Same	Same	Same

Office of Secretary,
San Francisco, Calif.,
February 12, 1948.

U.S. DIST. CT. N.D. CAL.
No. 26508-B
Plff. Exh. No. 25
FILED FEB 2 1949
C.W. CALBREATH, Clerk
BY [illegible] Deputy Clerk

EXHIBIT #5
4/16/48 P.C.

1068

102

PLAINTIFF'S EXHIBIT No. 28

Memorandum for File

Supplementing information on the Memorandum of Conference dated June 2, 1943, relating to assumption of certain salaries and expenses of the New York office by the Trustees, the following details are for record:

	Previously paid by Trustees	Previously paid by W.P. Corp.	Total now to be paid by Trustees	Annual Total
M. J. Curry	$ 600.00	$375.00	$ 975.00	$11,700.00
H. Brua Campbell	416.66	208.33	625.00	7,500.00
Mary C. Valouch	191.66	28.33	220.00	2,640.00
John F. Wienken	156.25	83.33	239.58 +	2,875.00
Lillian O'Neill	148.33	21.66	170.00	2,040.00
Catharine C. Sheehan	145.00	20.00	165.00	1,980.00
Total Salary Roll	$1,657.90	$736.65	$2,394.58	$28,735.00

(Monthly accounts adjusted end of year to annual totals)

Miscellaneous Expenses

Rent offices	188.34	188.34	376.68	(Month to month)
Electric (approx.)	18.00	18.00	36.00	
Storage (approx.)	.....	14.00	14.00	
Phone (approx.)	As req'd	25.00	?	
Postage (approx.)	As req'd	18.00	?	
Total former W.P. Corp. proportion			1,009.00	

San Francisco
June 2, 1943
(E.W.E.)

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 29

New York, January 27, 1943.

Mr. Curry:

My secretary, Mary C. Valouch, who has been doing my work since Walter Mittelberg left, has, as you know, assumed additional duties, particularly of a research and statistical character and handles our tax matters.

She is doing this work in a satisfactory manner so I am increasing her salary, effective January 1, 1943, on The Western Pacific Railroad Company payroll to $2,300 per year, which is an increase of $300 a year over her present salary—my former secretary received $3,400 a year from the Company.

Please arrange your payroll accordingly.

T. M. SCHUMACHER

(Original signed by) T. M. Schumacher.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 30

Memorandum of Conference
June 2, 1943.

At a conference held today between Messrs. Schumacher, Ehrman, Matthew and Elsey, it was agreed that the following changes should be made with respect to employes and expenses of the New York office:

1. Effective as of June 1, 1943, all employes of the New York office heretofore acting as joint employes of the Reorganization Trustees and The Western Pacific Railroad Corporation will be taken over as full time employes of the Trustees, viz:

M. J. Curry
H. Brua Campbell
Mary C. Valouch
John F. Wienken
Lillian O'Neill
Catherine C. Sheehan

2. The Trustes will assume the full rental of the New York office, together with all expenses for miscellaneous supplies and services incident to maintenance of the quarters.

3. It was understood that the above changes will increase the Trustees' expenses by approximately $1,000 per month. Mr. Curry will continue to report to the General Auditor, as heretofore, details as to salaries and expenses but on the single employer basis now agreed upon.

4. It was agreed that the Trustees would not pay any part of the Corporation's franchise tax ($1691.75 to April 1944).

5. Although the employes above mentioned will be receiving more compensation from the Trustees than formerly, it is the opinion of Mr. Dooling that no authority will be required from the Salary Stabilization Unit of the Bureau of Internal Revenue with respect to Mr. Curry, or from the War Labor Board, with respect to other employes, since none of them will be receiving more compensation from a single employer than they formerly received as joint employes.

6. It was understood that Mr. Schumacher would make necessary application to the Reconstruction Finance Corporation to cover Mr. Curry's increased salary on the Trustees' payroll, such consent from the R.F.C. being necessary in accord with terms of the Trustees' loan agreement with R.F.C.

CHARLES ELSEY.

Copy to Mr. T. M. Schumacher
Mr. Sidney M. Ehrman
Mr. Allan P. Matthew
Mr. D. C. DeGraff
Mr. E. C. Bates

San Francisco, California,
June 7, 1943.
(EWE)

The Western Pacific Railroad Company

37 Wall Street,
New York.

June 18, 1943.

Mr. Charles B. Henderson, Chairman,
Reconstruction Finance Corporation,
Washington, D. C.

Dear Mr. Henderson:

Pursuant to Subdivision (a), Item 3, of Agreement dated November 23, 1938, between the undersigned Trustees in Reorganization of The Western Pacific Railroad Company, Debtor, and the Reconstruction Finance Corporation, and supplements thereto, filed on December 2, 1940 and December 1, 1941, this is to respectfully request the written consent of the Reconstruction Finance Corporation to the folllowing changes in salaries, effective June 1, 1943:

Mr. M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, in our 37 Wall Street, New York Office, to be increased from $600 to $975 per month.

Mr. H. Brua Campbell, of Pierce & Greer, Counsel at New York, 40 Wall Street, to be increased from $416.66 to $625. per month.

These changes are brought about by reason of the fact that, effective as of June 1, 1943, all employees of the New York Office heretofore acting as joint employees of the Reorganization Trustees and The

Western Pacific Railroad Corporation (holding company) will be taken over as full time employees by the Trustees of the Debtor Company.

The total compensation paid Mr. Curry and Mr. Campbell are shown in Exhibit "C" attached to the aforementioned agreement. Mr. Curry's total salary (amended in accordance with your letter of March 25, 1943) remains unchanged. Mr. Campbell's total salary, however, is $208.33 per month less than shown on Exhibit "C."

Your Corporation's consent to the aforementioned changes will be appreciated.

Yours very truly,

T. M. SCHUMACHER &
SIDNEY M. EHRMAN,
Trustees in Reorganization,

THE WESTERN PACIFIC
RAILROAD COMPANY,

By /s/ T. M. SCHUMACHER,
One of the Trustees.

cc. Messrs. Ehrman, Elsey, Matthew & Nicodemus.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 31

November 9, 1943

Col. Robert E. Coulson
40 Wall Street
New York 5, N. Y.

Re: Western Pacific Reorganization

Dear Col. Coulson:

This will acknowledge receipt of your firm's letter of November 8, 1943, enclosing the report of the Reorganization Committee of the selection of officers and counsel and the designation of mailing address and adoption of by-laws.

This also seems very formal and excessively regular but nevertheless I wish to write informally to congratulate the Reorganization Committee on the selection of your firm as its counsel. As counsel for the Debtor as well as for the Western Pacific Railroad Corporation I stand ready to cooperate to the fullest extent in expediting the reorganization.

At the risk of possible repetition of what I have said to you personally I think your firm will render a distinct service if it insists on the preparation of trust indentures of a somewhat different character than those that have been used in recent reorganizations.

Yours very truly,

F. C. NICODEMUS, JR.

cc:
Mr. T. M. Schumacher.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 32A

April 21, 1945

Mr. Charles Elsey, President
The Western Pacific Railroad Company
526 Mission Street
San Francisco, California

Dear Mr. Elsey:

Since Mr. Droit left I have spent some time discussing with Mr. Schumacher and Mr. Curry some of the problems incident to the closing of the office of The Western Pacific Railroad Company at 37 Wall Street. In this connection I have made certain suggestions, some of which are not a matter of concern to your company but one of which at least is understood to be subject to your approval.

As to Miss Vauloch and Miss O'Neill who have been in the office at 37 Wall Street, I have agreed to employ them in this office quite independently of any tax work being done for your company. They will, of course, lose their Railroad Retirement protection since they leave the employ of a carrier but for that they are compensated by the six months' severance allowance, which I understand your company to have provided. In our opinion the fact that they promptly take employment in this office will have no bearing on the six months' retirement allowance you are giving them.

Mrs. Sheehan, who has been in the office at 37 Wall Street, is not desirous of taking other employ-

ment at the moment and seems quite satisfied with her six months' severance provision.

As to Mr. Wienken, there seems to be no other course than for him, with the protection of his six months' severance pay, to secure other employment. We are not able to make any place for him in this organization or to justify any arrangement to secure his availability in connection with pending tax problems of your company.

As to Mr. Curry, my suggestion has been that this office retain his services for the present on an annual basis to make investigations and furnish us with reports and to be available as a witness in connection with the pending tax questions which your company has up with the Federal Government. As president of the old holding company, which is a party in interest (without financial stake) in the consolidated return period, it seems to us essential that we have Mr. Curry available to secure us necessary data from the files of the holding company. On the other hand, it is not feasible for the holding company to maintain a New York office on its own account because of certain tax problems which arise under New York State laws. Under the arrangement which I have proposed, we would make available to Mr. Curry an office in which he could go over tax data in connection with studies and reports we desire and furnish him with stenographic assistance in compiling his reports. He would not, in any sense, be an "employee" of this office. It is our opinion that such

work as an independent contractor would not constitute "entering the service" of the operating company so as to prevent payments to him under the Provisional Retirement Plan of your company even though we expected, as we would, to be reimbursed by your company for the annual retainer paid him as an expense of the tax proceeding. The same applies, we think, to the Railroad Retirement benefits which Mr. Curry will receive, although we have made no extended study on this point. Mr. Curry, however, will have to resign his position as a nominal vice president of the Denver and Rio Grande for the purpose of stock transfers, in which connection he has been receiving compensation. Otherwise his Railroad Retirement benefits would not accrue.

The amount I suggest by way of annual retainer to Mr. Curry from this firm is $3,000. There is no doubt in my mind that his usefulness in connection with the tax matters will justify such a payment to him for the next year or two. Taken together with his Railroad Retirement payments and his Provisional Retirement Plan payment, this proposed retainer will also serve to tide him over a period which would otherwise be somewhat difficult for him.

Everyone seems to be in the mood to be quite content and happy if a program, such as is outlined above, can be worked out. This does not mean that Mr. Schumacher views with pleasure not having an office available and he still expresses some

concern as to whether the Western Pacific is wise to be without a New York office other than traffic offices. Also, I received a rather vehement protest from Mr. Nicodemus, whose solution was to have the holding company, in conjunction with the Denver and Rio Grande, continue to maintain the office at 37 Wall Street on a substantially reduced scale. There are, however, obstacles to any such program which seem to me to be insuperable.

Please let me have, as promptly as you can, your reaction to that part of the program outlined above in which the operating company has a definite interest, viz., the proposed retainer to Mr. Curry to be paid by us and reimbursed to us as one of our disbursements in connection with the pending tax matters.

Sincerely yours,

/s/ ROBERT E. COULSON.

[Stamped]: The Western Pacific R.R. Co., President, Apr. 24, 1945.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 39e

April 8, 1943

Col. Robert E. Coulson
40 Wall Street
New York, N. Y.

Dear Col. Coulson:

Referring to my recommendation to Messrs. Schumacher and Ehrman that your firm be en-

gaged as advisory counsel to aid Mr. Matthew and me in the solution of the serious problems that will arise in connection with the preparation of final Federal tax returns for the calendar year 1942, I am just in receipt of advice from Mr. Schumacher that this recommendation in which Mr. Matthew has concurred is agreeable to the two Trustees and that they desire me to arrange forthwith for your firm's services.

Since you already have advised me informally of your firm's willingness to undertake this work I write merely to confirm the arrangement and to say that I will hold myself in readiness to confer with your Mr. Polk and to make available to him such data as has been supplied to me and such further data as he may desire.

The firm of Lybrand, Ross and Montgomery has been employed in connection with certain accounting problem and I understand their services will be available to us to the extent that we deem necessary.

Yours very truly,

/s/ F. C. NICODEMUS, JR.

[Endorsed: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 39F

April 20, 1943

F. C. Nicodemus, Jr., Esq.
40 Wall Street
New York, N. Y.

Western Pacific

Dear Mr. Nicodemus:

This is a belated acknowledgement of your letter of April 8, 1943. I had assumed from its text and from the fact that Mr. Polk and you were already at work when I received your letter that you needed no formal acknowledgment. However, it may be better, as a matter of record, that you should have a formal acknowledgment of the fact that we have undertaken the Federal tax work for the Trustees as advisory counsel in conjunction with yourself and Mr. Matthews.

Sincerely yours,

/s/ ROBERT E. COULSON.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 42

The Western Pacific Railroad Company

November 15, 1948

To Whitman, Ransom, Coulson & Goetz, Dr., Attorneys and Counsellors at Law, 40 Wall Street, New York.

Final statement covering professional services in connection with Federal tax disputes as to the taxable period from January 1, 1942, through April 30, 1944	$300,000.00
Retainer payments, July 1, 1945, to December 31, 1948, to M. J. Curry	10,500.00
Total	$310,500.00

Received Payment,

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York

December 19, 1947

Mr. Charles Elsey, President
The Western Pacific Railroad Company
526 Mission Street
San Francisco, California

Dear Mr. Elsey:

In connection with the tax work which I and my associates have been carrying on for The Western

Pacific Railroad Company during the 1947 calendar year I have had prepared a statement which is enclosed. This statement covers such services on a time basis and does not purport to include any fee for the substantial tax savings effected for the period from 1942 through the first four months of 1944. You will, I think, concur in my view that any statement covering the fee for this special tax matter should not be determined or submitted until any possibility that the settlement agreement might be reopened by the Treasury Department is foreclosed by the expiration of the statutory period of limitations as to all the taxable years involved, and possibly even until there is at least a preliminary determination in the pending litigation in which The Western Pacific Railroad Corporation is seeking to assert an interest in such tax savings.

When you have reviewed the enclosed statement for current services, and the disbursements in connection therewith, please call me up if there is any question in your mind about them. From the standpoint of The Western Pacific Railroad Company it might be better to have any payment made on account of these services made during the current calendar year.

Sincerely yours,

/s/ JAMES K. POLK.

[Stamped]: The Western Pacific Railroad Co., President, Dec. 22, 1947.

Whitman, Ransome, Coulson & Goetz
40 Wall Street, New York

November 15, 1948

Mr. Charles Elsey, President
The Western Pacific Railroad Company
526 Mission Street
San Francisco, California

Dear Mr. Elsey:

On December 19, 1947, I wrote you as to the time when a bill should be rendered covering the services of myself and my associates in connection with the special Federal tax matter which resulted in substantial tax savings for the period from January 1, 1942 to May 1, 1944. It was suggested in my letter that no statement should be submitted for this special tax matter until the settlement agreement was protected from any suggestion on the part of the Treasury Department that the matter be reopened prior to the expiration of the statutory period of limitations as to all the taxable years involved. The statutory period of limitations as to the years involved ended on June 30th of this year and so far as that element is concerned there is no reason why a final statement should not be rendered.

My letter of December 19, 1947 also raised for consideration the possibility that a final bill might be deferred until there had been at least a preliminary determination in connection with the litigation in which the Western Pacific Railroad Corporation is seeking to assert an interest in the bene-

fits derived by The Western Pacific Railroad Company from the final disposition with the Treasury Department of the issues for the taxable period mentioned. We have given consideration to this aspect of the matter and have reached the conclusion that the balance of advantage to your company would be to have a final bill rendered during the calendar year 1948. You will no doubt wish to discuss this aspect of the matter with Mr. Matthew, as counsel for your company in the pending litigation between The Western Pacific Railroad Corporation and your company.

In order to put this matter in concrete form, I am enclosing a statement covering such services. The amount shown by this statement seems to us to represent a fair and reasonable basis of charge. In addition the statement shows the retainer payments which have been made and are being made through this office until the end of the current year to Mr. Curry in order that he might be available for research and as a witness in the event the matter had gone to trial instead of being settled.

If there is any aspect of this matter as to which you wish further information, do not hesitate to call me up here in the office.

Sincerely yours,

/s/ JAMES K. POLK.

[Stamped]: The Western Pacific Railroad Co., President, Nov. 19, 1948.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 43

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York

July 25, 1944

M. J. Curry, Esq., President,
The Western Pacific Railroad Corporation,
37 Wall Street,
New York 5, N. Y.

Dear Mr. Curry:

We have given the matter of adoption of declared value on the 1944 Capital Stock Tax Return for The Western Pacific Railroad Corporation consideration after discussing with Miss Valouch and Mr. Reilly the present estimates of declared value excess profits tax net income for the calendar year 1944.

You realize that the tax statute does not attempt to require a measurement of real or actual value of the capital stock and that the problem involved in the adoption of a declared value is one of selecting an amount which will incur a minimum combined capital stock tax and declared value excess profits tax liability. The adoption of a declared value of at least ten times the estimated taxable income for the year 1944 is necessary to escape the declared value excess profits tax provisions of the Act and a reasonable margin of protection must be added to provide for possible increases in taxable income over any present estimate.

The best judgment of the Company officials and

employees would seem to be that there will be no declared value excess profits tax net income derived by the Corporation for the calendar year 1944. Accordingly, it is believed that the capital stock tax return may properly reflect a declared valuation of zero for the Western Pacific Railroad Corporation.

We have also reviewed the draft of the capital stock tax return and accompanying statement of Trustees which has been prepared for The Western Pacific Railroad Company. Since it is believed that the Corporation will not have title to the property during the calendar year 1944 and the ownership will continue in the Trustees in Reorganization, the return and accompanying statement of Trustees reflects no capital stock tax liability for The Western Pacific Railroad Company.

Review has also been had of the copies of capital stock tax returns proposed to be filed for the Sacramento Northern Railway, the Tidewater Standard Railway Company, The Western Realty Company, the Standard Realty and Development Company and the Delta Finance Company, Ltd. As previously stated, the basis of the declaration of value should be at least ten times the estimated declared value excess profits tax net income of each corporation. Under the method of computing the declared value excess profits tax liabiltiy this income is substantial statutory revenue less statutory deductions, the net result of which is reduced by 85% of the dividends received from domestic corporations and by 10% of the valuation declared on the capital stock

tax return. It is assumed that the respective corporate officials have based their declarations of value on estimates of income for these Companies for the year 1944 so as to eliminate through the 10% credit on the declared value any declared value excess profits tax net income. We have no means of reviewing with the Company officials the estimates of income which formed the bases for the adopted values set forth in the capital stock tax returns.

The copies of the returns which were submitted with your letter of July 19th are herewith returned to you. It is requested that at your convenience copies of these papers be furnished us for our files. It is assumed that you will wire Mr. DeGraff so that the returns may be timely filed by him.

Very truly yours,

WHITMAN, RANSOM, COULSON & GOETZ.

July 26, 1944

Via air mail: Special Delivery.

Mr. D. C. DeGraff, General Auditor,
The Western Pacific Railroad Company,
526 Mission Street,
San Francisco 5, Calif.

Dear Mr. DeGraff:

After receiving copies of the 1944 Returns of Capital Stock Tax, which were enclosed with your letter of July 21st, they were delivered to our Tax

Counsel, Mr. James K. Polk of Whitman, Ransom, Coulson & Goetz, for his review, having previously submitted to him for consideration the question of the parent company's Capital Stock Tax Return.

I am in receipt of a reply from his firm, copy of which I am enclosing for your information.

I am also enclosing 1944 Return of Capital Stock Tax for The Western Pacific Railroad Company and Statement of Trustees, both executed by Mr. T. M. Schumacher, as Trustee. We would appreciate it if you will send us conformed copies of all returns filed for our records.

Yours very truly,

/s/ M. J. CURRY.

cc. Mr. James K. Polk:
Mr. F. C. Nicodemus, Jr.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 50

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York

May 20, 1943

Mr. M. J. Curry,
Vice President,
Western Pacific Railroad Company,
37 Wall Street,
New York, N. Y.

Dear Mr. Curry:

On May 15, there were filed at the Office of the Collector of Internal Revenue, Custom House, New York, the Federal income, excess profits tax and declared value excess profits tax returns for the Western Pacific Railroad Company and its affiliated corporations. The items entering into the preparation of these returns were reviewed by us and on the basis of the informaiton available, it is believed that the returns as filed met all of the conditions of the Internal Revenue Code and Bureau regulations in respect of the substantive matter contained therein and of supporting schedules.

It is believed, however, that a considerable amount of supporting detail and underlying data must be prepared in order that the figures set forth in the return can be supported upon subsequent Bureau audit. While it is true that much of this underlying detail will relate to the earnings and profits determination which, in turn, will probably

Plaintiff's Exhibit No. 50—(Continued)

have little effect upon invested capital, it is believed, however, desirable that the research be carried through in order that the position we assert in the returns may be hedged against the adverse implications of possible distributions out of capital which may have occurred up to the date of the last dividend payment in 1927. Further, we have used in the returns, book costs as bases for the affiliated corporations' stock investments which again may require adjustments, possible of determination only after such analyses.

It is also believed desirable to have a more complete review made of the computation of the unused excess profits credit adjustment. In the return as filed, it was assumed that the invested capital base for the years 1940 and 1941 was substantially the same as for the taxable year 1942. Undoubtedly, changes will be indicated when the schedules for borrowed invested capital and inadmissible adjustments for 1940 and 1941 have been prepared in detail. This adjustment will, in all probability, have no effect upon the 1942 tax return but will afford a more proper basis for administrative consideration of tax matters for 1943 and subsequent years.

It is further noted that a historical development of the profit and loss accounts of the several companies, not only as disclosed in their books, but as set forth in the reconciliations reported in prior Federal income tax returns, will bring to light any

Plaintiff's Exhibit No. 50—(Continued)

instances of write-ups, write-downs, etc. The survey of this character will also serve to establish more definite amounts of net operating loss deductions and carryovers.

Both in connection with the review of the deductions claimed for depreciation and the amounts shown for fixed capital investment returns, it will be helpful to review the significant tax positions adopted by the company and accepted by the Bureau of Internal Revenue in connection with the audits by the Bureau of Internal Revenue of prior year income tax returns. While not estopped by prior considerations and decisions, the Bureau may be disinclined to depart from previous determinations of basis of fixed capital investments as shown by treatment in computing depreciation deductions and in computing gains and losses upon the disposition of assets.

It may also be noted that it is clearly demonstrable that the consolidated return basis of reporting for the year 1942 as contrasted with a separate basis of reporting, was advantageous to the group. Since consolidated returns were filed for 1940 and 1941, any unused excess profits credit inhered in the common parent corporation, had separate returns been filed for 1942. A preliminary survey of the smaller affiliates indicates that they would have incurred no excess profits tax liability. The operating company, however, if placed on a separate basis without the benefit of the credit carry-

Plaintiff's Exhibit No. 50—(Continued)

overs, would have been liable for a net excess profits tax liability of $3,650,000 even if all other figures as shown in the return were left unchanged. This amount is offset by several factors. In the first place, on an individual basis, the operating companies' interest on expense deductions would have increased $703,000. It would have lost, however, its allocable share of the net operating loss reduction of approximately $438,000. Further, a portion of its earnings subject to excess profits tax rates would have been eliminated from normal tax rates. There would have been, in addition, a reduction in the surtax rate on a separate basis of the 2% penalty for filing a consolidated return, which would have amounted to approximately $200,000 in tax. All of these factors combine to establish a net tax advantage of in excess of $1,550,000 in the adoption of the consolidated return under the separate return.

There is a further possibility of adjustment under the Internal Revenue Code provisions contained in Sections 23(g)(4) and (k)(5) by which the worthlessness of the operating company's stock may produce a net loss for the year 1943 with possible carryback application. This is commented upon rather than suggested as of certain value, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose

Plaintiff's Exhibit No. 50—(Continued)

stock had become worthless. This matter will receive more careful consideration when the completion of the reorganization makes possible the assertion of the claim for worthlessness of the operating company's stock.

Apart from the 1942 tax liability, we are informed that a request has been addressed to the company for the submission of basic data to be considered by the Bureau of Internal Revenue in connection with the application made under date of March 29, 1943, for permission to change the method of accounting from retirement to a depreciation basis for Federal income tax purposes. Under general procedures adopted in the Bureau the premission to change the basis of accounting is premised upon the agreement of the applicant to adoption of accumulated depreciation reserve balances which, at the election of the company, may be determined by any one of the following methods:

1. The accounts may be reconstructed from their beginning, or may start with the I.C.C. valuation, setting up as a reserve the difference between cost of reproduction new and cost of reproduction less accrued depreciation as determined at the valuation date. From either starting point, the capital accounts shall be carried forward, increased by additions and decreased by retirements, except that any increase in replacement costs, or additions or betterments expensed, which have been deducted for

Plaintiff's Exhibit No. 50—(Continued)

income tax purposes, may not be restored. Depreciation at rates to be agreed upon shall be computed for all years and accrued into a depreciation reserve. From this reserve shall be deducted the cost of normal retirements, but for retirements due to casualty or special obsolescence, which would have been allowable under depreciation accounting, only the accrued depreciation thereon shall be deducted.

2. A reserve may be set up by multiplying the expired life of individual structures, or the weighted average ages of the accounts representing groups of assets, now in service, by the depreciation rates agreed upon for these assets.

3. A reserve of 30% of the total depreciable accounts at the date of change may be set up. It is to be understood that this is on overall reserve and the total amount so computed is to be allocated to the different depreciable accounts on a reasonable basis, such allocation to be a matter of agreement between each railroad and the Bureau.

We are familiar with the requirements of the Bureau of Internal Revenue in connection with depreciation computations generally embodied in the Valuation Division questionnaire, the provisions of T.D. 4422 and related Bureau rulings, and have discussed the railroad situation with the Bureau of Internal Revenue officials to whom these matters are assigned. It will, undoubtedly, be necessary

Plaintiff's Exhibit No. 50—(Continued)

to complete preliminary computations under the elective methods prescribed, and to compare the possible annual benefits of depreciated accounting with the retirement basis heretofore followed, before administrative action can be taken to complete the application for permission to change accounting basis filed with the Bureau of Internal Revenue.

We will be glad to confer with your company officials in planning these preliminary surveys so, if possible, to minimize the work required and will be glad to make available to you the benefit of our experience in the assembly and presentation of data to the Bureau of Internal Revenue, if you elect to take advantage of the depreciation basis of tax accounting for 1943.

Very truly yours,

/s/ JAMES K. POLK.

[Stamped]: The Western Pacific Railroad Corp., Received May 21, 1943.

[Stamped]: T. M. S. May 21, 1943.

[Endorsed]: Filed Feb. 2, 1949.

URGENT

June 26, 1943

MEMO FOR ~~JKP~~

Western Pacific

Will it embarrass you in the Western Pacific situation if the corporate charter of the Western Pacific Corporation is cancelled by the State of Delaware for failure to pay its 1940 Delaware franchise tax prior to July 1, 1943?

REC

EXHIBIT 60
3/19/48 E.O.

U.S. DIST. CT. N. D. CAL.
No. 26538-S
Clerk
FILED FEB 2 1948
By L. C. Ellington, Deputy Clerk

Until the Revenue provisions we are urging for incorporation into the Internal Revenue Code are adopted it is essential to protect the possible use of the net loss carryback that the holding company continue until the ~~C~~ confirmation of the reorganization. It would require a long study of the Canal Ditch regulation to prepare all the advantages & continuation of charter beyond 6/30 can be waited.

PIERCE & GREER
40 WALL STREET
NEW YORK

CABLE ADDRESS
PIERGREER

1001 FIFTEENTH STREET, N.W.
WASHINGTON, D.C.

May 26, 1943

EXHIBIT 91A
WWS E.O.

Mr. James K. Polk
40 Wall Street
New York, N. Y.

Dear Mr. Polk:

Attached is form of communication to security holders which The Western Pacific Railroad Corporation would like to hand out to persons applying at its office for information as to the status of the Corporation.

Is there any reason in your mind, in connection with your letter to the Railroad Company of May 20, 1943, why the Corporation should not do this?

Yours very truly,

F. C. Nicodemus, Jr.

U. S. DIST. CT. N. D. CAL.
No. 26508-L
Plff. 57
FILED FEB 2 1949
C. W. CALBREATH, Clerk
by R. Ellington Deputy Clerk

3/A

The Western Pacific Railroad Corporation

37 Wall Street
New York, N. Y.

To Holders of The Western Pacific Railroad Corporation Preferred Stock and Common Stock:

As information, we give you below a brief statement as to the status of this Corporation.

This Corporation is a holding company and not an operating railroad company. Its investments comprise the common and preferred stocks of The Western Pacific Railroad Company, one-half of the common stock of The Denver & Rio Grande Western Railroad Company and, in addition, certain other securities of both companies. These operating companies have been in process of reorganization since late in 1935, and, as a result, the Corporation has received no income on these investments during that period.

Aside from the preferred and common stocks of The Western Pacific Railroad Company, the balance of the securities owned by this Corporation are pledged as collateral under loans which have been in default since 1934 and on which interest has accumulated.

After lengthy court procedure, throughout which this Corporation was represented by Counsel to protect the interests of its stockholders, the Western Pacific case was appealed to the United States Supreme Court for review. On March 15, 1943,

that court rendered its decision, affirming the plan of reorganization which was promulgated by the Interstate Commerce Commission and approved by the Federal District Court in San Francisco. That plan declares the unsecured indebtedness and the preferred and common stocks of The Western Pacific Railroad Company to be without value.

The bank serving as Registrar of the Corporation's preferred and common stocks, having given notice of its resignation, effective May 1, 1943, and in view of the poor financial condition of the Corporation, it was determined by the officers that as Corporation no certificates for preferred stock or preliminary to liquidation and dissolution of the common stock would be accepted for transfer after April 29, 1943. The New York Stock Exchange suspended trading in the preferred stock on April 29, 1943 (the common stock had been delisted in 1939, since which time it has been traded in the Over-the-counter market).

In view of the Supreme Court's decision, which indicates clearly that the unsecured indebtedness and the preferred and common stocks of The Western Pacific Company (all owned by this Corporation) are of no value and, further, that all other securities owned by the Corporation are pledged as collateral under loans in default, and as the Corporation is without funds to continue its corporate existence, we regret to state we do not believe that during the course of liquidation and dissolution any assets will remain for distribution to holders

of the Corporation's preferred and common stocks.

JOHN F. WIENKEN,
Secretary.

date?

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 53

January 8, 1944

Memorandum

In Re: Western Pacific Reorganization Trustees
1943 Federal Income Tax Return

Conferences were held today with Mr. Elsey, Mr. Englebright, Mr. DeGraff, and Mr. Gloster at the Company offices, and with Mr. Elsey and Mr. Matthew at luncheon in connection with the deduction to be claimed by the parent company on loss on the operating company's stock, their effect thereof upon the tax liability of the subsidiary operating company.

It was explained that under Internal Revenue Code provisions losses on the stock of operating subsidiary companies were specifically removed from the capital gains and loss classification and accordingly allowed as operating losses and, on consolidated return treatment the parent company loss could offset subsidiary company incomes.

The Western Pacific Railroad Corporation's investment in the (operating) Western Pacific Railroad Company's stock has been shown at $75,000,000.

The basis is under any calculation well in excess of the operating income of the operating company for 1943.

There has been accrued on the operating company's books through November a reserve for Federal tax liability of approximately $7,500,000. Since there will be no tax liability if this operating loss deduction on the consolidated return basis is allowed the suggestion was made that the books of account be adjusted so as to reflect at December 31 no accrual for Federal tax liability on the part of the operating company for 1943.

After considerable discussion it was decided tentatively to set up a "Reserve for Road Improvement" in an amount approximating the $7,500,000 figure. This action is to be taken upon order of the court after appropriate application for same. As a preliminary step the procedure is to be further studied and submitted to the Reorganization Committee for their approval, which if obtained is to be then submitted to the Trustees for their approval. In support of the dollar reserve, accrual engineering studies are to be compiled showing cost of change of existing rails from 80 to 112 pounds, installation of continuous block system, substitution of concrete for timber tunnel linings, and possibly extension of centralized traffic control. Studies are also to be included of cost of acquiring modernized passenger and freight equipment. Further conferences are to be held Monday on these matters.

Mr. Gloster furnished the undersigned with a

preliminary draft of engineering studies on machinery and equipment investments for consideration in connection with the Bureau requirements for submission of data under Treasury Mimeograph 58.

Discussions were also had with Mr. Matthew and Mr. Elsey concerning the program for corporate readjustment and substitute lease arrangements with the Salt Lake City Union Depot and Railroad Company. Mr. Matthew has completed a draft of lease and a copy is to be furnished me for review. In the draft Mr. Matthew has made provision for limited preferred stock dividend requirements, but in the light of the discussion of Mr. McAllister's suggestions has noted that these provisions are subject to revision to accord with the proposals prepared by Mr. Hart and the undersigned. Mr. Matthew is to join in the conferences to be held Monday in regard to both the tax return and the Salt Lake Depot matters. A request was made that opinion letter of counsel be drafted covering the tax return deduction item and this will be done after review of the applicable statutory provisions Monday.

J. K. R.

[Endorsed]: Filed Feb. 2, 1949.

PLAINTIFF'S EXHIBIT No. 58.

Filed Feb. 21, 1944
C. W. Calbreath, Clerk

Allan P. Matthew,
1500 Balfour Building,
San Francisco 4, California

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

7100 000

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

PETITION FOR AUTHORITY TO ESTABLISH A RESERVE FUND FOR CONTINGENT TAX LIABILITIES

T. M. Schumacher and Sidney M. Ehrman, the duly appointed, qualified and acting Trustees of the properties of the Debtor above named, hereinafter referred to as the Trustees, hereby represent to the Court and petition as follows:

I.

The Trustees are advised and believe that the Debtor and the Trustees have no Federal income or excess profits tax liability for the year 1943. However, the Commissioner of Internal Revenue

has not yet passed upon the question, and the Trustees believe that it is in the best interests of the estate of the Debtor to provide a reserve fund out of which 1943 Federal income and excess profits taxes may be paid in the event that liability therefor should be established. The Trustees are advised and believe that the sum of $7,100,000 will be adequate to cover any possible liability for such taxes for the year 1943. The estate of the Debtor contains sufficient cash derived from the earnings of the railroad of the Debtor during the year 1943 to establish a reserve fund in the amount of $7,100,000 without using funds required for other purposes.

II.

It is the judgment of the Trustees that such reserve fund should be invested in United States Treasury securities. The Trustees propose to designate the fund as the "Reserve Fund for Contingent Tax Liabilities."

Wherefore, your petitioners pray that they be authorized to establish, out of the earnings of the railroad of the Debtor during the year 1943, a reserve fund in the amount of $7,100,000, to be designated as the "Reserve Fund for Contingent Tax Liabilities," to be invested in United States Treasury securities, and to be used for the payment of any Federal income and excess profits taxes which may be found due for the year 1943.

ALLAN P. MATTHEW,
Counsel for Petitioners.

State of California,
City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says:

That for more than twelve years last past he has been the President of The Western Pacific Railroad Company and since the appointment of the Trustees of the properties of said Company he has been their Agent in immediate charge of the railroad and other property of that Company; that he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge.

CHARLES ELSEY.

Subscribed and sworn to before me this ..... day of February, 1944.

[Notarial Seal]

.....,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 3, 1949.

PLAINTIFF'S EXHIBIT No. 63

January 23, 1945

Memorandum for Colonel Coulson:

The Western Pacific Railroad Company Journal Entries Reflecting Completion of Reorganization

A conference was held today by Colonel Coulson, L. J. Gosney and the undersigned in which were

Plaintiff's Exhibit No. 63—(Continued)

discussed the principles involved in the suggested journal entries attached to and made a part of the memorandum of conference of January 17, 1945, with the Bureau of Accounts of the Interstate Commerce Commission.

It was noted that the fundamental premise of such journal entries was that there must be reflected upon the books of the continuing corporate entity the factual changes occasioned by the reorganization, and that this premise necessarily rejects any such concept as the Bureau of Accounts apparently had when they suggested in their letter of December 6, 1944, opening up a new set of books for a new corporation.

It was clearly understood and agreed that under no circumstances would the corporation jeopardize its primary tax advantage deliberately secured through the maintenance of the continuity of the 1916 corporation by voluntarily filing any proposed journal entries of the type suggested in the letter of December 6, 1944. Subject to such amendments, additions and corrections of dollar figures as will develop from the use of the December 31, 1944, closing figures, it is the position of counsel and of Colonel Coulson as a member of the Board, that the entries as reflected in principle in the memorandum of the January 17th conference should form the basis of the proposed journal entries to be prepared and submitted for Interstate Commerce Commission consideration.

Plaintiff's Exhibit No. 63—(Continued)

There is attached a photostatic copy of a work sheet reflecting the type of balance sheet before and after journal entries of the kind indicated in the January 17th memorandum. It was noted, of course, that the position estimated as of December 31st will probably vary materially in the cash and current asset classifications from the actual figures which will form the starting point for the proposed journal entries and schedules to be submitted to the Interstate Commerce Commission. It will also be noted that the resulting balance sheet will reflect an unearned surplus of approximately $83,000,000.00 and that of this sum only the amount of $75,800,-000.00 is to be classified as "paid-in surplus" for Federal income tax purposes, the balance constituting "accumulated earnings and profits" in any invested capital or source of dividend distribution computation.

A discussion was also had with regard to the book accounting in respect of the interest on the income bonds. The payment of interest on these securities cannot be determined until sometimes between January and May when the formal action of the Board of Directors in its determination of available income and authorization of the payment of interest is the ultimate act bringing into existence liability on the part of the corporation for payment. Thus from a technical viewpoint the interest is accruable only when and as there is this formal Board action. From a practical viewpoint, there is

Plaintiff's Exhibit No. 63—(Continued)

equal justification for this position since the corporation enjoys the use of the borrowed funds whether or not during each year there are available earnings to pay interest, and the use of the borrowed funds justifies a deduction of compensation equally in every year. The payment within a calendar year is a fair compensation for the actual use of borrowed money during that calendar year.

There is a further tax aspect which is of extreme importance and that is that theoretically and practically there could be no accrual of interest at any time prior to the issuance of the bonds and to insist that there were such an accrual would be an attempt to secure a small interest deduction for 1944 in comparison to the interest deduction now allowable on the old debt structure up to the turnover date under the St. Paul decision. As far as is concerned the practical booking of interest on the income bonds in 1945, subject to some objection which we cannot find in the Interstate Commerce Commission's prescribed system of accounts, it might be that there could be accrued monthly one-twelfth of an estimated annual interest payment on the bonds by a debit to interest expense and a credit to a reserve for estimated interest liability. Upon the payment of interest, for instance in May of 1945, cash could be credited and this reserve debited and the reserve balance immediately after such entry constituting a deferred charge to the remaining months in the year would be absorbed by the monthly entries of the

Plaintiff's Exhibit No. 63—(Continued)

remaining months in the year. In this manner there would be no distortion as between months of income statements. As to the handling of this, however, in the current accounts—so long as there is no reflection of liability at December 31, 1944, for any accrued interest on the income bonds—this office would be glad to receive the comments and suggestions of the accounting officers of the corporation.

Colonel Coulson suggested that as soon as the December 31st figures are available every effort should be made to have a preliminary draft of the journal entries prepared and forwarded to this office for review as to tax implications as well as for Interstate Commerce Commission presentation purposes. It was his suggestion that a memorandum of this conference and of the January 17th conference together with the exhibits be forwarded to Mr. DeGraff so as to give Mr. DeGraff the viewpoint of this office on these matters.

J. K. P.

[Endorsed]: Filed Feb. 3, 1949.

PLAINTIFF'S EXHIBIT No. 64

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

May 31, 1946

Mr. C. R. Krigbaum
Internal Revenue Agent in Charge
225 Broadway
New York, N. Y.

Attention: Mr. T. K. Leahy

The Western Pacific Railroad Corporation
Federal Income Taxes 1942 and 1943

Dear Sir:

The audits of the Federal Income Tax Returns filed by the above named corporation are now being made by representatives of your office. In advance of the consideration of other issues, preliminary review is being given to the deduction claimed in the 1943 tax return for the loss sustained in the worthlessness occurring during that year in the stock of The Western Pacific Railroad Company. In order to facilitate the consideration of this matter, and without any attempt at this time to submit arguments in support of the claim of the taxpayer, there is furnished below a summary of the facts believed pertinent in this matter. The taxpayer specifically reserves the right to supplement this statement of facts and to submit a brief in support of the propriety of the claim for deduction in 1943.

The Western Pacific Railroad Corporation was

Plaintiff's Exhibit No. 64—(Continued)

organized under the laws of the State of Delaware in 1916 and has owned at all times from on or about July 14, 1916, to April 30, 1944, all of the outstanding stock of The Western Pacific Railroad Company. This latter company is a California corporation which has owned and operated railroad properties in the States of California, Nevada and Utah from 1916 to date. On August 2, 1935, a petition was filed in the United States District Court for the Northern Dist ct of California, Southern Division, for reorganization of The Western Pacific Railroad Company under the provisions of Section 77 of the Bankruptcy Act, as amended; simultaneously, a copy of said petition was filed with the Interstate Commerce Commission.

During 1936, 1937 and 1938 various plans of reorganization were filed with the Interstate Commerce Commission and hearings were held by the Commission. The resulting plan of reorganization formulated by the Interstate Commerce Commission was duly certified to the United States District Southern Division, and that Court after further hearings and argument, on August 15, 1940, entered an order approving the plan of reorganization proposed by the Interstate Commerce Commission.

All plans of reorganization filed with the Interstate Commerce Commission by the parties recognized value for the stock of The Western Pacific Railroad Company. The exclusion of the stock

Plaintiff's Exhibit No. 64—(Continued)

from participation by the Interstate Commerce Commission in the plan which it promulgated was vigorously contested before the Commission and before the United States District Court, both by the debtor company and by other parties to the proceeding.

Appeals were duly taken from the aforesaid order of the United States District Court to the United States Circuit Court of Appeals, Ninth Circuit, and in a decision handed down November 28, 1941, the Circuit Court of Appeals reversed the order of the District Court and ordered the case remanded for further proceedings. A principal contention of the debtor company, The Western Pacific Railroad Corporation, and other appellants before the Circuit Court of Appeals, was that the asset value and earning power of the debtor justified the participation of its stock in the reorganization. The Circuit Court of Appeals sustained this contention to the extent of holding that the Commission and the District Court had made no findings to justify the exclusion of this stock from participation. The Commission plan was based upon a forecast of earnings in the light of the worst depression experience the railroads had ever had. It is submitted that it is obvious that at the time of the Circuit Court of Appeals' decision the financial condition of the debtor was such that it would have been impossible to make any current findings of fact which would exclude the stock from participation in the reor-

Plaintiff's Exhibit No. 64—(Continued)

ganization. Accordingly, the Circuit Court of Appeals' reversal of the District Court was a practical insurance of participation in the reorganization by the equity ownership of the debtor company.

Petitions for certiorari to review the Circuit Court of Appeals decision were filed in the United States Supreme Court early in 1942. These petitions for review were granted by the Supreme Court on April 27, 1942, and the matter was argued before that Court in October, 1942. In the proceeding before the Supreme Court, the debtor and The Western Pacific Railroad Corporation both vigorously presented the claim that the decision of the Circuit Court of Appeals be sustained and that the demonstrated earning power and fair value of the operating properties warranted recognition of value for the stock. On March 15, 1943, the United States Supreme Court reversed the Circuit Court of Appeals and sustained the United States District Court, remanding the case to that Court for further proceedings under the provisions of Section 77 of the Bankruptcy Act. A petition for rehearing in this matter was denied by the Supreme Court and its decision became final on or about April 19, 1943.

Thereafter during the year 1943 the proceedings which are expressly required by the provisions of Section 77 of the Bankruptcy Act, as preliminary to a confirmation of a plan of reorganization, were taken in this case. The votes of security holders on acceptance of the plan were canvassed

Plaintiff's Exhibit No. 64—(Continued)

and recorded by the Interstate Commerce Commission. The favorable result of the vote was duly certified by the Interstate Commerce Commission to the United States District Court as required by the Bankruptcy Act. Thereafter upon notice to all parties and publication, a hearing was had on the confirmation by the United States District Court. On the record made at such hearing, the District Court under date of October 11, 1943, entered its order of confirmation of the plan. No appeals were taken from said order and it became final on or before November 20, 1943.

Under the plan of reorganization so confirmed by the United States District Court, The Western Pacific Railroad Corporation was excluded from any participation, and its stock ownership in The Western Pacific Railroad Company thereupon became worthless. The taxpayer claims that the stock of The Western Pacific Railroad Company at all times, until the date of the Supreme Court decision March 15, 1943, had a real and material fair market value, and that the stock became worthless on or after March 15, 1943, and, accordingly, that the loss occasioned by the worthlessness of the stock was properly deductible under the provisions of Section 23 (g) of the Internal Revenue Code in the determination of the consolidated taxable net income for 1943.

Very truly yours,

WHITMAN, RANSOM,
COULSON & GOETZ.

PLAINTIFF'S EXHIBIT No. 65

Know All Men By These Presents, that The Western Pacific Railroad Corporation, a Delaware corporation, by these presents hereby makes, constitutes and appoints James K. Polk and Harold F. Noneman, of the law firm of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York 5, New York, and Patrick J. Cavanaugh, an attorney associated with said firm, or either of them, its true and lawful attorneys, to appear for it and represent it before the Treasury Department, in connection with any matter involving its Federal Income Tax for the taxable years 1940 to 1945 inclusive, and to appear for and represent it before the Bureau of Internal Revenue, or any unit, division, or agent or employee thereof relative to any tax liability claimed against it for the taxable years 1940 to 1945 inclusive, giving and granting its said attorneys full power to do everything whatsoever requisite and necessary to be done in the premises, and to receive refund checks, to execute waivers of the statute of limitations, and to execut closing agreements, as fully as the undersigned might do if personally present, with full power of substitution and revocation; at any time subsequent to the date hereof and prior to the revocation hereof.

It is hereby requested that a copy of all communications regarding any matter in which the said attorneys are hereby authorized to act be addressed to James K. Polk, Esquire, at his office address, 40 Wall Street, New York 5, New York.

All powers of attorney heretofore given for the purposes herein enumerated by the undersigned are hereby revoked.

In Witness Whereof, the said The Western Pacific Railroad Corporation has caused its corporate name to be signed hereto by its President and its corporate seal affixed and attested by its Secretary all as of the 26th day of June, 1946.

THE WESTERN PACIFIC
RAILROAD CORPORATION,

[Seal] By /s/ M. J. CURRY,
President.

Attest:

/s/ M. C. VALOUCH,
Secretary.

[Endorsed]: Filed Feb. 3, 1949.

PLAINTIFF'S EXHIBIT No. 66

[Western Union Telegram Form]

CDU771 NL PD-CD New York NY 6

Allan P. Matthew,
Balfour Bldg., S Fran.
Received Dec. 7, 1946.
Answered 12/7/46 BE

We have an embarrassing situation in connection with examinations before trial in pending stockholders' suits because of various capacities in which

Curry has acted. He is president of the holding company. As such he holds certain files and papers of the holding company. We have pointed out necessity of distinction between these files and files of correspondence written or received by him or Schumacher as former officers of operating company. These files belong to operating company and should be technically in our custody as tax counsel insofar as they involve the tax matters. Curry raises question under your letter May 8, 1945 to bankruptcy trustees. Schumacher asked Curry to act as his representative in retaining custody of trustees books and records. This has been construed to include all correspondence with officers of operating company during reorganization period. In our judgment records directly affecting operating company must necessarily be turned over to operating company by bankruptcy trustees even though they remain available to bankruptcy trustees. Can you clear this situation by wire to us or directly to Mr. Curry?

COULSON.

[Marginal note]: W. P. REORG.

[Stamped]: Received Dec. 7, 1946.

[Stamped]: Ans'd. Dec. 7, 1946.—BE

[Endorsed]: Filed Feb. 3, 1946.

PLAINTIFF'S EXHIBIT No. 68

The Western Pacific Railroad Corporation
100 West Tenth Street,
Wilmington 99, Delaware.

At New York 5, N. Y.
40 Wall Street,
(Fifty-first Floor)

April 4, 1947.

Pierce & Greer,
44 Wall Street,
New York 5, N. Y.

Attention: Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

Herewith copy of letter dated April 2, 1947, and enclosure, from Mr. James K. Polk, of Whitman, Ransom, Coulson & Goetz, in regard to the Corporation's Federal Income Taxes for years 1942 and 1943 and period January 1 to April 30, 1944. A copy is also being sent to Mr. A. Perry Osborn.

This will be presented to the Board at meeting called for next Tuesday, the 8th, for consideration and such action as the Board may direct.

Yours very truly,

/s/ M. J. CURRY,
President.

Enclosure
cc. Mr. A. Perry Osborn,
20 Exchange Place,
New York 5, N. Y.

Plaintiff's Exhibit No. 68—(Continued)

(Copy)

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York.

April 2, 1947.

Mr. Michael J. Curry,
President,
The Western Pacific Railroad Corporation,
Room 5205,
40 Wall Street,
New York, N. Y.

Federal Income Taxes for Years 1942 and 1943 and Period January 1 to April 30, 1944.

Dear Mr. Curry:

As you doubtless know, Internal Revenue Agent Thomas Leahy has been conducting an examination of the operations of The Western Pacific Railroad Corporation and its affiliated companies for the calendar years 1942 and 1943 and the period from January 1 to April 30, 1944. His activities in this connection seem to be approaching completion. I have thoroughly covered with him all phases of the matter and this report is being made to you so that you may be advised of its current status.

In the course of his examination, Revenue Agent Leahy originally determined, on a tentative basis, that the worthlessness of the stock of The Western Pacific Railroad Company occurred in the year 1940. Although in view of the intermediate status of the matter no formal advice or notice of a proposed deficiency had been or could then be received, our ten-

Plaintiff's Exhibit No. 68—(Continued)

tative computations indicated that the deficiencies that would be asserted on the basis of any such determination as to the year of loss, would be considerably in excess of any reserve provision heretofore made against such tax liability. We immediately took the matter up with the local office of the Internal Revenue Agent in Charge, and various conferences were held at which were presented the taxpayer's views that this loss occurred in the year 1943.

The matter was submitted by the Internal Revenue Agent in Charge to the Office of the Commissioner of Internal Revenue in Washington, D. C. for advice. Conferences were held with Bureau officials in Washington in connection therewith. It was first proposed by the Bureau officials at Washington to support the tentative determination of the field examiner that the stock became worthless in 1940. In further conferences in Washington it was suggested that the matter was one appropriate for disposition by settlement or agreement between the parties. At the request of the Commissioner's Office, a written proposal as a basis for settlement was made by me as attorney-in-fact under date of February 11, 1947, a copy of which I am enclosing. After consideration by the Bureau officials, the case was recently returned by them to the local office of the Internal Revenue Agent in Charge. Revenue Agent Leahy, whose investigation was to a large extent suspended during the pendency of the matter in Washington, has now resumed his activities and is, we believe, now in the process of completing the draft of his report. His

Plaintiff's Exhibit No. 68—(Continued)

conclusions, we are hopeful, are now in accord with the proposal submitted to the Washington officials.

The proposal as to a possible basis for settlement is presently pending in the local office of the Internal Revenue Agent in Charge and will continue in that status until final action thereon can be taken by the appropriate Bureau officials. Under the Bureau practice and the necessities of this particularly difficult case, there will probably be an interval of at least two months before an agreement can be reached with those who must approve it, if it is accepted. It can be revoked at any time prior to such acceptance and there will be ample time for consideration by you and your associates before definitive action is taken.

If the Government approves the proposed basis for settlement, it will be an unusually advantageous disposition of the matter. The doubts as to the construction of the applicable Internal Revenue Code provisions are so real and the factual background so involved, that the Government would certainly be fully justified in resisting our claim in its entirety, if complete recovery were to be sought for 1942 as well as avoidance of all liability for 1943 and the period ended April 30, 1944. We would then be compelled to pursue our rights even to the Supreme Court of the United States. In any such extended litigation, we would necessarily incur all of the risks usually attendant upon any litigation, plus the inevitable bringing to bear on the problem, in behalf

Plaintiff's Exhibit No. 68—(Continued)

of the Government, of a succession of fresh and ingenious minds, eager to establish full tax liability in a case involving such large sums. The determination of the year of worthlessness is a factual matter involving a risk of loss which in itself, in my carefully considered opinion, fully justifies the proposed basis of settlement. This is entirely apart from other serious defenses which would most certainly be asserted by the Government, if it were to contest our position in the case.

It is, therefore, my definite recommendation that in the event the Government advises us of its willingness to close the matter on the basis suggested in the attached proposal, that the matter be so disposed of as promptly as possible. You will, of course, be advised promptly of any definitive corporate action required from your corporation to that end. I cannot impress upon you too much the depth of my conviction as to the importance of moving promptly when and if opportunity arises to close this matter on the basis proposed. I am fortified in this by the years of my experience in the Bureau of Internal Revenue and my knowledge of the extreme sensitivity which attends the situation in the Bureau in any case of this magnitude.

I will be glad to discuss this matter with you and your associates at any convenient time.

Very truly yours,

/s/ JAMES K. POLK.

Plaintiff's Exhibit No. 68—(Continued)

(Copy)

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

February 11, 1947.

The Honorable Joseph D. Nunan, Jr.,
Commissioner of Internal Revenue,
Washington, D. C.

Attention: Mr. Frank Eddingfield.

Re: The Western Pacific Railroad Corporation and Affiliated Corporations
1942, 1943 and 1944 Federal Income Taxes.

Dear Sir:

The Western Pacific Railroad Corporation and its affiliated subsidiaries filed consolidated returns for the calendar years 1942 and 1943 and the said Western Pacific Railroad Corporation filed a consolidated return for the calendar year 1944 including therein its said subsidiaries for the period from January 1, 1944, to April 30, 1944, during which period affiliation existed.

On the said return for 1942 a consolidated tax liability of $4,201,821.54 was reported and duly assessed and paid. On the said return for 1943 there was reported a net loss and no taxable income. On the said return for 1944, based on a carryover of the unused 1943 net loss, there was reported no taxable income and no tax liability. A claim for refund of the tax so paid for 1942, based on a carryback of the said

Plaintiff's Exhibit No. 68—(Continued)

1943 net loss, was filed and is now pending in your office.

The taxpayer on behalf of itself and its aforesaid affiliated subsidiaries hereby offers to settle and determine the tax liabilities of the said corporations for the said taxable years 1942, 1943 and 1944 in the amounts shown on the returns filed as aforesaid. This proposal of settlement does not relate to or affect the tax liability of the said subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated. The within proposal is made without prejudice to any rights or claims of the parties, if the proposal is not accepted by you.

As part of this proposal The Western Pacific Railroad Corporation, on behalf of itself and its aforesaid affiliated subsidiaries agrees that, if this proposal is accepted, it will consent to a rejection of the said claim for refund of the 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is further agreed by the said The Western Pacific Railroad Corporation on behalf of itself and its aforesaid affiliated subsidiaries that if this proposal is accepted it will execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement.

Authority for the submission of the within propo-

Plaintiff's Exhibit No. 68—(Continued)

sal of settlement by the undersigned is contained in a Power of Attorney heretofore filed in your office.

Respectfully,

THE WESTERN PACIFIC
RAILROAD CORPORATION

JAMES K. POLK,
Attorney-in-Fact.

[Endorsed]: Filed Feb. 3, 1949.

PLAINTIFF'S EXHIBIT No. 69

The Western Pacific Railroad Corporation
100 West Tenth Street,
Wilmington 99, Delaware.

May 5, 1947.

At: New York 5, N. Y.
40 Wall Street,
Fifty-first Floor.

Mr. James K. Polk,
Messrs. Whitman, Ransom, Coulson & Goetz,
40 Wall Street,
New York 5, N. Y.

Dear Mr. Polk:

After the conference between the Board Committee dealing with Corporation tax matters, and yourself, held in your office on April 15th, we have further

considered the questions involved and the points raised at the conference.

We are prepared to recommend to the Board the sending to you of a letter of general approval of the proposed tax settlement, outlined in your letter to the Corporation under date of April 2nd, signed by myself as President, with a copy of an authorizing resolution of the Board.

We will expect to be informed as to the progress of the negotiations and if there are any changes in the proposed settlement the Corporation must be entirely free to reconsider its approval.

Although we wish to be entirely cooperative in this matter, the Corporation finds itself embarrassed by the action of the Western Pacific Railroad Company in opposing judicial settlement of the allocations of tax benefits, if any, derived from the application of the capital losses of the Corporation for the benefit of the Group. The Railroad Company's pleadings that the Railroad Corporation should be denied its day in court by reason of the statute of limitations and the District Court's injunctive order in reorganization, does not invite the kind of cooperation from the Railroad Corporation that a settlement of the tax case, so ably and fairly proposed by you as counsel for both the Railroad Company and the Railroad Corporation, requires. Had there been any question of the Railroad Corporation's right to a determination of the question of allocations of tax benefits, we feel sure that counsel representing both the Railroad Company and the Railroad Corporation would have

specifically stipulated, at the time of the filing of the consolidated returns, for such allocation to be determined by the court, if the parties found themselves unable to agree thereto. Inasmuch as in the proposed settlement the Railroad Corporation foregoes its refund claim of $4,200,000, we think it appropriate that a stipulation promptly be entered into between the Railroad Company and the Railroad Corporation, and the other members of the Group, which will insure the Corporation its day in court for a settlement of the questions of proper and equitable allocations of tax savings, if any, as well as fixing the amount of the refund as the basis for such savings.

We trust you will use your good offices, representing both parties in this situation, to secure the approval of the Railroad Company to such a stipulation.

Very truly yours.

/s/ M. J. CURRY,
President.

cc: Mr. F. C. Nicodemus, Jr.
Mr. A. Perry Osborn
Mr. Willis D. Wood

[Endorsed]: Filed Feb. 3, 1949.

LIBRARY
SUPREME COURT, U.S.

Vol. V

TRANSCRIPT OF RECORD

(Pages 1797 to 2176)

Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DuP. BAYARD, RECEIVER, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN AND J. S. FARLEE & CO., INC., PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 150—PETITION FOR CERTIORARI FILED JUNE 23, 1952
No. 160—PETITION FOR CERTIORARI FILED JUNE 26, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAIROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Transcript of Record
In Five Volumes

Volume V
(Pages 1797 to 2176)

**Appeals from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PLAINTIFF'S EXHIBIT No. 70

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

May 6, 1947.

Mr. M. J. Curry,
40 Wall Street,
Room 5205,
New York, N. Y.

Dear Mr. Curry:

This acknowledges your letter of May 5th as to the pending tax matters for the years 1942, 1943 and 1944, The Western Pacific group, in which I act as tax counsel. Obviously, as your letter suggests, the only thing that I could do in connection with a possible stipulation between the various interested companies in connection with pending litigation between them as to allocation, would be to 'use my good offices''. The use of my good offices would necessarily be limited to calling to the attention of the other members of the group the fact which I have impressed upon your group; namely, that there is a common interest in concluding promptly the proposed settlement which I have been negotiating with the Treasury Department. It would in my judgment be disastrous if controversies between the members of the group, which could properly await subsequent disposition, should make impossible a settlement along the lines heretofore outlined to your group.

As you know, the legal representation of the rail-

road company in this matter is entirely in the hands of Mr. Allan P. Matthew of the firm of McCutchen, Thomas, Matthew, Griffiths & Greene of San Francisco. I understand that Mr. Matthew is represented here in New York in connection with the New York procedings by Mr. Crouch of the firm of Clark, Carr and Ellis. My function is definitely limited to the dealings with the Treasury Department in connection with the tax controversy where certainly all members of the group have a common interest. I have sent a copy of your letter to me and a copy of this letter to Mr. Allan P. Matthew.

Naturally, I am at the disposition of you and your associates and of any other member of the corporate group as to the method of computing the settlement or any other information which will be helpful in ironing out such differences as may exist between members of the corporate group. In closing, however, let me emphasize again the vital element that this controversy between the members of the corporate group shall not be allowed to interfere with an advantageous settlement with the Treasury Department, as to which there is clearly no conflict in interest.

Sincerely yours,

JAMES K. POLK.

Copies to: Mr. Nicodemus
Mr. A. P. Osborn
Mr. Willis D. Wood

[Endorsed]: Filed Feb. 3, 1949.

PLAINTIFF'S EXHIBIT No. 71

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

May 19, 1947.

Mr. C. R. Krigbaum,
Internal Revenue Agent in Charge,
225 Broadway,
New York, N. Y.

The Western Pacific Railroad Corporation and Affiliated Corporations

1942, 1943 and 1944 Federal Income Taxes.

Dear Sir:

Reference is made to the conference held in your office May 6th with regard to the tax liabilities of The Western Pacific Railroad Corporation and its affiliated companies for the taxable years 1942, 1943 and 1944.

At this conference an agreed basis of settlement of the tax liabilities involved was reached and this letter contains the written undertaking of the taxpayers effectuating the settlement.

The taxpayer on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liabilities of said corporation for the taxable years 1942, 1943 and 1944 in the amounts shown on the returns as filed. This proposal of settlement accordingly relates to the consolidated returns filed for the calendar years 1942 and 1943 and 1944, in which said return for 1944 The Western Pacific Railroad Corporation included therein its subsidiaries for the

period January 1, 1944 to April 30, 1944, during which period affiliation existed. This settlement does not relate to or affect the tax liability of the subsidiaries from and after April 30, 1944 when their affiliated status with The Western Pacific Railroad Corporation was terminated.

As part of the settlement The Western Pacific Railroad Corporation consents to the rejection of the pending claim for refund of 1942 taxes and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is also stipulated that The Western Pacific Railroad Corporation on behalf of itself and its affiliated subsidiaries will, if this settlement is accepted, execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement.

The settlement reached with your office is agreed to without prejudice, however, to any rights or claims of the parties in the event the settlement is not accepted by the Commissioner of Internal Revenue.

Authority for settlement of the tax liabilities of the above named taxpayers by the undersigned is contained in power of attorney heretofore filed with your office.

Respectfully,

THE WESTERN PACIFIC
RAILROAD CORPORATION,

JAMES K. POLK,
Attorney-in-Fact.

[Endorsed]: Filed Feb. 3, 1949.

PLAINTIFF'S EXHIBIT No. 72

The Western Pacific Railroad Company
Western Pacific Building,
526 Mission Street,
San Francisco 5, California.

February 11, 1947.

Via Air Mail 073

James K. Polk, Esq.,
c/o Carlton Hotel,
Washington, D. C.

Dear Mr. Polk:

In order that you may have definite authorization from this Company to proceed in connection with the pending controversy as to Federal income taxes for the years 1942, 1943 and 1944, as to which you hold power of attorney, I have today conferred with all available directors. All of the directors I have been able to reach, constituting a majority of the directors, have concurred in the proposal that you submit in writing to the Commissioner of Internal Revenue a definite proposal that the three years 1942, 1943 and 1944 be settled on the basis of no refund and no additional tax.

We understand that the year 1944 is involved in this controversy, so far as this Company is concerned, only during the period of affiliation, that is, through April 30, 1944, and that for the balance of the year 1944 the taxes of this Company will be determined on the basis of its separate return for that peroid outside the affiliation.

This authorization will be formally ratified at a meeting of the Board of Directors to be held early in March, 1947.

Very truly yours,

/s/ CHARLES ELSEY.

Copy by regular mail.

Draft—2/25/4..—JKP:EMD

The Western Pacific Railroad Company

March , 1947.

Resolution of Board of Directors

The President submitted to the Board a copy of a letter which was submitted by James K. Polk, Tax Counsel for the Company, to the Commissioner of Internal Revenue relative to the settlement of Federal Income Tax liabilities for the years 1942, 1943 and so far as this Company and its affiliates are concerned, the first four months of 1944. He stated that prior to the submission of that letter, the matter had been taken up with the members of the Board individually and the approval and authorization of a majority of the Board to the submission of that letter had been obtained. He stated that following such submission to the individual members of the Board, he had instructed Mr. Polk in writing to make such offer. A copy of the President's letter was presented to the meeting. After consideration and on motion duly made and seconded, it was

Resolved, that the submission of the afore-

said letters, copies of which were presented at this meeting, be and the same are in all respects ratified, affirmed and approved.

"The Chairman submitted to the Board a copy of a letter which was submitted by James K. Polk, Tax Counsel for the Company, to the Commissioner of Internal Revenue relative to the settlement of Federal Income Tax liabilities for the years 1942, 1943 and so far as this Company and its affiliates are concerned, the first four months of 1944. He stated that prior to the submission of that letter, the matter had been taken up with the members of the Board individually and the approval and authorization of a majority of the Board to the submission of that letter had been obtained. He stated that following such submission to the individual members of the Board, he had instructed Mr. Polk in writing to make such offer. A copy of the President's letter was presented to the meeting. After consideration and on motion duly made and seconded, it was

Resolved, that the submission of the aforesaid letters, copies of which were presented at this meeting, be and the same are in all respects ratified, affirmed and approved."

I, C. L. Droit, Secretary of The Western Pacific Railroad Company, a corporation, as such Secretary do hereby Certify that the foregoing is an Extract from the minutes of proceedings of a regular meeting of the Board of Directors of said corporation, duly and regularly convened and held at the office

of said corporation on the 4th day of March, 1947, at which a quorum of said Board was present; that the motion and resolution set forth in said Extract were duly adopted by said Board at said meeting and have not been rescinded or amended and remain in full force and effect.

In Witness Whereof, I have hereunto signed my name as such Secretary and affixed the seal of said corporation this 28th day of March, 1947.

[Seal] /s/ C. L. DROIT,
Secretary,
THE WESTERN PACIFIC
RAILROAD COMPANY.

[Endorsed]: Filed Feb. 3, 1949.

PLAINTIFF'S EXHIBIT No. 73

The Western Pacific R.R. Corp. and Affiliates
Summary of Comparative Tax Computations

Year	Return As Filed	Stock Loss Eliminated	Stock Loss Eliminated & Invested Capital Reduced $25,000,000
1943	.....	$8,566,200	$9,837,900—
1944	.....	1,127,900	1,127,900—

The Western Pacific R.R. Company—8 Mos.—1944 Return Tax Paid Is $185,000 Below 80% Maximum

Reduction of Invested Capital Base of Approximately $4,000,000 Would Produce the 80% Condition.

1943

The W.P.R.R. Corp. and Affiliates

Recomputation of Consolidated Income and Excess Profits Tax Liability on Basis of the Elimination of Sec. 23(g) Stock Loss

Item No.				
1.	Consol. Adjusted Net Income per Return as filed			$55,093,108.70
2.	Add Stock Loss Deduction			73,116,400.00
3.	Adj. Net Income (before Stock Loss)			18,023,291.30
4.	Add 50% of Int. on Borrowed Capital			1,594,966.23
5.	Dividends Rec'd			108.00
6.	Consol. Excess Profits Net Income			19,618,149.53
7.	Deduct Excess Profits Credit	$8,573,153.33		
	Specific Exemption	5,000.00		
8.	Unused Credit (1941)	8,474,200.00		17,052,353.33
9.	Adjusted Excess Profits Net Income			2,565,796.20
10.	Consol. Excess Profits Tax @ 81% (Net)			$2,078,300—
11.	Consol. Normal-Tax Net Income (3-9)		$15,447,495.10	
12.	Consol. Normal-Tax @ 42%			6,487,900—
	Consol. Total Tax Liability			$8,566,200

Note:

80% Max. not applicable.

.80 × $18,023,291.30 = $14,400,000.

1943

The W.P.R.R. Corp. and Affiliates

Recomputation of Consol. Income and Excess Profits Tax Liability on Basis of Elimination of Stock Loss and Reduction of Invested Cap. Base—$25,000,000

Item No.			
1.	Con. Adj. Net Income (before Stock Loss)		$18,023,291.30
2.	Con. E. P. Net Income		19,618,149.53
3.	Deduct:		
	E. P. Credit	$7,073,153.33	
	Specific Ex.	5,000.00	
4.	Unused Credit	6,724,200.00	13,802,353.33
5.	Con. Adj. E. P. Net Income		5,815,796.20
6.	Con. E. P. Tax @ 81% (Net)		$4,710,800—
7.	Con. Normal-Tax Net Income (1-5)		12,207,495.10
8.	Con. Normal-Tax @ 42%		5,127,100—
	Consol. Total Tax Liability		9,837,900

Note: The increase in tax liability over the computation on Sheet 1 reflects a total reduction of Inv. Cap. of $50,000,000—the carryover and the current year

1941 Carryover Current

$[(7\% \times 25{,}000{,}000) + (6\% \times 25{,}000{,}000)] \times$

Tax Rate Differential

$[81\% - 42\%] = \$1{,}271{,}700.$

1944

The W.P.R.R. Corp—12 Mos.

Affiliates—4 Mos.

Recomputation on Basis of Elimination of Net Operating Loss Attributable to 1943 Stock Loss

Item No.		
1.	Consol. Adj. Net Income per Return as filed	$42,403,256.08
2.	Add: Net Oper. Loss Deduction	45,088,695.18

3.	Consol. Adj. Net Income (before N. Oper. Loss)	2,685,439.10	
4.	Add 50% of Int. on Borrowed Cap.	526,244.29	
5.	Dividends Rec'd	116.00	
6.	Consol. E. P. Net Income	3,211,567.39	
7.	Deduct: E. P. Credit $5,710,848.31		
	Spec. Exemption 5,000.00		
8.	Unused Credit	5,715,848.31	
9.	Consol. Adj. E. P. Net Income		
10.	Consol. E. P. Tax		
11.	Consol. Normal-Tax Net Income (Item 3)	2,685,439.10	
	Consol. Normal-Tax @ 42%		1,127,900—
	Consol. Total Tax Liability		1,127,900—

1944

The W.P.R.R. Corp.—12 Mos.
Affiliates—4 Mos.

Recomputation on Basis of Elimination of Net Operating Loss and Reduction of Invested Capital Base in Amount of $25,000,000

Excess Profits Credit is then reduced to $4,960,000. Which is still sufficient to insulate against E. P. Liability and the total tax remains unchanged from computation on Sheet 3.

1944

The W.P.R.R. Company
8 Mos.—May 1 to Dec. 31, 1944

Surtax Net Income		$8,866,205—
		80%
Maximum Tax Payable		$7,092,728.64
Tax Paid—per returns—E. P. Tax	$5,706.661—	
Before post war refund—Normal	1,200,737	6,907,398.00
Margin of Tax		$ 185,330.64

$185,330.64 ÷ 90% = $206,000 = Income Margin.
$206,000 ÷ 5% = $4,120,000 Invested Capital Margin before 80% Max. applies.

Sched. I

The W.P.R.R. Corporation and Its Affiliated Companies
Estimate of Federal Income and Excess Profits Tax Liability
Jan. 1 to April 30, 1944

Item No.	Consolidated Return—Parent Full Year, Affiliates Jan. 1 to April 30, 1944			Inv. Cap Before Adj. Ded	Operating Loss (Sec. 23(g)) (4) Not Considered Inv. Capital Base—Per Books Before Wage Adj. Deduction	Operating Loss (Sec. 23(g)) (4) Not Considered Inv. Capital Base—Per Books After Wage Adj. Deduction	Operating Loss (Sec. 23(g)) (4) Not Considered Invested Capital "Floor" Before Wage Adj. Deduction	Operating Loss (Sec. 23(g)) (4) Not Considered Invested Capital "Floor" After Wage Adj. Deduction
	Estimated Net Income, before taxes, Separate Return Basis							
1.	The Western Pacific Railroad Corporation [est. 12 mos. deficit]		[$ 105,000—]					
2.	The Western Pacific Railroad Company [act. 4 mos. figure]	$ 3,871,250—						
3.	Deduct: Retroactive Wage Adjustment	1,064,250—	2,807,000—					
4.	Sacramento Northern Railway [4 mos. actual figures]		[328,600—]					
5.	Tidewater Southern Railway		28,100—					
6.	Combined Taxable Net Income		2,401,500—					
	Add: Intercompany Interest Deductions							
7.	Corporation Advances to Company	92,000—						
8.	Sacramento Owing to Company on Bonds, Notes and Advances	248,100—						
9.	Sacramento Owing to Corporation	14,200—						
10.	Company Owing to Corp.—1st Mtg. Bonds	99,600—	453,900—					
11.	Consolidated Taxable Net Income		2,855,400—	$3,919	$3,919,650—	$2,855,400—	$3,919,650	$2,855,400—
12.	Deduct: Consol. Net Operating Loss Deduction	55,093,000—						
	Less: Adj. Under Sec. 122(d)	.....	55,093,000—	.....	.....	.....		
13.	Consolidated Taxable Net Income (after Net Oper. Loss Deduction)		[52,237,600—]	3,919	3,919,650—	2,855,400—	3,919,650	2,855,400—
	Add: ½ of interest on Borrowed Capital—							
14.	W.P.R.R. Company—⅓ ($1,563,000—)	$521,000—						
15.	Less: Corp's holding—4 mos. (½ × $99,600)	49,800—	471,200—					
16.	W.P.R.R. Corp. (int. on loans)	51,000—	522,200—	522	522,200—	522,200—	522,200—	522,200—
17.	Adj. of Net Operating Loss—Inv. Cap. Basis		1,596,000—	.....	.....	.....	.....	.....
18.	Consolidated Excess Profits Net Income		[50,119,400—]	4,441	4,441,850—	3,377,600—	4,441,850—	3,377,600—
19.	Deduct: Specific Exemption	10,000—		10	10,000	10,000—	10,000—	10,000—
20.	Consol. Excess Profits Credit	6,375,000—		6,375	6,375,000—	6,375,000—	3,274,000—	3,274,000—
21.	Consol. Unused Excess Profits Credit Adj. (1943 Carryover)	8,570,000—	14,955,000	.....	.....	.....	.....	.....
				6,385	6,385,000	6,385,000—	3,284,000—	3,284,000—
22.	Consolidated Adjusted Excess Profits Net Income		[65,074,400—]				1,157,850—	93,600—
23.	Consolidated Excess Profits Tax—95% × Item 22		.....				1,099,950—	88,920—
24.	Consolidated Normal-Tax Net Income (Item 13 minus Item 22)		[52,237,600—]	3,919	3,919,650—	2,855,400—	2,761,800—	2,761,800—
25.	Consolidated Normal-Tax and Surtax—42% of Item 24		.....	1,646	1,646,250—	1,199,300—	1,159,950—	1,159,950—
26.	Total Federal Income and Excess Profits Tax Liability (Item 23 + Item 25)		.....	1,646	1,646,250—	1,199,300—	2,259,900—	1,248,870—

Red Figures in Brackets.

[Endorsed]: Filed Feb. 9, 1949.

PLAINTIFF'S EXHIBIT No. 74

The Western Pacific Railroad Company

Western Pacific Building,
526 Mission Street,
San Francisco 5, California.

Air Mail

November 8, 1943.
File B-29-1.

Mr. James K. Polk,
c/o Whitman, Ransom, Coulson and Goetz,
40 Wall Street,
New York, New York.

Dear Mr. Polk:

I am enclosing copy of a computation I have made for an estimate of the year 1943 Federal income and excess profits taxes for the consolidated group for the purpose of arriving at a figure to base our estimated tax accruals upon for the remainder of the current year. Will you be so kind as to have this computation check up and let me know, as soon as you conveniently can, whether there is anything about the principle or fixed figures I have used which is wrong.

The figures shown for "Taxable Net Income" are, of course, purely estimates but they appear conservative at the present time. However, there are many elements which may affect them to a more or less degree so they will be subject to revisions, either up

or down, before we close our accounts for the year and whatever changes we find necessary there will correspondingly affect our tax accruals.

Yours truly,

/s/ D. C. DeGRAFF,
General Auditor.

[Endorsed]: Filed Feb. 9, 1949.

The Western Pacific Railroad Company

Estimated Federal Income and Excess Profits Tax—Year 1943

Estimated Consolidated Taxable Net Income, Before Inter-Company Eliminations		
The Western Pacific Railroad Corporation		$ *353,000*
The Western Pacific Railroad Company		17,710,000
Sacramento Northern Railway		*618,179*
Tidewater Southern Railway Company		35,000
Delta Finance Company, Ltd.		4,000
The Western Realty Company		*2,000*
Standard Realty and Development Company		6,000
[Italicized figures shown in red]	Total	$16,781,821
Add		
Inter-Company Eliminations		
Interest on First Mortgage Bonds of The W.P.R.R. Co. held by The W.P.R.R. Corp.	$299,400	
Interest on Advances from The W.P.R.R. Corp. to The W.P.R.R. Co.	274,736	
Interest on Advances from The W.P.R.R. Corp. to Sacramento Northern Railway	42,813	
Interest on Bonds, Notes and Advances of Sacramento Northern Railway held by The W.P.R.R. Co.	750,366	
Interest on Advances from The Western Realty Company	2,500	
Amortization of Discount on First Mortgage Bonds held by The W.P.R.R. Corp.	9,364	**1,379,179**

Estimated Consolidated Normal Tax Net Income		$18,161,000
Net Short Term Capital Gain		None
Adjustment of Net Operating Loss Deduction		None
50% of Interest on Borrowed Capital		1,581,000
Total		$19,742,000
Deductions		None
Estimated Consolidated Excess Profits Net Income		$19,742,000
Estimated Excess Profits Credits		
Invested Capital Estimated same as for year 1942	$147,088,200	
$5,000,000 at 8%	400,000	
5,000,000 at 7%	350,000	
137,088,200 at 6%	8,225,292	$ 8,975,292
Specific Exemption		5,000
Unused Excesss Profits Credit (from 1941)		9,103,360
Total Estimated Excess Profits Credits		$18,083,652

Estimated Excess Profits Tax Computation		
Estimated Excess Profits Tax Net Income		$19,742,000
Less Estimated Excess Profits Credits		18,083,652
Estimated Adjusted Excess Profits Net Income		$ 1,658,348
90% of $1,658,348	$ 1,492,513	
Estimated Net Income		$18,161,000
Estimated Surtax Net Income		18,161,000
80% of $18,161,000		14,528,800
Estimated Normal Tax and Surtax Net Income	$18,161,000	
Less Adjusted Excess Profits Net Income	1,658,348	
	$16,502,652 @42%	6,931,114
Excess of 80% of Surtax Net Income over Income Tax		$ 7,597,686
90% of Estimated Adjusted Excess Profits Net Income		1,492,513
Less Credits for debt retirement—10%		149,251
Estimated Excess Profits Tax Due		$ 1,343,262
Net Post-War Refund		None

Summary

Estimated Normal Income Tax and Surtax	$ 6,931,114
Estimated Excess Profits Tax	1,343,262
Total Estimated Federal Income and Excess Profits Tax—Year 1943	$ 8,274,376

Apportionment on Basis of Taxable Income

Company	Estimated Taxable Net Income After Eliminations	% of Total	Allocation of Estimated Tax
The Western Pacific Railroad Company	$18,296,000	98.812	$8,176,076
Sacramento Northern Railway	175,000	.945	78,193
Tidewater Southern Railway Company	35,000	.189	15,639
Delta Finance Company, Ltd.	4,000	.022	1,820
Standard Realty and Development Company	6,000	.032	2,648
	$18,516,000	100.000	$8,274,376

PLAINTIFF'S EXHIBIT No. 75

Air Mail November 13, 1943.

200.3

Mr. Robert E. Coulson,
c/o Whitman, Ransom, Coulson & Goetz,
40 Wall Street,
New York, New York

Dear Mr. Coulson:

In addition to the statements heretofore sent you showing income available under the Reorganization Plan set-up for past years, I am enclosing herewith ten (10) copies of an estimate of similar income for the current year. Revised recapitulation sheets are also enclosed.

Please note that these statements are on the basis of estimated federal taxes in the amount of $8,274,000 which have been calculated as set forth in detail on a statement submitted by Mr. DeGraff to Mr. Polk by letter dated November 8th, 1943. Also note that, in the absence of information as to how or when recently granted wage increases for "non-operating" groups will be applied, we have made no attempt to compensate our 1943 estimate for such expense.

Very truly yours,

/s/ CHARLES ELSEY.

RR Co Ex 898
NHW

cc—Mr. T. M. Schumacher,
Mr. Sidney M. Ehrman.

The Western Pacific Railroad System

Statement Showing Distribution of Income as It Would Be Under Reorganization Plan, if Effective January 1, 1939 Estimated for Calendar Year 1943

		System
Estimated Total Railway Operating Revenues		$52,900,000
Net Railway Operating Income		$12,824,000
Add Other Income		582,000
Deductions from Income—Miscellaneous		178,000
Income Available for Fixed Charges		$13,228,000
Less Rent for Leased Road & Equipment	$ 3,600	
Less Interest on Equipment Obligations	89,400	
Less Interest on Trustees' Certificates (c)	135,000	
Less Amort. of Disc. on Equip. Obligations	4,500	
Less Other Miscellaneous Fixed Charges	5,000	237,500
Available Net Income as Defined by Plan		$12,990,500
Maximum Capital Fund	$500,000	
Less Oper. Exp. System Road Retirements	50,000	
Less Oper. Exp. Amort. Road Defense Projects	130,000	
Less Road Property Depreciation	400,000	.....
Income Available for Interest on Income Bonds		$12,990,500
Less full 4½% interest on $20,887,888 Income Bonds (b)		939,955 (a)
Income Available for Sinking Fund on Income Bonds		$12,050,545 (a)
Less Sinking Fund (½% on $20,887,888 outstanding (b)		104,439 (a)
Less 4½% on $331,187 Bonds previously redeemed (b)		14,903 (a)
1943 Income Available for Other Corporate Purposes or for Dividends on Stocks		$11,931,203 (a)

Notes

Income Taxes: As of this date, The System Railroad Companies, as constituted during 1943, expect to accrue estimated Federal Income taxes of $6,931,000 and estimated Excess Profits taxes of $1,343,000 or a total of $8,274,000. All income figures on the above statement are *after* such accruals.

Wages: No accounting in above figures for wage increases which may be authorized or for Land Grant *rate reserves* or *maintenance reserves.*

Note A: If any changes are made in original Plan total amount of $21,219,075 face value of Income Bonds as finally issued to Railroad Credit Corporation, all amounts marked "A" will be modified. The original unpaid interest claim of the R.C.C. ($146,503) has been materially reduced each year by credits from the Marshalling and Distributing Plan and other payments. These payments will effect reductions in amounts of securities finally issued to Railroad Credit Corporation and affect the totals of certain securities issued under the Plan. (See I.C.C. Plan—Section P-4.)

Note B: Based on amount of $20,887,888 for value of Income Bonds outstanding January 1, 1943, as it would be after purchases of $316,673 face value of such bonds by Sinking Fund of 1940-1941-1942 and $14,514 face value of such bonds purchased from "interest" at 4½% on an amount equal to face value of all bonds retired by Sinking Fund operations of years prior to 1943.

Note C: Net interest paid on outstanding Trustees' Certificates after crediting 4% on amount of $6,000,000 cash collateral on deposit with Reconstruction Finance Corporation.

RR Co Ex 898 A

Office of the President,
San Francisco, California,
November 13, 1943 (EWE)

[Endorsed]: Filed Feb. 9, 1949.

PLAINTIFF'S EXHIBIT No. 76

The Western Pacific Railroad Company
Journal

Month of December 1943

Folio No.		Debit	Credit
402	Acct. 767—U.S. Government—Federal Income Taxes	$7,069,052.00	
	To		
580	Acct. 532 C—Railway Tax Accruals		$7,069,052.00

To reverse over-accruals of Federal Income and Excess Profits Taxes for the years 1942 and 1943 as follows:

Year 1942 ..... $ 9,886.13
Year 1943 ..... 7,059,165.87

$7,069,052.00*

* Contingent Liability for this amount will appear on General Balance Sheet as of December 31, 1943, and subsequent months.

I hereby certify that the above entry is correct
/s/ C. P. RUSSELL
Ass't General Auditor

/s/ J. R. WENDT

Approved for Entry
/s/ D. C. DeGRAFF
General Auditor

Month Dec. 1943
Number 1536

The Western Pacific Railroad Company
Journal

Month of January 1944

Folio No.				Debit	Credit
592	Acct. 541-P Joint Facility Rents			$1,993.74	
	For this company's proportion of the following rents accruing during the month of January 1944:				
396	Acct. 766—Accrued Interest on Bonds of The Salt Lake City Union Depot and Railroad Co.				$1,160.41
397	Acct. 766—Sinking Fund for Redemption of Bonds of The Salt Lake City Union Depot and Railroad Company				833.33
	Interest				
	Bonds outstanding 1/1/44		$557,000.00		
	Interest on $557,000.00 January 1944, One month @ 5% per annum $2,320.83				
	This Company's Prop. ½ of	2,320.83	$1,160.41		
	Sinking Fund				
	November 1, 1943, to October 31, 1944		$ 20,000.00		
	Less D.&R.G.W. Prop. 50%		10,000.00		
	The Western Pacific RR Co's Prop. 50%		$ 10,000.00		
	January 1944 Prop. 1/12th of $10,000.00				833.33
					$1,993.74

354	Acct. 761—Hospital Fund		166.36	
581	Acct. 532-C—Railway Tax Accruals		1,055,706.35	
600	Acct. 544—Miscellaneous Tax Accruals		4,933.33	
	To			
402	Acct. 767—U.S. Govt.—Federal Income Taxes			893,000.00
422	Acct. 767—Accrued Tax Liability—State Counties and Cities			82,669.81
418	Acct. 767—U.S. Govt.—Carriers Taxing Act of 1937—Employers Proportion			44,270.84
423	Acct. 767—U.S. Govt.—Railroad Unemployment Insurance Act			40,865.39
	Accrued Taxes for the month of January 1944			
	California	$ 58,836.81		
	Nevada	18,000.00		
	Utah	5,833.00	82,669.81	
	Railroad Unemployment Insurance Act		40,865.39	
	Carriers Taxing Act of 1937		44,270.84	
	Federal Income Taxes		893,000.00	

I hereby certify that the above entry is correct

/s/ C. P. RUSSELL
Ass't. General Auditor

/s/ J. R. WENDT

Approved for Entry
/s/ D. C. DeGRAFF
General Auditor

Month Jan. 1944
Number 1553

The Western Pacific Railroad Company

Journal

Month of March 1944

Folio No.			Debit	Credit
592	Acct. 541-P Joint Facility Rents		$1,993.74	
	For this company's proportion of the following rents accruing during the month of March 1944.			
394	Acct. 766—Accrued Interest on Bonds of The Salt Lake City Union Depot and Railroad Co.			$1,160.41
397	Acct. 766—Sinking Fund for Redemption of Bonds of The Salt Lake City Union Depot and Railroad Company			833.33
	Interest			
	Bonds outstanding 3/1/44	$557,000.00		
	Interest on $557,000.00 March 1944, One Month @ 5% per annum $2,320.83			
	This Company's Prop. ½ of	2,320.83	$1,160.41	
	Sinking Fund			
	November 1, 1943, to October 31, 1944	$ 20,000.00		
	Less D.&R.G.W. Prop. 50%	10,000.00		
	The Western Pacific RR Co's Prop. 50%	$ 10,000.00		
	March 1944 Prop. 1/12th of $10,000.00		833.33	
			$1,993.74	

354	Acct. 761—Hospital Fund		184.40	
581	Acct. 532-C—Railway Tax Accruals		1,133,716.39	
600	Acct. 544—Miscellaneous Tax Accruals		4,933.33	
	To			
402	Acct. 767—U.S. Govt.—Federal Income Taxes			932,300.00
422	Acct. 767—Accrued Tax Liability—State Counties and Cities			81,969.81
418	Acct. 767—U.S. Govt.—Carriers Taxing Act of 1937—Employers Proportion			64,773.44
423	Acct. 767—U.S. Govt.—Railroad Unemployment Insurance Act			59,790.87
	Accrued Taxes for the month of March 1944			
	California	$ 58,136.81		
	Nevada	18,000.00		
	Utah	5,833.00	81,969.81	
	Railroad Unemployment Insurance Act		59,790.87	
	Carriers Taxing Act of 1937		64,773.44	
	Federal Income Taxes		932,300.00	

I hereby certify that the above entry is correct

/s/ C. P. RUSSELL
Ass't. General Auditor

/s/ J. R. WENDT

Approved for Entry
/s/ D. C. DeGRAFF
General Auditor

Month Mar. 1944

Number 1610

The Western Pacific Railroad Company

Journal

Month of April 1944

Folio No.			Debit	Credit
592	Acct. 541-P Joint Facility Rents		$1,993.79	
	For this company's proportion of the following rents accruing during the month of April 1944.			
394	Acct. 766—Accrued Interest on Bonds of The Salt Lake City Union Depot and Railroad Co.			$1,160.45
397	Acct. 766—Sinking Fund for Redemption of Bonds of The Salt Lake City Union Depot and Railroad Company			833.34
	Interest			
	Bonds outstanding 3/1/44	$557,000.00		
	Interest on $557,000.00 April 1944, one month @ 5% per annum $2,320.83			
	This Company's Prop. ½ of	2,320.83	1,160.45	
	Sinking Fund			
	November 1, 1943, to October 31, 1944	$ 20,000.00		
	Less D.&R.G.W. Prop. 50%	10,000.00		
	The Western Pacific RR Co's Prop. 50%	$ 10,000.00		
	April 1944 Prop. 1/12th of $10,000.00		833.34	
			1,993.79	

354	Acct. 761—Hospital Fund		173.69	
581	Acct. 532-C—Railway Tax Accruals		1,483,896.87	
600	Acct. 544—Miscellaneous Tax Accruals		4,933.33	
	To			
402	Acct. 767—U.S. Govt.—Federal Income Taxes			1,282,700.00
422	Acct. 767—Accrued Tax Liability—State Counties and Cities			92,369.81
418	Acct. 767—U.S. Govt.—Carriers Taxing Act of 1937—Employers Proportion			59,245.72
423	Acct. 767—U.S. Govt.—Railroad Unemployment Insurance Act			54,688.36
	Accrued Taxes for the month of April 1944			
	California	$ 68,536.81		
	Nevada	18,000.00		
	Utah	5,833.00	92,369.81	
	Railroad Unemployment Insurance Act		54,688.36	
	Carriers Taxing Act of 1937		59,245.72	
	Federal Income Taxes		1,282,700.00	

I hereby certify that the above entry is correct

/s/ C. P. RUSSELL
Ass't. General Auditor

/s/ J. R. WENDT

Approved for Entry

/s/ D. C. DeGRAFF
General Auditor

Month Apr. 1944

Number 1642

[Endorsed]: Filed Feb. 9, 1949.

PLAINTIFF'S EXHIBIT No. 80

The Western Pacific Railroad Corporation and Its Affiliates

Federal Income Taxes and Excess Profits Taxes on a Separate Return Basis
(Using Data as Actually Shown in Consolidated Returns Filed)

Basis One

	Year 1942	Year 1943	Period January 1 to April 30, 1944	Total
The Western Pacific Railroad Corporation:				
Excess profits tax	None	None	None	
Income tax	None	None	None	
Total	None	None	None	None
The Western Pacific Railroad Company:				
Excess profits tax	$4,713,594.03	$10,415,729.54	$1,295,616.56	
Income tax	2,170,104.09	2,167,612.77	583,910.25	
Total	6,883,698.12	12,583,342.31	1,879,526.81	$21,346,567.24
Sacramento Northern Railway:				
Excess profits tax	None	None	None	
Income tax	127,527.71	51,696.87	None	
Total	127,527.71	51,696.87	None	179,224.58
Tidewater Southern Railway Company:				
Excess profits tax	None	None	None	
Income tax	55,907.03	19,843.16	2,460.73	
Total	55,907.03	19,843.16	2,460.73	78,210.92

	Year 1942	Year 1943	Period January 1 to April 30, 1944	Total
Deep Creek Railroad Company:				
Excess profits tax	None	None	None	
Income tax	None	None	None	
Total	None	None	None	None
The Western Realty Company:				
Excess profits tax	None	None	None	
Income tax	6,168.43	4,562.82	507.75	
Total	6,168.43	4,562.82	507.75	11,239.00
Standard Realty and Development Company:				
Excess profits tax	None	None	None	
Income tax	124.83	2,869.97	40.39	
Total	124.83	2,869.97	40.39	3,035.19
Delta Finance Company:				
Excess profits tax	910.57	None	None	
Income tax	2,265.06	906.15	None	
Total	3,175.63	906.15	None	4,081.78
Grand Total:				$21,622,358.71

The Western Pacific Railroad Corporation and Its Affiliates

Federal Income and Excess Profits Taxes on a Separate Return Basis (using data as actually shown in consolidated returns filed, and giving each affiliate the benefit of any operating loss carryover or unused excess profit credit carryover attributable to it, though contrary to Reg. 110, Sec. 33.31(e) and (f).)

	Year 1942	Year 1943	Period January 1 to April 30, 1944	Total
The Western Pacific Railroad Corporation:				
Excess profits tax	None	None	None	
Income tax	None	None	None	
Total	None	None	None	None
The Western Pacific Railroad Company:				
Excess profits tax	None	$ 4,180,935.84	$1,295,473.65	
Income tax	$4,322,492.75	5,246,929.22	526,799.08	
Total	4,322,492.75	9,427,865.06	1,822,272.73	$15,572,630.54
Sacramento Northern Railway:				
Excess profits tax	None	None	None	
Income tax	2,969.74	51,675.45	None	
Total	2,969.74	51,675.45	None	54,645.19
Tidewater Southern Railway Company:				
Excess profits tax	None	None	None	
Income tax	55,907.03	19,843.16	2,460.73	
Total	55,907.03	19,843.16	2,460.73	78,210.92

	Year 1942	Year 1943	Period January 1 to April 30, 1944	Total
Deep Creek Railroad Company:				
Excess profits tax	None	None	None	
Income tax	None	None	None	
Total	None	None	None	None
The Western Realty Company:				
Excess profits tax	None	None	None	
Income tax	6,168.43	None	299.42	
Total	6,168.43	None	299.42	6,467.85
Standard Realty and Development Company:				
Excess profits tax	None	None	None	
Income tax	None	2,869.97	40.39	
Total	None	2,869.97	40.39	2,910.36
Delta Finance Company, Ltd.:				
Excess profits tax	None	None	None	
Income tax	349.42	906.15	None	
Total	349.42	906.15	None	1,255.57
Grand Total:				$15,716,120.43

Basis Three

The Western Pacific Railroad Corporation and Its Affiliates

Federal Income Taxes and Excess Profits Taxes on Basis of Consolidated Returns as Filed But Excluding Corporation's Stock Loss

	Year 1942	Year 1943	Period January 1 to April 30, 1944*	Total
Excess profits tax		$2,078,294	$1,115,447	$ 3,193,741
Income tax	$4,201,821	6,492,109	579,903	11,273,833
	$4,201,821	$8,570,403	$1,695,350	$14,467,574

* Corporation's excess profits credit for 1944 prorated.

[Endorsed]: Filed Feb. 9, 1949.

DEFENDANT'S EXHIBIT No. 1

To record transfer of ownership of the capital stock to the Reorganization Committee of the Western Pacific Railroad Company, in accordance with request of the said Committee made under and pursuant to order dated December 17, 1943, of the District Court of the United States for the Northern District of California, Southern Division, and also under and pursuant to agreement dated November 22, 1943, between the Western Pacific Railroad Corporation, its secured creditors and said Reorganization Committee, in respect of which approval of the stockholders was given at special meeting held on April 20, 1944.

[Endorsed]: Filed Feb. 4, 1949.

DEFENDANTS' EXHIBIT No. 2

4/20/44

Memorandum Entry

Loss as result of reorganization of subsidiary:
Capital Stock—The Western Pacific Railroad Company.

To record transfer of ownership of the capital stock to the Reorganization Committee under Plan of Reorganization of the Western Pacific Railroad Company, pursuant to order of the Federal District Court for the Northern District of California, dated December 17, 1943, and also under and pursuant

to an Agreement, dated November 22, 1943, between The Western Pacific Railroad Corporation, its secured creditors and said Reorganization Committee and approval of the stockholders of The Western Pacific Railroad Corporation given at special meeting held April 20, 1944.

[Endorsed]: Filed Feb. 4, 1949.

DEFENDANTS' EXHIBIT No. 3

New York, February 5, 1935.

Mr. Schumacher:

In re the Corporation's situation in connection with proposed recapitalization of The Denver and Rio Grande Western Railroad Company and the Western Pacific Railroad Company:

We have prepared a statement showing new set-up of assets of the Corporation, if and when the present proposals for readjustments of the two companies mentioned become effective. There are two statements herewith:

(1) Securities Assignable by Proposed Readjustment of Capitalization of the Western Pacific Railroad Company and The Rio Grande Western Railroad Company in Exchange for Existing Securities Owned and List of Other Assets Owned Remaining Undisturbed.

(2) Schedule of Securities Owned if Proposed Readjustment of Capitalization of The Western Pacific Railroad Company and The

Defendants' Exhibit No. 3—(Continued)

Denver and Rio Grande Western Railroad Company is effected.

The income to the Corporation, which, as you know is entirely from interest received from securities owned, will be very materially reduced, as you will note from Statement #2. The income from the first mortgage bonds received in exchange for certain of the Corporation securities on the basis proposed would amount to approximately $190,000. However, the income will, no doubt, be increased through income derived from income bonds in the contingent class. I believe it is safe to assume we would get some return from the Incomes, inasmuch as the annual fixed interest set up for both companies based on their net income, even in the poorest year, 1932, was earned. The years '33 and '34 had net income more than sufficient to take care of the proposed First Mortgage Bonds and if business conditions continue to show an upward trend, there should be earnings applicable to the income bonds.

We must also not overlook the fact that the Corporation's loans with The Chase National Bank, Curtiss Southwestern Company and Central Hanover Bank amount to $9,299,850. The interest per annum on these amounts to approximately $467,000 being 5% of The Chase and Curtiss and 4½% on the Central Hanover. In addition, our general expenses including taxes, salaries, transfer and registry fees, and office expenses, amount to approximately $60,000 per year. This is a total of approxi-

Defendants' Exhibit No. 3—(Continued)

mately $527,000 per annum covering general expenses and interest on loans.

From the above it will be seen that we will be considerably short of our requirements for meeting this overhead.

As I see it from a Corporation viewpoint, if we are to carry on, we should endeavor to get our creditors to declare a moratorium on interest payments for possibly two years with the understanding that, if there is income applicable to payment of such interest, it will be paid.

An Agreement on the part of the said creditors to reduce the interest on their loans to 2½% would not see us through as the charge would be in excess of our receipts.

Another thing in connection with this is that under the Railroad Company's proposal Preferred Stock of the operating company is to be distributed to First Mortgage Bondholders as a bonus in the proportions of 25% of principal amount of First Mortgage Bonds held and 100% of 1934 deferred interest on such bonds. As all of this stock, as well as the common, is owned by the Corporation, if such an arrangement is affected, it will be necessary to call special meeting of stockholders to approve it.

M. J. CURRY.

[Marginal note]: Noted and discussed by Mr. Schumacher, 2/11/35.

Defendants' Exhibit No. 3—(Continue

No. 3—(Continued)

The Western Pacific Railroad Corporation

Railroad Corporation

Securities Assignable by Proposed Readjustment of Capitalization of The Western Pacific Railroad Com

ern Pacific Railroad Company and The Denver & Rio Grande Western Railroad

Company in Exchange for Existing Securities Owned and List of Other Assets

and List of Other Assets Owned Remaining Undisturbed

Existing Securities and Other Assets Owned as of December 31, 1934		The Western Pacific Railroad Company					The Denver and Rio Grande Western Railroad Company				
	Amount	Undisturbed	40% 1st. Mtg. 4% Fixed Int. Bonds	60% 1st. Mtg. 4% Adjustment Income Bonds (Cumulative)	4% Preferred Stock (Non-Cumulative)	1st M 4% Sc B	erred Stock umulative)	40% 1st Mortgage 4% Series "A" Bonds	60% General Income Mtg. Convertible 4% Series "A" Bds. (Non-Cum.)	100% Convertible Income Series "A" 5% Notes (Non-Cum.)	1st. Preferred $5 Partieipating Stock—No Par (Shares)	Common Stock No Par (Shares)
The Western Pacific Railroad Co.												
1st. Mtg. Bonds 5%—1946	$11,702,000		$4,680,800	$7,021,000	$2,925,500—25%		00—25%					
Deferred Interest—1934	585,100				585,100—100%		00—100%					
Preferred Stock	28,300,000		Contributed to Reorganized Company									
Common Stock	47,500,000	$47,500,000										
Advances	5,639,722		To be cancelled									
The Denver & Rio Grande RR. Co.												
1st. Con. Mtg. Bonds 4%—1936	10,000					$		$ 4,000	$ 6,000			
The Rio Grande Western Ry. Co.												
1st. Con. Mtg. Bonds 4%—1949	364,000					1		145,600	218,400			
The D. & R.G.W. Railroad Co.												
Rfdg. & Imp. Bonds 6%—1974	1,000,000										10,000	
General Mtg. Bonds 5%—1955	3,751,875									$3,751,875		
Unpaid Interest to 1/1/35	218,855									218,855		
Preferred Stock 6% (Par $100)	2,070,000										20,700	
Common Stock (No Par) Shares	150,000											37,500
Totals		$47,500,000	$4,680,800	$7,021,000	$3,510,600	$1	600	$149,600	$224,400	$3,970,730	30,700	37,500
Assets Remaining—Undisturbed												
Sacramento Nor. Ry.—Advances	856,260											
Standard R. & D. Co. Advances	120,000											
The Western Realty Co.												
*Capital Stk. 3005 Shs. (Book Val.)	1,500,000											
Tidewater Sou. Rwy. 5%												
1st. Mtg. Bonds—1942	100,000											
The D. & R.G.W. RR. Company												
Note Receivable (Non Interest)	17,500											
The Rio Grande Sou. RR. Co.												
1st. Mtg. Bonds 4%—1940 (In default)	4,000											
Equity in Utah Fuel Co. Capital Stk. 50,000 Shs. (No-Par Value)												

* Subject to $788,000 loan from The Western Realty Company.

Defendants' Exhibit No. 3—(Continued)

The Western Pacific Railroad Corporation

Loans Payable and Supporting Collateral if Proposed Readjustment of Capitalization of The Western Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company Is Effected

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Loans

The Chase National Bank City of New York.....$4,186,000.00

Collateral

$1,785,600 The W.P.R.R.Co. 1st Mtg. Fixed Int. Bonds 4%
2,678,400 The W.P.R.R.Co. 1st Mtg. Adj. Inc. Bds. 4% (Cum.)
1,339,200 The W.P.R.R.Co. Pfd. Stock 4% (Non-Cum.) Par $100.
28,700 Shares The D&RGW 1st Pfd. $5. Participating Stock—No Par—(Non-Cum.)
3,970,730 The D&RGW Convertible Income Series "A" Notes 5% (Non-Cum.)

Central Hanover Bank & Trust Company.....$635,000.00

Collateral

$ 496,800 The W.P.R.R.Co. 1st Mtg. Fixed Int. Bonds 4%
745,200 The W.P.R.R.Co. 1st Mtg. Adj. Inc. Bds. 4% (Cum.)
372,600 The W.P.R.R.Co. Pfd. Stock 4% (Non-Cum.) Par $100.
149,600 The D&RGW RR. 1st Mtg. Series "A" Bonds 4%
224,400 The D&RGW RR. Gen'l. Income Mtg. Convertible Series "A" Bds. 5% (Non-Cum.)
11,248.86—Cash on Deposit (Pledged)

Curtiss Southwestern Company $4,478,850.00

Collateral

$2,392,000 The W.P.R.R.Co. 1st Mtg. Fixed Int. Bonds 4%
3,588,000 The W.P.R.R.Co. 1st Mtg. Adj. Inc. Bds. 4% (Cum.)
1,794,000 The W.P.R.R.Co. Preferred Stock 4% (Non-Cum.) Par $100
2,000 Shares The D&RGW 1st Pfd. $5. Participating Stock—No-Par (Non-Cum.)
300,500 The Western Realty Co.—Capital Stock—Par $100.

Defendants' Exhibit No. 3—(Continued)

The Western Pacific Railroad Corporation

Schedule of Securities Owned if Proposed Readjustment of Capitalization of the Western Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company Is Effected

	Par Value		Assured Annual Interest	Contingent Annual Interest
The Western Pacific Railroad Company				
First Mortgage Fixed Interest Bonds 4%	$ 4,680,800.00		$187,232.00	
First Mortgage Adjustment Income Bonds 4% (Cum.)	7,021,200.00			$280,848.00
Preferred Stock—4% (non-cumulative) Par $100	3,510,600.00			
Common Stock	47,500,000.00			
The Denver and Rio Grande Western Railroad Company				
First Mortgage, Series A, Bonds 4%	149,600.00		5,984.00	
General Income Mtg. Convertible Series A Bonds, 4% (Non-Cum.)	224,400.00			8,976.00
Convertible Income Series A Notes 5% (Non-Cum)	3,970,[illegible]0.00			198,536.50
First Preferred $5 Participating Stock—No Par—shs. 30,700				
Common Stock—No Par—shs. 37,500				
Totals			$193,216.00	$488,360.50
*Interest Charges and General Expenses				
The Chase Chase National Bank of the City of New York—Notes 5%	$ 4,186,000.00	$212,206.95		
Central Hanover Bank & Trust Company—Notes 4½%	635,000.00	28,575.00		
Curtiss Southwestern Company—Notes 5%	4,478,850.00	227,052.85		
Total Interest Expense		$467.834.80		
General Expenses		60,000.00		
Taxes		2,550.00		
Total Interest and General Expenses		$530,384.80		

* Interest on the $788,000 loan from The Western Realty Company not included.

O-2/4/35

[In pencil on margin: Balance free funds in Chase Bank 2/1/35 $140,521.]

Defendants' Exhibit No. 3—(Continued)

The Western Pacific Railroad Corporation

Loans	Amount	Present Collateral			Status of Collateral if Proposed Readjustment of Capitalization of The Western Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company Is Effected	
The Chase National Bank City of New York	$4,186,000.00	The W.P.R.R.Co. 1st Mtg. Bds. 5%	$4,464,000.00	40%	The W.P.R.R.Co. 1st. Mtg. Fixed Int. Bds. 4%	$1,785,600.00
				60%	The W.P.R.R.Co. 1st. Mtg. Adj. Inc. Bds. 4% (Cum)	2,678,400.00
				25%	The W.P.R.R.Co. Preferred Stock 4% (Non-Cum.)	1,116,000.00
				100%	The W.P.R.R.Co. Preferred Stock 4% (Non-Cum.) (1934 Defr'd Int)	223,200.00
		The D&RGWRR. Co. Rfdg. Imp. Mtg. Bds. 6%	800,000.00	100%	The D&RGW. RR. 1st. Pfd. $5 Participating Stk.—No Par—shares	8,000
		The D&RGWRR. Co. Gen'l. Mtg. Bds. 5%	3,751,875.00	100%	The D&RGW. RR. Convertible Inc. Series "A" Notes 5% (Non-Cum.)	3,751,875.00
				100%	The D&RGW. RR. Convertible Inc. Series "A" Notes 5% (Unpaid Int. to 1/1/35)	218,855.00
		The D&RGWRR. Co. Pfd. Stock	2,070,000.00	100%	The D&RGW. RR. 1st. Pfd. $5 Participating Stock—No Par—shs.	20,700
Central Hanover Bank & Trust Co.	635,000.00	The W.P.R.R.Co. 1st Mtg. Bds. 5%	1,242,000.00	40%	The W.P.R.R.Co. 1st. Mtg. Fixed Int. Bds. 4%	496,800.00
				60%	The W.P.R.R.Co. 1st. Mtg. Adj. Income Bds. 4% (Cum.)	745,200.00
				25%	The W.P.R.R.Co. Preferred Stock 4% (Non-Cum.)	310,500.00
				100%	The W.P.R.R.Co. Preferred Stock 4% (Non-Cum) (1934 Defr'd Int)	62,100.00
		The D&RGW RR. Co. 1st Con. Mtg. Bds. 4%	10,000.00	40%	The D&RGWRR Co. 1st Mtg. Series "A" Bonds 4%	4,000.00
				60%	The D&RGWRR Co. Gen'l. Inc. Mtg. Convertible Series "A" Bonds 5% (Non-Cum.)	6,000.00
		The R.G.W.Ry. 1st Con. Mtg. Bds. 4%	364,000.00	40%	The D&RGWRR Co. 1st Mtg. Series "A" Bonds 4%	145,600.00
				60%	The D&RGWRR Co. Gen'l. Inc. Mtg. Convertible Series "A" Bonds 5% (Non-Cum)	218,400.00
		Cash on Deposit (Pledged)	11,248.86	100%	Cash on Deposit (Pledged)	11,248.86
Curtiss Southwestern Company	4,478,850.00	The W.P.R.R.Co. 1st Mtg. Bonds 5%	5,980,000.00	40%	The W.P.R.R.Co. 1st Mtg. Fixed Interest Bonds 4%	2,392,000.00
				60%	The W.P.R.R.Co. 1st Mtg. Adj. Income Bonds 4% (Cum.)	3,588,000.00
				25%	The W.P.R.R.Co. Preferred Stock 4% (Non-Cum.)	1,495,000.00
				100%	The W.P.R.R.Co. Preferred Stock 4% (Non-Cum) (1934 Defr'd. Int)	299,000.00
		The D&RGW RR Co. Rfdg. & Imp. Mtg. Bds. 6%	200,000.00	100%	The D&RGWRR Co. 1st Pfd. $5 Participating Stk.—No Par—shares	2,000
		The Western Realty Co. Capital Stk. Par.	300,500.00		The Western Realty Co. Capital Stock—Par Value	300,500.00

Defendants' Exhibit No. 3—(Continued)

[Stamped]: T.M.S. Sept. 19, 1938.

Memorandum

September 15, 1938

Mr. Schumacher:

Re: Cash Condition of the Corporation.

Referring to our several discussions recently on the above subject.

Have given serious thought to question of economies that may be effected in connection with operations of the Corporation for the year 1939, and, as a result of such study, I would recommend, for one thing, consideration be given to taking over in this office from the Chase Bank, the work of handling transfer of our stock and incidental services in connection therewith.

Attached is a statement showing cost of services of the Chase National Bank as Stock Transfer Agent for the years of 1926-1937 inclusive.

You will note the total cost over the period covered was $72,522.39, an average per annum of $6,043.55.

Of this amount, there are certain charges, such as stationery, printing, binding and postage, upon which no savings can be effected. These items amounted to $6,436.11 for the period, a per annum average of $536.34.

Deducting these charges leaves a net amount of possible net savings if the work is handled in this office of approximately $5500 per annum.

Defendants' Exhibit No. 3—(Continued)

I am satisfied, after discussing this with Mr. Andrews, that he, with the assistance of our other employees, can take on this work and handle it efficiently and expeditiously. If we employed Hatton to do this, in addition to his services as transfer agent for the Denver, it would mean, we would have to place him on some salary with the Corporation, which would have the effect of further reducing the possible savings mentioned above.

If it is decided to do the work in this office, the cost of necessary equipment such as, bookkeeping records, addressograph, file cabinets, etc. cannot be estimated, as we have hesitated to go into the subject with the officer of the Chase Bank who is in charge of our transfer work. If you feel we should contact him to ascertain all facts in connection with this proposal, we will do so. This, of course, would give them advance notice we are contemplating taking the work away from them. Whether or not this would affect our status with the Chase Bank is a question. That is the reason I have hesitated to approach them on the subject, as yet.

I find, the Corporation's By-Laws, under Section 2, Article 5, Capital Stock, it provides:

"The Board of Directors or Executive Committee may provide for registration and transfer of the Capital Stock of the Corporation of both classes in the City of New York, and in such other places within or without the United States as they may

Defendants' Exhibit No. 3—(Continued)

deem advisable and, for such purpose, may appoint the necessary registrars and transfer agents (who may be either Corporation or individuals), and other officers. * * *"

Under the above recited provision, the Board or the Executive Committee can designate who the transfer agent may be. As I understand it, if it is decided we should take this over, we would simply have to notify the Chase Bank, and the Board could designate its office in New York as the Transfer Office.

Another item on which I am certain we can effect a saving, is rental. Our present lease expires May 1, 1939. We are now paying $7,000 per annum, for approximately 2500 sq. ft., over $3.00 per foot. In the first place, for our purposes, we do not require that amount of space. I feel that an arrangement can be made with the Chase Bank or for space in some other building in this vicinity, on a basis of $2.00 a foot, for approximately 2,000 sq. ft. or $4,000 annual rental, which would be a reduction of $3,000 from the present rental.

As a matter of information, we have four employees on our Corporation payroll receiving salaries as follows:

	Per Month	Per Annum
Secretary to President	$187.50	$2,250.00
Clerk-Accountant	216.66	2,600.00
Stenographer	67.50	810.00
Telephone Operator	55.00	660.00
	$526.66	$6,320.00

Defendants' Exhibit No. 3—(Continued)

Assuming we take over the transfer work and that we will be successful in arranging for sufficient office space at a lesser cost, these two items will result in approximate saving of $8500 per year.

We are, and have been, for several years, very watchful of the expense of operation of this office, and, in my opinion, it has been kept to the minimum. This, of course, we will continue to do and should any other means of further reducing the cost be discovered, we will take advantage of it.

Another means of reducing the cost of operations is to endeavor to get the Operating Company to bear a larger proportion of the salaries paid to our employees. The division of the total salaries paid at present is approximately 52% by the Corporation and 48% by the Company. These percentages, in my opinion, should be changed, for the reason that a greater portion of time and labor by such employees is being given to Railroad Company matters. We feel the proper division should be 75% Company and 25% Corporation. As you will note from statement above of salaries paid, the total for four employees is $6320.00 per annum, which, I am sure you will agree, is not comparable to salaries paid generally in other Railroad offices for similar work.

Consideration should also be given to the Railroad Company paying a greater share of the rental. I would suggest it be divided in the same manner

Defendants' Exhibit No. 3—(Continued)

as suggested for the salaries, that is, 25% by the Corporation and 75% by the Company.

I will discuss with you further at your convenience.

M. J. CURRY.

Defendants' Exhibit No. 3—(Continued)

I don't believe it is worth while to withhold payment of these bills as the amount is only $972. However, I should like to have your advice.

If paid, it will leave balance in Chase of $2,500.60.

M. J. CURRY.

[Marginal Note]: O.K.—T.M.S.

[Endorsed]: Filed Feb. 4, 1949.

DEFENDANT'S EXHIBIT 4A

Memorandum

New York, January 11, 1941

Mr. Schumacher:

In re subject attached letter from Col. Coulson:

As you know, this question has been in our minds for a long time and, at meeting of the Board several months ago, I mentioned it to Mr. Olyphant of the Central Hanover, and handed him a statement (copy attached) showing allocation of new securities, under the approved ICC reorganization plans for the Western Pacific and the D&RGW, in lieu of securities now pledged under loan with his bank, which he said he would be glad to study and, later on, discuss the matter of possible release of the $11,248 pledged cash. I pointed out to him that the Corporation had been carrying on, during the past few years, through borrowing funds from The Western Realty Company (wholly-owned subsid-

Defendants' Exhibit No. 3—(Continued)

The Chase National Bank of the City of New York

Charges as Transfer Agent, Common and Preferred Stocks of The Western Pacific Railroad Corporation

	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935	1936
Annual fee	$ 500.00	$ 500.00	$ 500.00	$ 500.00	$ 500.00	$ 500.00	$ 500.00	$ 500.00	$ 500.00	$ 500.00	$ 500.00
Excess certificates issued	2,229.75	3,176.75	957.25	1,051.50	771.50	633.00	615.00	1,264.95	2,115.40	1,106.00	1,310.0
Excess accounts maintained	5,096.99	3,899.24	3,460.12	3,155.2	2,971.00	2,882.25	2,923.51	2,378.84	2,212.44	2,188.99	2,137.8
Sealing certificates				17.50	17.50		8.75		25.20	7.00	10.5
x Stationery, printing and binding	576.85	110.41	162.38	52.72	70.88	42.81	33.59	72.57	112.89	66.32	107.4
x Registered mail and postage	142.12	94.05	24.89	30.95	74.69	67.00	74.76	49.54	49.91	43.55	57.4
Annual report—mailing	172.00	178.75	145.75	188.25	121.00	115.50	121.00	123.75	126.50	129.25	123.7
Annual report—postage	163.14	162.87	237.42	213.43	194.99	207.20	194.36	202.55	205.47	210.60	202.4
Annual meeting—list	137.50	137.50	127.50	56.25	53.75	52.50	55.00	210.95	210.93	215.63	206.2
Annual meeting—proxies	242.50	175.00	175.00	175.00	175.00	175.00	175.00	140.63	123.75	126.50	122.0
x Annual meeting—postage	110.02	109.27	101.25	150.00	171.64	124.71	133.53	127.79	128.79	130.91	125.7
Special meeting—list											215.6
Special meeting—proxies											152.7
x Special meeting—postage											266.4
Extra list charges			28.00		81.00						
Dividend services	932.25	818.58	234.15								
Total Cost handled by the Chase Bank	$10,303.12	$9,362.42	$6,153.71	$5,590.85	$5,202.95	$4,799.97	$4,834.50	$5,071.57	$5,811.28	$4,724.75	$5,538.3
Savings that might be effected if handled in this office	$ 9,310.99	$8,885.82	$5,627.77	$5,143.75	$4,690.75	$4,358.25	$4,398.26	$4,619.12	$5,314.22	$4,273.37	$4,778.8
x Charges upon which no savings can be effected	$ 992.13	$ 476.60	$ 525.94	$ 447.10	$ 512.20	$ 441.72	$ 436.24	$ 452.45	$ 497.06	$ 451.38	$ 759.5

•—1 year.

†—3 years.

ed)

rk

Pacific Railroad Corporation

933	1934	1935	1936	1937	Total for 12 years, 1926/37 inc.	Average for 12 yr. period, 1926/37 inc.
500.00	$ 500.00	$ 500.00	$ 500.00	$ 500.00	$ 6,000.00	$ 500.00
264.95	2,115.40	1,106.00	1,310.05	1,639.05	16,870.20	1,405.85
378.84	2,212.44	2,188.99	2,137.89	2,061.50	35,368.02	2,947.34
	25.20	7.00	10.50	31.50	117.95	9.83
72.57	112.89	66.32	107.47	74.99	1,483.88	123.66
49.54	49.91	43.55	57.49	50.03	758.98	63.25
123.75	126.50	129.25	123.75	121.00	1,666.50	138.88
202.55	205.47	210.60	202.46	195.84	2,390.33	199.19
210.95	210.93	215.63	206.25	207.86	1,671.62	139.30
140.63	123.75	126.50	122.00	119.25	1,924.63	160.39
127.79	128.79	130.91	125.71	122.90	1,536.52	128.04
			215.63		215.63	17.97•
			152.75		152.75	12.73•
			266.40		266.40	22.20•
				5.00	114.00	9.50
					1,984.98	165.42†
071.57	$5,811.28	$4,724.75	$5,538.35	$5,128.92	$72,522.39	$6,043.55
619.12	$5,314.22	$4,273.37	$4,778.82	$4,685.16	$66,086.78	$5,507.19
452.45	$ 497.06	$ 451.38	$ 759.53	$ 443.76	$ 6,436.11	$ 536.34

iary), the entire stock of which is pledged under loan with the Curtiss Southwestern Company—the latter company having consented to such borrowing in each instance; that it seemed to me the Central Hanover loan was in far better shape collaterally than those with the Chase Bank and the Curtiss Southwestern Company and I felt that under all the circumstances the Central Hanover could very well release the cash to the Corporation, to enable it to meet its current operating expenses.

I have heard nothing further from him, neither have I broached the subject since, my thought being that at the first meeting of our Board I would again take it up with him.

In view of Mr. Coulson's suggestion, however, perhaps we should take it up formally, by letter. Will discuss this with you at your convenience.

/s/ M. J. C.

[Marginal Note]: Discussed 1/13/41.

[Stamped]: T.M.S. Jan. 13, 1941.

[Endorsed]: Filed Feb. 4, 1949.

Defendants' Exhibit No. 3—(Continued)

[Stamped]: T.M.S. Sept. 21, 1938.

Memorandum

New York, September 20, 1938.

Mr. Schumacher:

Referring to my memorandum September 15th re cash condition of the Corporation and comments therein, relative Railroad Company bearing a larger share of salaries of our joint employees:

Your salary, as Trustee and Chairman of the Executive Committee, being fixed by the Court at $15,000 per annum cannot be changed. All others employed in this office (with one exception mentioned below), including myself, are on the payrolls of the Company and the Corporation.

Mr. James, Chairman of the Board, is on Company payroll at $5,000 per annum, nothing from the Corporation.

Pierce & Greer, Counsel, are on the payrolls for $10,000 per annum divided 50/50 between the Corporation and Company.

We have one employee, Miss O'Neill, on Company payroll at $1,560 per annum, does not receive any salary from the Corporation.

In line with recommendation in memo referred to, I show below the names, salaries paid by Company and Corporation at present, what they would amount to if divided on basis of 75% Company and 25% Corporation, and the totals. It will be noted

Defendants' Exhibit No. 3—(Continued)

the salaries paid now by the Company amount to $10,700 per annum, whereas, under arrangement suggested this would be increased to $16,815, a net increase in the Company payroll of $6,115 per annum.

I cannot help feeling that under the conditions existing at the present time which will, no doubt, continue through 1939 and possibly beyond that, the division of these salaries on basis suggested is justified. If you agree, it might be well to take the question up with Mr. Ehrman to ascertain if he is willing to join you in instructing Mr. Elsey to arrange accordingly.

	Present		Proposed		
	Company	Corpn.	Company	Corpn.	Total
M. J. Curry	$ 4,500	$ 5,400	$ 7,425	$ 2,475	$ 9,900
C. E. Andrews	2,420	2,600	3,765	1,255	5,020
W. C. Mittelberg	2,070	2,250	3,240	1,080	4,320
M. C. Valouch	930	810	1,305	435	1,740
C. C. Sheehan	780	660	1,080	360	1,440
	$10,700	$11,720	$16,815	$ 5,605	$22,420
% of Total	47.73	52.27	75.	25.	

M. J. CURRY.

T.M.S.
SEP 21 1938

209

This note will enclose Co's

cheque for $6.11.8 for your

loan which will thus be

reduced to £10 by after payment

of your loan in full

Yours etc

RRGAWS EXHIBIT 136A
3/28/42 E.G.

203 A
TV

Defendants' Exhibit No. 3—(Continued)

Memorandum

New York, September 21, 1938.

Mr. Schumacher:

Your memorandum attached:

As a partial offset to proposed increase in Company payroll of $6,115 per annum, we feel certain a saving can be effected beginning May 1, 1939, in our rental. Our present lease with the Chase Bank is on basis $7,000 per annum divided 50/50 between Corporation and Company. We have approximately 2500 sq. ft. of space, more than we actually need. When question of renewal comes up it is my purpose to request reduction in rental to approximately $4,000 per annum; failing in that we can, no doubt, secure desirable and adequate space in some other building at that rental. If proposed basis of dividing rental is arranged, that is, 75% to be paid by the Company and 25% by the Corporation, this change in rental will result in a saving of $3,000, or $2,500 to the Corporation and $500 to the Company, over what it is costing at the present time. Applying this saving to the proposed increase in payroll of $6,115 per annum, would result in a net total increase in cost of operation of this office of $5,615 per annum.

So far as effecting any savings in our general expenses is concerned, I don't believe anything more can be done as we are now and have been for

Defendants' Exhibit No. 3—(Continued)

several years watching these expenses closely and have brought them down to the minimum.

Below is a recapitulation of expenses for 8 months of this year, January 1 - August 31, 1938, inclusive:

		% of Total
Salaries of officers and clerks	$24,522.97	78.08
Travelling expenses	2,306.04	7.34
Stationery and printing	107.06	.34
Transfer and registry	1,194.38	3.80
Fees—Executive Committee meetings	60.00	.19
General expenses	437.12	1.39
Rent	2,333.36	7.44
Miscellaneous	445.66	1.42
Total	$31,406.59	100.00

An average of approximately $4,000 per month.

As will be seen from the above—outside of salaries, rent, transfer and registry charges and travelling expenses, our "general and miscellaneous expense" amounts to approximately $130 per month.

Included in item "General and miscellaneous expense" are the following charges: telephone, telegraph, stationery, printing, Executive Committee fees, postage, subscriptions (Official Guide, Standard Statistics service, Poor's Railroad Manual, Moody's Industrial Manual and other railway publications), etc.

Transfer and registry charges cover services of the Chase Bank and Central Hanover Bank in connection with payment of interest on our outstanding Trustees' and Equipment Trust Certificates.

Defendants' Exhibit No. 3—(Continued)

It is my understanding that while the Company is undergoing reorganization, in order to avoid possibility of some creditor stepping in and taking any funds that might be on deposit here in New York to the credit of the Railroad Company, it was decided to designate these banks as the Paying Agents on the certificates. The same situation exists so far as the D&RGW is concerned. The Trustees have designated the Chase Bank as the Paying Agent on their certificates rather than the office of Hatton, Assistant Secretary and Assistant Treasurer.

When the first issue of $3,000,000 Trustees' Certificates was sold, question of payment of the principal and interest at maturity was the subject of correspondence between you and Mr. Ehrman. In Mr. Ehrman's letter to you of November 12, 1936, he stated:

"In this connection, we will also have to make arrangements for the payment of outstanding certificates when they come in on January 2nd. I doubt whether we have the facilities at the office to take care of this and would suggest that it be put in the hands of some bank or trust company to whom we could refer certificate holders who present the certificates for payment."

In your reply to Mr. Ehrman, you stated:

"* * *, as the major amount of such certificates are held here in the east, it might be desirable to have them presented to The Chase National Bank

Defendants' Exhibit No. 3—(Continued)

of the City of New York, as Agent, for payment and they in turn can handle with the Crocker Bank. * * * "

M. J. CURRY.

[Stamped]: T.M.S. Sept. 26, 1938.

Memorandum

New York, September 23, 1938

Mr. Schumacher:

With further reference to question of the Railroad Company bearing a larger share of salaries of joint employees:

As requested, I show below figures based on the division of salaries and rental of 66⅔% Company and 33⅓% Corporation, instead of 75% and 25%, respectively, as suggested in my memo 20th.

	Present		Proposed		
	Company	Corpn.	Company	Corpn.	Total
M. J. Curry	$ 4,500	$ 5,400	$ 6,600	$ 3,300	$ 9,900
C. E. Andrews	2,420	2,600	3,347	1,673	5,020
W. C. Mittelberg	2,070	2,250	2,880	1,440	4,320
M. C. Valouch	930	810	1,160	580	1,740
C. C. Sheehan	780	660	960	480	1,440
	$10,700	$11,720	$14,947	$ 7,473	$22,420
% of Total	47.73	52.27	66⅔	33⅓	

It will be seen that if the Company takes over the salaries of these joint employees on the suggested percentages, 66⅔ Company and 33⅓ Cor-

Defendants' Exhibit No. 3—(Continued)

poration, it will result in an increase in the Company's New York Office payroll of $4,247 per annum.

If reduction in rental can be effected, as suggested, this would result in a saving in this item, on basis percentages above-mentioned, of $834, making a total increase to be assumed by the Company of $3,413 per annum.

M. J. CURRY.

Memorandum

New York, November 28, 1938

Mr. Schumacher:

After payment of salaries, checks for which are enclosed for your signature, it will leave a balance on deposit with the Chase Bank of $3,472.88. We have on hand unpaid bills amounting to $972.28, as follows:

Chase National Bank—Rent and Light	$597.99
Chase National Bank, Services	120.11
N. Y. Trust Co., Services	40.35
N. Y. Telephone Co., Phone	143.48
Pioneer Warehouses, Rent	46.80
Towels	7.10
Water	5.92
Miscellaneous	10.53
	$972.28

DEFENDANTS' EXHIBIT No. 4B

January 14, 1941.

Mr. Robert E. Coulson
40 Wall Street
New York, N. Y.

Dear Mr. Coulson:

I have your letter of the 10th instant, suggesting some investigation be made of the status of the cash which this Corporation has on deposit in the Central Hanover Bank, pledged to secure, in part, our loan, before further advance from the Western Realty Company to the Corporation is made.

The principal of the demand note of this Corporation held by the Central Hanover Bank & Trust Company, dated May 25, 1932, is $635,000. Interest rate was originally 5%; however, as of February 1, 1935, the rate was reduced to 4½%. This was brought about through conference our Treasurer, Mr. Curry, had with Mr. Olyphant, Vice President of Central Hanover, and in accordance with resolution adopted at meeting of Board of Directors on January 10, 1935, which resolution was as follows:

"Resolved, that the Directors of the Corporation are of the opinion that it is for the best interest of the Corporation to have $40,000 of said deposit of $51,248.86 applied by the Central Hanover Bank and Trust Company in part-payment of said loan of $675,000 and the officers are directed to use their best efforts to induce said bank to make application of said amount and to also endeavor to secure a

reduction of 1% in the present rate of 5% for said loan."

Our records indicate that at the aforementioned conference Mr. Olyphant inquired if we had approached our other two creditors (Chase Bank and Curtiss Southwestern) with like request, and statement was made that we had not, for the reason that their loans were not as well collaterated as the Central Hanover loan and that therefore a reduction from the 5% rate would seem to be fair and reasonable.

The question you raise has been in our minds for a long time and, at a meeting of the Board, several months ago, Mr. Curry mentioned it to Mr. Olyphant and handed him a statement (copy attached, revised to December 31, 1940); showing allocation of new securities under the approved ICC reorganization plans for the Western Pacific and the D&RGW in lieu of securities now pledged with Central Hanover. Mr. Olyphant stated he would be very glad to study it and, later on, discuss with us the matter of possible release of the $11,248 pledged cash. It was pointed out to him that the Corporation had been carrying on, during the past several years, through borrowing funds from the Western Realty Company, the entire stock of which is pledged under loan with Curtiss Southwestern Company—that company having consented to such borrowing in each instance; that it seemed to us the Central Hanover loan was in much better shape collaterally than those of the other two cerditors and

we felt, under all the circumstances, the Central Hanover should be willing to release the cash to the Corporation to help meet current operating expenses.

However, the question has not been pursued further for the reason we have felt the Central Hanover had a right to hold this cash as part collateral under the loan, which has been in default since January, 1934. Aside from this, it is my judgment it is not opportune at this time to take this up with Central Hanover, as I feel they would turn it down, and I prefer to allow it to remain "as is" until actual necessity arises, when the Western Realty Company's cash resources may not be sufficient to permit of further loans to the Corporation.

Yours very truly,

/s/ T. M. SCHUMACHER.

bcc. Mr. F. C. Nicodemus, Jr.

[Endorsed]: Feb. 4, 1949.

DEFENDANTS' EXHIBIT No. 4C

(For Identification Only)

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York

August 7, 1941

Mr. T. M. Schumacher,
The Western Pacific Railroad Corporation,
37 Wall Street,
New York, N. Y.

Dear Mr. Schumacher:

Since 1936 there has been advanced to The Western Pacific Railroad Corporation something over $200,000 by the Western Realty Company. The stock of the Western Realty Company is all held by Curtiss Southwestern Company as collateral for an under-collateralized loan which is in default. The advances have been made possible by formal consents given by the Curtiss Southwestern Company to such advances. During the lifetime of Mr. James these advances represented no problem in view of the ownership of the Curtiss Southwestern Company. Today all the stock in Curtiss Southwestern Company is held by the executors under the wills of Mr. James and of Mrs. James.

We have given consideration to the question whether we could properly advise the executors to consent to the continuance of such advances. We find no basis upon which we may properly give such advice.

As you know, Curtiss Southwestern Company is one of three secured creditors of The Western Pacific Railroad Corporation, the other two being The Chase National Bank of the City of New York and the Central Hanover Trust Company. It is possible that some plan could be worked out for cooperation between the three secured creditors in providing The Western Pacific Railroad Corporation with needed funds on the basis of which some favorable recommendation might be made to the executors of the James' estates. We suggest that you get in touch with the other secured creditors as promptly as you can and obtain their views as to the situation.

Sincerely yours,

/s/ ROBERT E. COULSON.

[Stamped]: T.M.S. Aug. 13, 1941.

[Stamped]: The Western Pacific Railroad Corporation—Received Aug. 11, 1941.

DEFENDANT'S EXHIBIIT No. 5A

May 20, 1943.

Messrs. Pierce & Greer
40 Wall Street
New York, N. Y.

Att. Mr. H. Brua Campbell

Dear Mr. Campbell:

The enclosed copies of letters from Tri-Continental Corporation, this city, explain themselves.

Will you please advise as to nature of reply that should be made.

In this connection, I refer you to your letter dated May 21, 1942, to Lybrand, Ross Bros. & Montgomery (copy to me) having reference to question of whether this Corporation is subject to New York State franchise tax. The opinion expressed therein, it seems to me, may also serve as an answer to the inquiry from Tri-Continental.

Yours very truly,

/s/ M. J. CURRY.

[Marginal Note]: Mr. Campbell suggested we make reply stating that the corp. does not file N. Y. State Franchise Tax.

/s/ M. J. C.
5/24/43.

[Endorsed]: Filed Feb. 8, 1949.

DEFENDANTS' EXHIBIT No. 5B

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York

May 18, 1944

Mr. M. J. Curry, Vice President,
Western Pacific Railroad Company,
37 Wall Street,
New York, N. Y.

Dear Sir:

You have inquired as to the possible liability of The Western Pacific Railroad Corporation for future franchise taxes in the State of New York in view of the prospective changes to be occasioned by the reorganization of The Western Pacific Railroad Company and the transfer of the capital stock of the Railroad Company to the Reorganization Committee.

We understand that you have heretofore been advised by counsel that your corporation was not subject to any State franchise taxes under then existing laws and decisions, in the light of its activities in New York State.

However, since such advice was given, the New York State franchise tax laws have been substantially changed by enactments at the 1944 Session of the Legislature, and, in particular, by Chapter 415 of the Laws of 1944, effective March 31, 1944.

From the present point of view of The Western Pacific Railroad Corporation, the most significant

Defendants' Exhibit No. 5B—(Continued)

change effected by Chapter 415 of the Laws of 1944 is a new definition of "doing business" in New York State, for purposes of franchise taxation. Prior to the enactment of Chapter 415 of the Laws of 1944, the provision under which The Western Pacific Railroad Corporation was deemed not to be doing business in the State for franchise tax purposes (Subdivision 6, Section 188, Tax Law) read as follows:

> "The holding of real property in this state by a foreign corporation shall be deemed to be doing business in this state within the meaning of this article, but a foreign corporation shall not be deemed to be doing business in this state, for the purposes of this article, solely by reason of (a) having office furniture and fixtures in this state, or (b) the maintenance of cash balances with banks or trust companies in this state, or (c) the ownership of shares of stock or securities kept in this state, if pledged as collateral security, or, if deposited with one or more banks or trust companies, or with brokers, who are members of a recognized security exchange, in safekeeping or custody accounts, or (d) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation, or (e) any combination of the foregoing activities."

The provision in the new franchise tax laws (Tax Law, Section 209 (4)) which replaces Section 188,

Defendants' Exhibit No. 5B—(Continued)

subdivision 6, reenacts substantially the above-quoted provision except that the words which we have underscored above were omitted in the new enactment. The omission of clause (a) "having office furniture and fixtures in this state" was undoubtedly intended to bring under the provisions of the New York statute all foreign corporations maintaining offices of their own in the State of New York, and we would anticipate that the maintenance of an office by The Western Pacific Railroad Corporation in the State of New York, after the effective date of the new statute for such purposes, would subject the Corporation to New York State franchise taxes.

Although the new law was effective as of March 31, 1944, under its provisions a company, theretofore deemed not to be doing business in New York State under the prior law, but deemed to be doing business in New York State under the provisions of the new law, would not incur liability for tax prior to the tax period commencing November 1, 1944. The President of the Tax Commission stated the position of the Tax Commission as follows: (Paragraph 13,028-B, Prentice-Hall, State and Local Tax Service):

> "* * * For example, a corporation on the calendar year basis which would be deemed to have commenced doing business in the state on the effective date of the new law would not incur liability for tax under the new law un-

Defendants' Exhibit No. 5B—(Continued)

less it continued doing business in the state after October 31, 1944 * * *"

It is our opinion that, if The Western Pacific Railroad Corporation continues to maintain an office in New York State and continues its business activities as heretofore, after October 31, 1944, it will thereby subject itself to the provisions of the New York State franchise tax laws.

If you have any other questions in connection with these problems, we should be glad to advise you.

Very truly yours,

WHITMAN, RANSOM,
COULSON & GOETZ.

[Stamped]: Received May 23, 1944, Western Pacific Railroad Co.

May 23, 1944.

Mr. F. C. Nicodemus, Jr.
Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Dear Mr. Nicodemus:

Herewith is copy of letter dated May 18th, from Messrs. Whitman, Ransom, Coulson & Goetz, Tax Counsel of the Railroad Company, which is self-explanatory.

As we are anxious to avoid payment of the tax

Defendants' Exhibit No. 5B—(Continued)

in question, which will begin to accrue as of November 1, 1944, it will be appreciated if you will advise what, if anything should be done to accomplish this result, or, in any event, to enable us to pay a minimum tax.

Yours very truly,

/s/ M. J. CURRY.

[Marginal Note]: MVC to note /s/ M. J. C.
Noted /s/ M. C. V.

Pierce & Greer
40 Wall Street
New York 5, N. Y.

June 14, 1944.

Mr. M. J. Curry, President
The Western Pacific Railroad Corporation
37 Wall Street
New York 5, N. Y.

Dear Mr. Curry:

This will serve as a tardy acknowledgment of your letter to me of May 23, 1944, enclosing opinion from Messrs. Whitman, Ransom, Coulson & Goetz, in respect of the recently enacted New York State franchise tax.

I understand that this tax liability does not begin to accrue until November 1, 1944, by which time we

Defendants' Exhibit No. 5B—(Continued)

are hopeful of disposing of our controversy with Mr. Buckland. In any event I think it will be necessary to make this payment in order to enable The Western Pacific Railroad Corporation to function at least through the present calendar year.

Yours very truly,

/s/ F. C. NICODEMUS, JR.

[Stamped]: Received June 15, 1944, Western Pacific Railroad Co.

October 5, 1944.

Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Attention Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

Referring to our exchange of letters in May and June, last, in re. New York State Franchise tax:

As this tax will begin to accrue as of November 1, 1944, and the first report is due May 15, 1945, and the tax shown by such report is payable one-half at time of filing report and one-half on or before the succeeding November 15th, I am again calling it to your attention with request for advice as to what can be done to avoid payment, in view of conditions surrounding the Corporation at this time.

Defendants' Exhibit No. 5B—(Continued)

Do you feel it would be desirable to address a letter to Mr. Rollin Browne, State Tax Commissioner, at Albany, stating the facts, and request a waiver of the obligation under the new law in behalf of the Corporation? If you do, will you please let me have draft of such a letter.

Yours very truly,

/s/ M. J. CURRY.

[Marginal Notes]: President, State Tax Commission.—MCV to note and return /s/ M. J. C.
Noted.

Pierce & Greer
40 Wall Street
New York 5, N. Y.

October 11, 1944.

Mr. M. J. Curry, President
The Western Pacific Railroad Corporation
37 Wall Street
New York 5, N. Y.

Dear Mr. Curry:

Mr. Nicodemus asked me to reply to your letter of October 5, 1944, with reference to the applicability to the Corporation of the franchise tax on business corporations imposed by Article 9-A of the

Defendants' Exhibit No. 5B—(Continued)

New York Tax Law, as amended by Chapter 415 of the Laws of 1944, effective March 31, 1944.

Inasmuch as the tax thereby imposed does not begin to accrue until November 1, 1944, and the first return required to be made by the Corporation will not be due until May 15, 1945, it is our thought that it would not be profitable to do anything in the matter until shortly before the date for the filing of the return, at which time the Corporation will be in a position to deal with the matter in the light of such developments as may hereafter occur.

Yours very truly,

/s/ H. BRUA CAMPBELL.

[Marginal Note]: Noted M. C. V.

[Stamped]: M. J. O. Oct. 13, 1944.

[Stamped]: Received Oct. 31, 1944, Western Pacific Railroad Company.

March 26, 1945.

Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Attention Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

Referring to enclosed copy of letter dated March 23, 1945, from Tri-Continental Corporation, this city, on subject New York State Franchise Tax:

Defendants' Exhibit No. 5B—(Continued)

See your letters to me under dates June 14, 1944, and October 11, 1944, and let me know, please, what I should say in answer to their inquiry.

Yours very truly,

/s/ M. J. CURRY.

[Marginal Notes]: M. C. V. to note and return
/s/ M. J. C.
Noted /s/ M. C. V.

Tri-Continental Corporation
65 Broadway
New York

March 23, 1945

Western Pacific R. R. Corp.
37 Wall St.
New York 5, N. Y.

Dear Sirs:

During the year 1944 the undersigned or certain of its associated companies were the beneficial owners of securities of your corporation. In the preparation of our New York State Franchise Tax report we are required to apportion the value of such securities in accordance with the percentage of the entire capital or the issued capital stock of your corporation allocable to New York State as determined on your New York tax report for the preceding tax year.

Defendants' Exhibit No. 5B—(Continued)

Accordingly, we should appreciate your advising us of the percentage, if any, of the entire capital or the issued capital stock of your corporation allocated to New York State on the New York State Franchise Tax report, if any, filed by your corporation during the year 1944. It will answer our purpose, if you merely fill in such information at the bottom of this letter, or indicate that you do not file New York State Franchise Tax reports.

We shall appreciate an early reply.

Very truly yours,

TRI-CONTINENTAL CORPORATION,

/s/ WILLIAM RENNER,
Treasurer.

Percentage of entire capital or issued capital stock allocated to New York State on New York State Franchise Tax report filed during the year 1944.

.....%.

.....

Signed.

[Stamped]: Received March 26, 1945, Western Pacific Railroad Co.

Defendants' Exhibit No. 5B—(Continued)

Pierce & Greer
40 Wall Street
New York 5, N. Y.

April 9, 1945

Mr. M. J. Curry, President
The Western Pacific Railroad Corporation
37 Wall Street
New York 5, N. Y.

Dear Mr. Curry:

This refers to your letter of March 23, 1943, enclosing copy of letter from the Tri-Continental Corporation requesting advice as to the percentage of capital stock of The Western Pacific Railroad Corporation allocable to New York State.

My suggestion is that you call Mr. James K. Polk and ascertain whether any of the James Corporations are concerned with the same request that has been made by the Tri-Continental Corporation and be guided by his recommendation as to the answer to be made pursuant to this inquiry.

Yours very truly,

/s/ F. C. NICODEMUS, JR.

[Stamped]: Received April 10, 1945, Western Pacific Railroad Co.

Defendants' Exhibit No. 5B—(Continued)

April 10, 1945

Mr. James K. Polk
Messrs. Whitman, Ransom, Coulson & Goetz
40 Wall Street
New York 5, N. Y.

Dear Mr. Polk:

Enclosed is copy of letter dated March 23, 1945, from Tri-Continental Corporation, this city, on subject of New York State Franchise tax.

I referred this to Mr. Nicodemus, of Counsel for this corporation, for advice as to nature of reply to be made and he suggests I ascertain from you whether any of the James corporations are concerned with the same request that has been made by the Tri-Continental, and advise me, if you will, please, as to answer to be made to the inquiry.

Yours very truly,

/s/ M. J. CURRY.

April 11, 1945.

Tri-Continental Corporation
65 Broadway
New York 6, N. Y.

Attention Mr. William Renner, Treasurer.

Gentlemen:

In response to your letter of March 23rd, this is to advise that the Western Pacific Railroad Cor-

Defendants' Exhibit No. 5B—(Continued)

poration did not file a New York State franchise tax report during the year 1944.

Yours very truly,

/s/ M. J. CURRY.

bcc. Mr. F. C. Nicodemus, Jr.
See your letter of April 9th. The above letter was written on suggestion made by Mr. Polk over the 'phone today.
M. J. C.

April 23, 1945.

Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Attention Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

I refer you to my letter dated October 5, 1944, your reply dated October 11, 1944, in regard to the franchise tax imposed by Article 9-A of the amended New York Tax law:

As the first return required to be made will be due May 15, 1945, which date is rapidly approaching, I would appreciate your prompt advice as to what should be done in the matter so far as the corporation is concerned.

Mr. Polk, of the firm of Whitman, Ransom, Coul-

Defendants' Exhibit No. 5B—(Continued)

son & Goetz, I understand, has had this question under consideration and I suggest you consult him in the matter.

Yours very truly,

/s/ M. J. CURRY.

cc. Mr. James K. Polk
Whitman, Ranson, Coulson & Goetz.

April 26, 1945.

Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Attention Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

Referring to my letter to you of April 23rd, in regard to New York State Franchise Tax:

For your information, I quote below item which appeared in this morning's edition of the New York Times:

"Tax Deadline Is Extended

Put Off by State From May 15 to June 15 on Corporate Returns

Albany, April 25 (AP)—The State Tax Commission today extended from May 15 to June 15 the deadline for filing 1944 corporation franchise tax returns.

Defendants' Exhibit No. 5B—(Continued)

The extension affects corporations and those whose fiscal years ended in July, August, September, October or November, 1944, or in January or February, 1945.

Commissioner Rollin Browne said the extra month was granted to permit taxpayers to follow newly adopted regulations, now being printed."

Yours very truly,

/s/ M. J. CURRY.

cc. Mr. James K. Polk.
Whitman, Ransom, Coulson & Goetz.

[Endorsed]: Filed Feb. 8, 1949.

DEFENDANTS' EXHIBIT No. 5-C

Moody's Investors Service
65 Broadway, New York

January 8, 1943

Mr. T. M. Schumacher, Trustee,
Western Pacific Railroad Co.,
37 Wall Street,
New York City, N. Y.

Dear Sir:

In analytical work dealing with railroad securities the federal income tax liability (past, present and future) and the correct method of computation

Defendants' Exhibit No. 5-C—(Continued)

based on accurate knowledge of the various basic factors is today more important than ever. We in our work here at Moody's have naturally had to make estimates, but sometimes, due to inadequate knowledge of the facts, our tax conclusions have not been as accurate as we would wish.

We wonder whether you would be willing to be of help to us regarding the above and, on the possibility that you would, we are enclosing a tax form a return of which filled out (even on a tentative basis) would be of great assistance.

We should be glad to hold any information furnished us in confidence, if you so desire.

Yours very truly,

MOODY'S INVESTORS SERVICE

/s/ WALTER F. HAHN,
Manager-
Railroad Department.

WFH:FD
Enclosure

[Initialed]: MJC & MCV

[Stamped] Received Jan. 9, 1943, W. P. R. R. Co.

[Stamped]: T.M.S. Jan. 11, 1943

Defendants' Exhibit No. 5-C—(Continued)

Estimate of Excess Profits Tax For 1942

Preferred Stock
Common Stock
Premium on Stock
One half of Debt
Corporate Surplus
Other items of invested capital (explain)
Total Invested Capital
Inadmissable Assets (1)
Total Assets (2)
Ratio of (1) to (2)
Invested Capital Less Inadmissables
8% on First 5 Million
7% on Second 5 Million
6% on Next 190 Million
5% on Balance
Excess Profits Tax Credit
Pre-Tax Net Income—1942
Less Net Operating Loss Carryover
Less Net from Inadmissables
Balance
Plus One-Half Interest Charges
Total
Excess Profits Tax Credit plus Carryover
Excess Profits
Excess Profits Tax (90%)

Estimate of Normal Tax and Surtax For 1942

Pre-Tax Net Income—1942
Less Excess Profits

Defendants' Exhibit No. 5-C—(Continued)

Less Net Operating Loss Carryover
Balance
Add Back income from Inadmissables subject to Normal & Surtax
Total
Normal & Surtax (40%)
Total Normal & Surtax
Pre-Tax Net Income
Less Total Tax
Net Income

Estimate of Unused Excess Profits Credit

	1941	1940
Federal Income Tax Accrual		
Pre-Tax Net Income Indicated (1941 tax rate 31%; 1940 tax rate 24%)		
Net Operating Loss Carryover from 1939		
Net Operating Loss Carryover from 1939 & 1940		
Adjusted Net Income		
Plus One-half of Interest Charges		
Total		
Less Net from Inadmissables		
Balance (1)		
8% of First 5 Million of Invested Capital Less Inadmissable Assets		
7% of Balance of Such Assets		
Total Excess Profits Credit		
Balance (1)		
Excess Profits-Credit Carryover		

Defendants' Exhibit No. 5-C—(Continued)

January 13, 1943.

Mr. Walter F. Hahn, Manager,
Railroad Department,
Moody's Investors Service,
65 Broadway,
New York, N. Y.

Dear Sir:

Your letter of January 8, addressed to Mr. T. M. Schumacher, Trustee, has been turned over to the undersigned for reply.

As The Western Pacific Railroad Company is included in the consolidated income and excess profits tax returns filed by The Western Pacific Railroad Corporation (parent company), we show below estimated consolidated figures, of which the Company's Pre-Tax Net Income is $10,290,278:

Pre-Tax Net Income	$9,501,492
Less Net Operating Loss Carry-over	1,217,213
	$8,284,279
Add Eliminations	1,575,727
	$9,860,006
Normal & Surtax (42%)	$4,141,202
Western Pacific Railroad Company's apportionment of tax	$4,078,794
Less accrued 1941	384,800
Accrued in 1942—Estimated	$3,693,994

Defendants' Exhibit No. 5-C—(Continued)

No provision has been made for accrual of excess profits tax since it appears whatever excess profits net income there may be will be more than offset by the excess profits credit and the unused profits credit carryover.

It will be appreciated if you will treat the above information confidentially.

Yours very truly,

/s/ M. J. CURRY.

[Endorsed]: Filed Feb. 8, 1949.

DEFENDANTS' EXHIBIT No. 6

The Western Pacific Railroad Company

Western Union Telegram Form

New York, March 2, 1943

D. C. DeGraff
Western Pacific Railroad Company
526 Mission Street
San Francisco, Calif.

Wire date: At conference with accountants here yesterday decided file consolidated tax returns including subsidiaries you list. In view this, we filed yesterday request for extension time to May 15th. Am hopeful will be granted and will advise you promptly. Glad you are preparing necessary working schedules and tentative declared value excess profits tax returns and expect forward latter part

this week. Our understanding regarding consents not in accord with yours. See Paragraph eye, Page Two, of instructions for Form 1120, which in our opinion requires such consents. This has been confirmed with Revenue Agent* here who states forms of consents have been printed and are available for 1942 returns. Procedure same as last year.

M. J. CURRY.

*Mr. Scanlon Ext 252

[Initialed]: MCV ok MJC

[Stamped]: M.J.C Mar. 3, 1943.

[Endorsed]: Filed Feb. 8, 1949.

DEFENDANTS' EXHIBIT No. 7

March 15, 1943.

Collector of Internal Revenue,
Second District of New York,
Custom House,
New York, N. Y.

Dear Sir:

Enclosed herewith is Tentative Consolidated Income and Declared Value Excess-Profits Tax Return (Form 1120) of The Western Pacific Railroad Corporation for the year ended December 31st, 1942.

The estimated tax on this return is $4,209,948. and we hand you herewith New York draft No. MT 56492 in favor of United States Collector of

Internal Revenue, New York, in the amount of $1,052,487. covering first installment of one-fourth of the estimated tax.

Yours very truly,

/s/ M. J. CURRY,
Treasurer.

Enclosures

[Endorsed]: Filed Feb. 8, 1949.

DEFENDANTS' EXHIBIT No. 8

The Western Pacific Railroad Company

Western Union
Telegram Form

New York, May 7, 1943.

D. C. DeGraff
Western Pacific Railroad Company
526 Mission Street
San Francisco, Calif.

Reference question income and excess profits tax returns 1942: Tax lawyers have decided we should file consolidated returns, which will do on or before May 15th. Would appreciate if you will have final declared value returns prepared and executed for all subsidiaries similar to tentative returns filed in March and forward here original and two copies each. Figures on tentative returns should be corrected as follows: Show Sacramento Northern in-

terest $1313.00; Net operating loss deduction $710,-783.55 making deficit $391,755.08. Standard Realty Net Operating Loss Deduction $4407.51; Deficit $3,908.20.

M. J. CURRY.

[Endorsed]: Filed Feb. 8, 1949.

DEFENDANTS' EXHIBIT No. 9

The Western Pacific Railroad Company
37 Wall Street
New York

May 21, 1943.

Mr. F. C. Nicodemus
40 Wall Street
New York, N. Y.

Dear Mr. Nicodemus:

Enclosed is copy of Mr. Polk's letter of May 20, 1943, in re. tax matters. Very interesting!

I suggest it might be well for you to drop over Monday morning, the 24th, and discuss with Mr. Schumacher, who will leave that afternoon for San Francisco.

Yours very truly.

/s/ M. J. CURRY.

Defendants' Exhibit No. 9—(Continued)

Copy

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York

May 20, 1943.

Mr. M. J. Curry,
Vice President,
Western Pacific Railroad Company
37 Wall Street,
New York, N. Y.

Dear Mr. Curry:

On May 15, there were filed at the Office of the Collector of Internal Revenue, Custom House, New York, the Federal income, excess profits tax and declared value excess profits tax returns for the Western Pacific Railroad Company and its affiliated corporations. The items entering into the preparation of these returns were reviewed by us and on the basis of the information available, it is believed that the returns as filed met all of the conditions of the Internal Revenue Code and Bureau regulations in respect of the substantive matter contained therein and of supporting schedules.

It is believed, however, that a considerable amount of supporting detail and underlying data must be prepared in order that the figures set forth in the return can be supported upon subsequent Bureau audit. While it is true that much of this underlying detail will relate to the earnings

Defendants' Exhibit No. 9—(Continued)

and profits determination which, in turn, will probably have little effect upon invested capital, it is believed, however, desirable that the research be carried through in order that the position we assert in the returns may be hedged against the adverse implications of possible distributions out of capital which may have occurred up to the date of the last dividend payment in 1927. Further, we have used in the returns, book costs as bases for the affiliated corporation's stock investments which again may require adjustments, possible of determination only after such analyses.

It is also believed desirable to have a more complete review made of the computation of the unused excess profits credit adjustment. In the return as filed, it was assumed that the invested capital base for the years 1940 and 1941 was substantially the same as for the taxable year 1942. Undoubtedly, changes will be indicated when the schedules for borrowed invested capital and inadmissible adjustments for 1940 and 1941 have been prepared in detail. This adjustment will, in all probability, have no effect upon the 1942 tax return but will afford a more proper basis for administrative consideration of tax matters for 1943 and subsequent years.

It is further noted that a historical development of the profit and loss accounts of the several companies, not only as disclosed in their books, but as set forth in the reconciliations reported in prior Federal income tax returns, will bring to light any

Defendants' Exhibit No. 9—(Continued)

instances of write-ups, write-downs, etc. The survey of this character will also serve to establish more definite amounts of net operating loss deductions and carry overs.

Both in connection with the review of the deductions claimed for depreciation and the amounts shown for fixed capital investment returns, it will be helpful to review the significant tax positions adopted by the company and accepted by the Bureau of Internal Revenue in connection with the audits by the Bureau of Internal Revenue of prior year income tax returns. While not estopped by prior considerations and decisions, the Bureau may be disinclined to depart from previous determinations of basis of fixed capital investments as shown by treatment in computing depreciation deductions and in computing gains and losses upon the disposition of assets.

It may also be noted that it is clearly demonstrable that the consolidated return basis of reporting for the year 1942 as contrasted with a separate basis of reporting, was advantageous to the group. Since consolidated returns were filed for 1940 and 1941, any unused excess profits credit inhered in the common parent corporation, had separate returns been filed for 1942. A preliminary survey of the smaller affiliates indicates that they would have incurred no excess profits tax liability. The operating company, however, if placed on a separate basis without the benefit of the credit carryovers, would

Defendants' Exhibit No. 9—(Continued)

have been liable for a net excess profits tax liability of $3,650,000 even if all other figures as shown in the return were left unchanged. This amount is offset by several factors. In the first place, on an individual basis, the operating companies' interest on expense deductions would have increased $703,000. It would have lost, however, its allocable share of the net operating loss reduction of approximately $438,000. Further, a portion of its earnings subject to excess profits tax rates would have been eliminated from normal tax rates. There would have been in addition, a reduction in the surtax rate on a separate basis of the 2% penalty for filing a consolidated return, which would have amounted to approximately $200,000 in tax. All of these factors combine to establish a net tax advantage of in excess of $1,550,000 in the adoption of the consolidated return under the separate return.

There is a further possibility of adjustment under the Internal Revenue Code provisions contained in Sections 23 (g) (4) and (k) (5) by which the worthlessness of the operating company's stock may produce a net loss for the year 1943 with possible carryback application. This is commented upon rather than suggested as of certain value, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock

Defendants' Exhibit No. 9—(Continued)

had become worthless. This matter will receive more careful consideration when the completion of the reorganization makes possible the assertion of the claim for worthlessness of the operating company's stock.

Apart from the 1942 tax liability, we are informed that a request has been addressed to the company for the submission of basic data to be considered by the Bureau of Internal Revenue in connection with the application made under date of March 29, 1943 for permission to change the method of accounting from retirement to a depreciation basis for Federal income tax purposes. Under general procedures adopted in the Bureau, the permission to change the basis of accounting is premised upon the agreement of the applicant to adoption of accumulated depreciation reserve balances which, at the election of the company, may be determined by any one of the following methods:

1. The accounts may be reconstructed from their beginning, or may start with the I.C.C. valuation, setting up as a reserve the difference between cost of reproduction new and cost of reproduction less accrued depreciation as determined at the valuation date. From either starting point, the capital accounts shall be carried forward, increased by additions and decreased by retirements, except that any increase in replacement costs, or additions or betterments expensed, which have been deducted for income tax purposes, may not be restored. Depreciа-

Defendants' Exhibit No. 9—(Continued)

tion at rates to be agreed upon shall be computed for all years and accrued into a depreciation reserve. From this reserve shall be deducted the cost of normal retirements, but for retirements due to casualty or special obsolescence, which would have been allowable under depreciation accounting, only the accrued depreciation thereon shall be deducted.

2. A reserve may be set up by multiplying the expired life of individual structures, or the weighted average ages of the accounts representing groups of assets, now in service, by the depreciation rates agreed upon for these assets.

3. A reserve of 30% of the total depreciable accounts at the date of change may be set up. It is to be understood that this is on overall reserve and the total amount so computed is to be allocated to the different depreciable accounts on a reasonable basis, such allocation to be a matter of agreement between each railroad and the Bureau.

We are familiar with the requirements of the Bureau of Internal Revenue in connection with depreciation computations generally embodied in the Valuation Division questionnaire, the provisions of T.D. 4422 and related Bureau rulings, and have discussed the railroad situation with the Bureau of Internal Revenue officials to whom these matters are assigned. It will, undoubtedly, be necessary to complete preliminary computations under the elective methods prescribed, and to compare the possible annual benefits of depreciated accounting with the

Defendants' Exhibit No. 9—(Continued)

retirement basis heretofore followed, before administrative action can be taken to complete the application for permission to change accounting basis filed with the Bureau of Internal Revenue.

We will be glad to confer with your company officials in planning these preliminary surveys so, if possible, to minimize the work required and will be glad to make available to you the benefit of our experience in the assembly and presentation of data to the Bureau of Internal Revenue, if you elect to take advantage of the depreciation basis of tax accounting for 1943.

Very truly yours,

/s/ JAMES K. POLK.

[Endorsed]: Filed Feb. 8, 1949.

DEFENDANTS' EXHIBIT No. 10

March 9, 1944.

Mr. F. C. Nicodemus, Jr.
40 Wall St.
New York 5, N. Y.

Dear Mr. Nicodemus:

The attached copy of letter dated Feb. 4, 1944, from the office of the Attorney General, State of Delaware, is self-explanatory.

The 1941 Franchise tax which you will recall was reduced by the State Tax Board early last year as

a result of negotiations, will amount to $1350.90 ($1262.50 principal and $88.40 penalty interest) on April 1, 1944. Payment should be made on or before that date if forfeiture of the Corporation's charter is to be avoided.

In view of conditions confronting the Corporation, filing of consolidated Federal income and excess profits tax returns, etc., I should like to have your advice as to whether payment of the 1941 tax should be made on or before April 1st.

Yours very truly,

/s/ M. J. CURRY.

[Marginal Note]: Mr. Campbell discussed this with Me and agreed we should request extension to July 1, 1944.

/s/ MJS

[Endorsed]: Filed Feb. 8, 1949.

DEFENDANTS' EXHIBIT No. 11

The Western Pacific Railroad Company
37 Wall Street
New York

April 1, 1943.

Via air mail

Mr. Sidney M. Ehrman,
Nevada Bank Building,
San Francisco, Calif.

Dear Mr. Ehrman:

Referring to our telephone conversation last evening:

This morning I have looked up our records to see just what the expense of making up the consolidated tax returns in our office and the tax savings effected has been since The Western Pacific Railroad Company went into trusteeship.

First of all, the certified public accountants, Lybrand, Ross Bros. & Montgomery, were employed by the "Corporation" from year to year to audit the accounts pursuant to provisions of the Securities and Exchange Act. Their charge for this audit has averaged approximately $1,000 a year. For the past two years we have consulted them on excess profits tax on a consolidated basis and their charge for this was $150 in 1940 and $400 in 1941, which was paid by the Corporation.

This work has all been done in this office and consolidated tax returns have been prepared and filed under Mr. Curry's supervision. I might add

that during the years the Company has been in trusteeship, payment of income taxes for the consolidated group was nil because of the large consolidated deficits. In fact, the Tidewater Southern, which made a profit every year and was included in the returns, benefited by these deficits which effected a tax saving to it of approximately $116,000 for the six year period. During that period expert advice from counsel was not necessary.

However, commencing with 1942, the situation has changed considerably because the affiliated companies' earnings have greatly increased. For this reason and in view of the new complicated tax law, we now require the advice of competent tax attorneys.

For your further information, I find that the last payment of consolidated income tax was made in 1929. At that time there was a net consolidated taxable income of $365,000, on which the income tax amounted to $40,230.

Yours very truly,

/s/ T. M. SCHUMACHER.

cc. Mr. Charles Elsey
Mr. Allan Matthew
Mr. F. C. Nicodemus, Jr.

[Endorsed]: Filed Feb. 10, 1949.

DEFENDANTS' EXHIBIT No 12

Filed March 3, 1944,
C. W. Calbreath, Clerk.

Allan P. Matthew,
1500 Balfour Building,
San Francisco 4, California

In the District Court of the United States, for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER AUTHORIZING ESTABLISHMENT OF A RESERVE FUND FOR CONTINGENT TAX LIABILITIES

The petition filed February 21, 1944, by T. M. Schumacher and Sidney M. Ehrman, the Trustees of the properties of the Debtor above named, for authority to establish a reserve fund of $7,100,000 for contingent tax liabilities, came on duly to be heard and was heard this day and thereupon submitted. Good cause appearing therefor, the Court, being fully advised, finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court, that all of the averments of said petition are true, and that it is for the best interests of the estate of the Debtor that this order be made.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the Trustees are hereby authorized to establish, with funds in their hands belonging to the estate of the Debtor and derived from the earnings of the railroad of the Debtor during the year 1943, a reserve fund in the amount of $7,100,000, to be designated as the "Reserve Fund for Contingent Tax Liabilities," to be invested in United States Treasury securities, and to be used for the payment of any Federal income and excess profits taxes which may be found due for the year 1943.

Dated: March 3, 1944.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Feb. 10, 1949.

DEFENDANTS' EXHIBIT No. 13

The Western Pacific Railroad Corporation
Office of the President
37 Wall Street

New York 5.
May 19, 1944.

Mr. James K. Polk
Whitman, Ransom, Coulson & Goetz
40 Wall Street
New York, 5, N. Y.

Dear Mr. Polk:

I will appreciate advice from you as to nature of reply to be made to letter from Robert L. Whittaker & Co., Philadelphia, of which enclosed is a copy.

Yours very truly,

/s/ M. J. CURRY

cc. Mr. F. C. Nicodemus, Jr.

(Copy)

Robert L. Whittaker & Co.
1420 Walnut Street
Philadelphia

May 17, 1944.

Western Pacific Railroad Corporation
37 Wall Street
New York, N. Y.

Gentlemen:

It has occurred to us as holder of Western Pacific 5s due 1946 that the large tax credit in the earnings statement for December 1943 of the Western Pacific could take place annually for some years to come, as long as the Revenue Act allows holding companies to consolidate their returns of subsidiaries for income tax purposes.

Since the ownership of the Western Pacific Railroad was declared valueless for 1943 we thought possibly this loss, which must involve upwards of $50,000,000, could be used as a tax credit for future years until the total loss is used.

We would appreciate hearing from you regarding this situation.

Very truly yours,

/s/ ROBERT L. WHITTAKER & CO.

RLW:es

[Endorsed]: Filed Feb. 10, 1949.

DEFENDANTS' EXHIBIT No. 14

September 12, 1944

Mr. Sidney M. Ehrman
Nevada Bank Building
San Francisco 4, California

My dear Mr. Ehrman:

From your letter to Mr. Schumacher which he was good enough to show me it seems evident that there is a lack of understanding in San Francisco of the nature and extent of the services rendered and being rendered by our firm as counsel for The Western Pacific Railroad Company.

These services are under employment by the Railroad Company continued by the Trustees.

They may be roughly placed in four general categories which I shall set out below in which seems to me to be the order of their importance.

First: Services rendered as counsel here for Mr. Schumacher, Trustee resident in New York, in respect of all matters of administration and operation with which he is specifically charged and as to which he requires day to day advice. These include his relations with the Association of American Railroads and with governmental authorities at Washington; negotiating, closing and renewing loans; attendance at meetings of member roads; and generally all matters for which he is jointly responsible as Trustee and wishes to consult and exchange views with counsel on the ground. My understanding is that he explained to Judge St. Sure at the outset

Defendants' Exhibit No. 14—(Continued)

the necessity of having such counsel and that Judge St. Sure acquiesced.

Second: Services rendered by New York counsel as a member of the Law Committee of the Association of American Railroads. The Law Committee is composed of selected counsel for the principal carriers and I have been a member for many years. Meetings are held alternately at New York and Chicago and ordinarily continue for two days. The docket rarely has less than twenty items, each of which is a problem of major importance to the railway industry. Through this source and through my membership in the Railway Conference which meets weekly in New York I have been in a position to keep Mr. Schumacher informed and keep myself informed as to what is going on in the railway industry that may affect our property. It would serve no useful purpose to review these various problems. They include, however, such matters as the dismemberment of the Pullman Company; the land grant problem; and the recent anti-trust suit in which you and Mr. Schumacher are named as defendants.

Third: Services rendered in the matter of Federal taxation. All tax returns for the Railroad Company and for the Trustees have been made from New York under advice of New York counsel. Owing to the heavily increased tax burden incident to the war economy, the complex Federal tax structure and the necessity of recurring conferences with the Commissioner of Internal Revenue and the

Defendants' Exhibit No. 14—(Continued)

Treasury, the firm of Whitman, Ransom, Coulson & Goetz on our advice were brought in a year or more ago as tax consultants. They are peculiarly well equipped to serve in that capacity. The responsibility of New York counsel for the Railroad Company has not, however, been limited to work under the existing tax laws but has required constant attention to proposed changes that might adversely affect our property. In the last Congress the so-called Johnson Bill was originally so drawn that it would deprive the Western Pacific of the invaluable carry-over and carry-back provisions of the present Act. Our firm prepared and submitted amendments tt protect the situation which Senator Johnson accepted. At the present time legislation is in process of incubation which unless the interests of the Western Pacific are guarded may prove equally embarrassing.

Four: Services rendered currently on routine matters. Included in this category are (a) attention to litigation in New York on loss and damage claims in which the Western Pacific is a participating carrier; (b) the corporate work for subsidiaries; (c) problems arising under our commitments to the New York Stock Exchange; (d) reports to governmental authorities; (e) problems under corporate mortgages; (f) correspondence with security holders in relation to their personal tax problems; and (g) a variety of matters of minor importance too numerous to classify but nevertheless being often tedious and exacting.

Defendants' Exhibit No. 14—(Continued)

It is my best judgment that the allowance we are receiving currently from the trust estate is not even compensatory for the services rendered in the last category.

The question is not whether any part of our current allowance should be applied toward compensation as counsel for the Debtor in the reorganization proceedings—this would be inadmissible under the terms of the order of Court—but the real question is whether our firm should not in justice to ourselves apply at some future time for compensation for the services falling in categories First, Second and Third. As matters now stand these services have been rendered gratuitously.

It is less important, however, that our firm be justly compensated than it is that you and perhaps Judge St. Sure should have a broader understanding of what has been and is being done here in the interest of the Western Pacific property.

As Mr. Schumacher has advised you it is my purpose to attend the hearing which is set for September 25th. I cannot leave here earlier than September 21st but unless the Overland is late I expect to be on hand at the opening of the Court.

My best regards to you.

Yours very truly,

F. C. NICODEMUS, JR.

[Endorsed]: Filed Feb. 10, 1949.

DEFENDANTS' EXHIBIT No. 15

Heller, Ehrman, White & McAuliffe
Attorneys and Counselors at Law
Nevada Bank Building
San Francisco

(4)

September 14, 1944

Mr. F. C. Nicodemus, Jr.
Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

My dear Mr. Nicodemus:

I am in receipt of your letter of September 12th going into some detail in regard to the nature and extent of the services which are being rendered by you on behalf of The Western Pacific Railroad Company and its trustees. I wrote to Mr. Schumacher after you had filed your petition so that if both of us are called by the judge during the hearing on the subject of your compensation our testimony would be in harmony.

I have always been under the impression that the monthly compensation paid to your firm is the only compensation for which the trustees or the trust estate have incurred any liability. Your representation of the debtor company in the reorganization proceeding is, as I view it, a separate matter with which we as trustees are not concerned.

With kind regards,

Very truly yours,

/s/ SIDNEY M. EHRMAN

[Endorsed]: Filed Feb. 11, 1949.

1904

DEFENDANTS' EXHIBIT No. 17
(Identification only)

Henry Offerman

Schedule of Preferred Stock of Western Pacific Railroad Corporation Owned as at April 1, 1948, Showing Date of Purchase and Cost of Each Certificate

Certificates Held				Purchase Confirmations					No. of Shares	
Date	Cert. No.	No. Shares	Name	Trade Date Bought	Price Per Share	Total Cost (Including Commissions)	Broker		Held	Total on Confirmation
7/14/42	D20730	100	Henry Offerman	7/ 7/42	5/8	66.50	Goodbody & Co.		100	100
8/26/42	D20764	100	Henry Offerman	8/13/42	5/8	66.50	Goodbody & Co.		100	100
2/ 8/43	D21282	100	Cohen, Simonson & Co.	(5/ 6/43	1/2	57.00	R. F. Gladwin & Co.		100)	800
2/ 8/43	D21281	100	Cohen, Simonson & Co.	(5/ 6/43	1/2	52.00	R. F. Gladwin & Co.		100)	
4/19/43	D22282	100	Ruth Haiken)							
4/19/43	D22283	100	Ruth Haiken)							
4/19/43	D22284	100	Ruth Haiken)	7/ 6/43	3/8	228.75	R. F. Gladwin & Co.		500)	
4/19/43	D22286	100	Ruth Haiken)							1,000
4/19/43	D22287	100	Ruth Haiken)						)	
4/26/43	D22342	100	Maude Remsberg	7/ 6/43	1/4	39.50	R. F. Gladwin & Co.		100)	
3/25/43	D21834	100	Thomson & McKinnon	8/31/43	1/8	14.00	R. F. Gladwin & Co.		100	1,000
3/25/43	D21881	100	Mansell & Co.	9/20/43	1/8	19.00	R. F. Gladwin & Co.		100	100
3/29/43	D21996	100	Thomson & McKinnon	11/ 5/43	1/8	13.50	Goodbody & Co.		100	100
3/29/43	D22000	100	Thomson & McKinnon	11/10/43	1/8	13.50	Goodbody & Co.		100	400
3/ 1/44	D22456	100	Henry Offerman)							
3/ 1/44	D22457	100	Henry Offerman)							
3/ 1/44	D22458	100	Henry Offerman)	1/14/44	15c	32.00	R. F. Gladwin & Co.		200	200
3/ 1/44	D22459	100	Henry Offerman)	2/ 2/44	1/4	34.25	R. F. Gladwin & Co.		103	103
3/ 1/44	D22460	100	Henry Offerman)	2/ 3/44	1/4	66.50	R. F. Gladwin & Co.		200	200
3/ 1/44	D22461	100	Henry Offerman)	2/ 4/44	1/4	116.00	R. F. Gladwin & Co.		400	400
3/ 1/44	D22462	100	Henry Offerman)	2/ 5/44	1/4	88.50	R. F. Gladwin & Co.		300	300
3/ 1/44	D22463	100	Henry Offerman)							
3/ 1/44	D22464	100	Henry Offerman)							
3/ 1/44	D22465	100	Henry Offerman)							
3/ 1/44	D22466	100	Henry Offerman)							
3/ 1/44	D22467	100	Henry Offerman)							
3/ 1/44	D042746	3	Henry Offerman)							
3/ 9/44	D22610	100	Henry Offerman)							
3/ 9/44	D22611	100	Henry Offerman)							
3/ 9/44	D22612	100	Henry Offerman)	2/29/44	1/2	216.00	Goodbody & Co.		400	400
3/ 9/44	D22613	100	Henry Offerman)	3/ 1/44	1/2	54.00	Goodbody & Co.		100	100
3/ 9/44	D22614	100	Henry Offerman)	3/ 1/44	1/2	54.00	Goodbody & Co.		100	100
3/ 9/44	D22615	100	Henry Offerman)							
3/14/44	D22630	100	Henry Offerman)							
3/14/44	D22631	100	Henry Offerman)							
3/14/44	D22632	100	Henry Offerman)	3/ 7/44	3/8	250.00	Kearns & Williams		500	700
3/14/44	D22633	100	Henry Offerman)							
3/14/44	D22634	100	Henry Offerman)							
4/25/44	D22825	100	Henry Offerman)	4/14/44	5/8	158.00	J. S. Farlee & Co., Inc.		200	200
4/25/44	D22826	100	Henry Offerman)							
Totals		3,903				1,639.50			3,903	6,303

DEFENDANTS' EXHIBIT No. 18

(Identification only)

Henry Offerman

Summary Schedule of All Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock

Trade Date	Broker	Purchases			Sales		
		No. of Shares	Price Per Share	Total Cost	No. of Shares	Price Per Share	Total Proceeds
7/ 7/42	Goodbody & Co.	100	5/8	$ 66.50			
8/13/42	Goodbody & Co.	100	5/8	66.50			
5/ 6/43	Gladwin & Co.	400	1/2+)	525.00			
		400	3/8+)				
5/ 7/43	Gladwin & Co.	200	3/8+	91.50			
7/ 6/43	Gladwin & Co.	500	1/4+)	426.25			
		500	3/8+)				
8/31/43	Gladwin & Co.	1000	1/8	140.00			
9/20/43	Gladwin & Co.	100	1/8	19.00			
11/ 5/43	Goodbody & Co.	100	1/8	13.50			
11/10/43	Goodbody & Co.	400	1/8	54.00			
1/14/44	Gladwin & Co.	200	16c	32.00			
2/ 2/44	Gladwin & Co.	103	1/4+	34.25			

Western Pacific R.R. Company, etc. 1905

Trade Date	Broker	Purchases: No. of Shares	Purchases: Price Per Share	Purchases: Total Cost	Sales: No. of Shares	Sales: Price Per Share	Sales: Total Proceeds
2/ 3/44	Gladwin & Co.	200	¼ +	66.50			
2/ 4/44	Gladwin & Co.	400	¼ +	116.00			
2/ 5/44	Gladwin & Co.	300	¼ +	88.50			
2/29/44	Goodbody & Co.	400	½	216.00			
3/ 1/44	Goodbody & Co.	100	½	54.00			
3/ 1/44	Goodbody & Co.	100	½	54.00			
3/ 7/44	Kearns & Williams	700	⅜ +	350.00			
3/18/44	Goodbody & Co.	100	⅝	66.50			
4/ 8/44	Goodbody & Co.				200	⅞	$ 151.00
4/14/44	J. S. Farlee & Co.	200	⅝ +	158.00			
7/12/44	Gladwin & Co.				1400	⅞	1,064.00
3/26/45	Gladwin & Co.	300	½	156.75			
5/12/45	Goodbody & Co.				400	1 +	344.00
11/23/45	Goodbody & Co.				500	1⅛	502.50
2/19/46	Goodbody & Co.				500	1⅜	627.50
	Totals	6903		$2,794.75	3000		$2,689.00

DEFENDANTS' EXHIBIT No. 19

(Identification only)

Cleta C. Offerman

Schedule of All Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock

		Purchases			Sales		
Date	Broker	No. of Shares	Price Per Share	Total Cost	No. of Shares	Price Per Share	Total Proceeds
4/29/43	Goodbody & Co.	100	7/8	$ 91.50			
4/30/43	Goodbody & Co.	900	7/8	823.50			
7 14/43	Goodbody & Co.	400	5/16	133.00			
4/22/44	Goodbody & Co.	400	5/8	266.00			
7/12/44	R. F. Gladwin & Co.				1600	7/8	$1,216.00
2/18/46	Goodbody & Co.				200	1 1/8	201.00
	Totals	1800		$1,314.00	1800		$1,417.00

DEFENDANTS' EXHIBIT No. 20

Order No. 1
Entered 193

In the District Court of the United States for the Northern District of California, Southern Division

In proceedings for the reorganization of a railroad. No. 1

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER

Upon due consideration of the petition of The Western Pacific Railroad Company, the above named debtor, verified August 2, 1935, and filed herein this day, stating that such debtor is unable to meets its debts as they mature and that it desires to effect a Plan of Reorganization in accordance with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said section and has been filed in good faith, it is ordered:

(1) That said petition be, and hereby is, approved as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

(2) That the debtor be, and it hereby is, authorized and directed, pending further order of the court

Defendants' Exhibit No. 20—(Continued)

in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of the debtor, wherever situated, whether in this state, judicial circuit, or elsewhere and to manage and conduct its business as a railroad company, and to this end to exercise its authority and franchises and discharge all public duties obligatory upon it, and to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees; to collect and receive the incomes, rents, revenues, tolls, issues and profits of said property; to collect all outstanding accounts and all dividends and interest on securities belonging to it; to exercise such sale, conveyance, exchange and release rights as are reserved to, or available to, the debtor, under outstanding deeds of trust, mortgages, trust indentures and similar instruments, and to use the proceeds of sale of all released property as provided in such instruments; all in the same manner that it would be entitled and bound to do in its own right; and, to the extent necessary to protect and preserve the property of the debtor, to make and pay for additions and betterments to the railroads and property of the debtor; and to make such advances to its subsidiary corporations as are necessary to protect the debtor's interest therein, all in the same manner that it would be entitled and bound to do in its own right; and, to the extent necessary to protect and preserve the property of the debtor, to make and pay for

Defendants' Exhibit No. 20—(Continued)

additions and betterments to the railroads and property of the debtor, all of the foregoing powers to be exercised according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein. The authority given by the foregoing shall not include authority to incur expense, other than such as is necessary in the course of the usual and ordinary maintenance and operation of the debtor's property. Any extraordinary expense and expense incident to reorganization of the debtor shall be subject to the prior approval of the Court.

(3) That the debtor is authorized, in its discretion, from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the property of the debtor.

(b) All necessary expenses of operating the railroads and conducting the business of the debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the debtor; ticket, traffic, car mileage and car per diem balances; interline accounts; freight and overcharge claims; interest on and installments of principal of equipment trust obligations; and amounts for car and equipment repairs now due or that may become due to connecting or other railroad companies or other common carriers,

Defendants' Exhibit No. 20—(Continued)

including all sums now due or which may hereafter become due to other persons or corporations for the occupation or use, jointly or otherwise, or buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges and other railroad facilities, and such sums as may be necessary to comply with the obligations of the debtor under contracts by virtue of which said occupation or use may now or hereafter be enjoyed (but such payments shall not constitute affirmations of said contracts, or of any of them);

(c) The following claims incurred by the debtor within six months preceding the date of this order, in the usual and customary operation of its properties, and the conduct of its current business, to-wit: Wages, salaries, fees, and other charges due and payable for services rendered to the debtor, unpaid material and supply accounts incurred in the operation of said properties; unpaid and outstanding pay checks and wage checks representing labor actually performed for the debtor. The debtor is also authorized in its discretion to adjust, compromise and pay claims of shippers, consignees, or others in interest, for overcharges or reparation awards, and for loss, damage or delay to freight and baggage; also to settle and pay on behalf of itself and other carriers and private car owners, claims arising out of rate divisions, interline settlements, per diem accounts, switching reclaims, proportion of reparation awards, and freight charges or adjustments respecting ship-

Defendants' Exhibit No. 20—(Continued)

ments with transit or storage privileges and other charges or adjustments of like character, between carriers in the conduct of their joint business, regardless of when accrued.

(d) Pending further order of this Court in the premises, the debtor hereby is authorized to pay pay checks, and like instruments issued to employees for services rendered to the debtor, whether before or during said six months' period, whenever the same are presented for payment.

(e) The cost of maintaining the corporate existence of the debtor, including the necessary expenses of the preservation of records, and the registration and transfer of its stocks and bonds, and trustees' charges under indenture under which securities of the debtor have been issued.

(f) All monthly payments due from time to time under any existing pension or insurance system of the debtor.

(g) The expense of printing pleadings, motions, petitions and orders now on file or hereafter filed in this case reasonably necessary to be printed, in such quality as shall provide copies for the use of the Court, the debtor, parties to the cause, and such others as may have a substantial interest therein; such expense to be taxed as costs in this case.

(4.) That the debtor shall be allowed until January 1, 1936 (unless the time be extended further by order of this Court), within which to disaffirm any contracts. Such disaffirmance shall be indicated by

Defendants' Exhibit No. 20—(Continued)

notice to that effect, in writing, served on the other party or parties to such contract, and filed of record in this proceeding, and continued operation by the debtor under any of said contracts, within said period allowed for disaffirmances, shall not be deemed to conclude the debtor in respect of such election, or to constitute an election.

(5) That, pending further order of the Court in the premises, the debtor is authorized and empowered to institute or prosecute in any Court, or before any tribunal of competent jurisdiction, all such suits and proceedings as may be necessary, in its judgment, for the recovery or proper protection of its property or rights, and to make settlement of any thereof; and likewise to defend or liquidate, by written agreement or consent judgments, any actions, claims, proceedings, or suits, now pending against the debtor, or which may hereafter be asserted, or be brought in any Court, or before any officer, department, commission or tribunal, to which the debtor is, or shall be, a party, but no payments shall be made by the debtor in respect of any such claims accruing prior to the date of this order, in respect of any actions, proceedings, or suits, on such claims, without further order or direction of this Court except as may be provided in other paragraphs of this order and except such as may be permitted by other general orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no

Defendants' Exhibit No. 20.—(Continued)

action taken by the debtor in defense or settlement of such claims, actions, proceedings, or suits, shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the debtor, that otherwise would not exist.

(6) That the debtor shall close its present books of account as of the close of business on July 31, 1935. The debtor shall open new books of account as of the opening of business on August 1, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the debtor, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the debtor are presently deposited as shall be selected by the debtor, or in such other bank or banks as shall be selected by and approved by this Court.

(7) That within sixty days after the entry of this order, the debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the debtor as of the close of business on July 31, 1935, and within fifty days after the close of each calendar month thereafter shall file with said Clerk a statement of the assets and liabilities of the debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the debtor of the second preceding calendar month.

Defendants' Exhibit No. 20—(Continued)

All such statements shall be certified as correct by the chief accounting officer of the debtor.

(8) That all persons, firms and corporations, whatsoever and wheresoever situated, located, or domiciled, hereby are restrained and enjoined from interfering with, attaching, garnisheeing, levying upon, and enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, railroads, properties and premises belonging to, or in the possession of the debtor, or from taking possession of the same, or any part thereof, or in any way interfering in any manner to prevent the discharge by the debtor of its duties in the operation of said property and business, under the orders of this Court, or from bringing any new suits or actions, accruing prior to this date, in or before any Court from which an appeal or proceedings to review, can be taken only upon the filing of an appeal bond, as a jurisdictional or mandatory requirement.

(9) That all persons and corporations holding collateral heretofore pledged by the debtor as security for its notes or obligations be, and each of them is, hereby restrained and enjoined from selling, converting or otherwise disposing of such collateral, or any part thereof, until further order of this Court.

(10) This Court reserves full power and jurisdiction to make from time to time such orders amplifying, extending, limiting or otherwise modifying

Defendants' Exhibit No. 20—(Continued)

this order as to the Court may at any time seem proper.

A. F. ST. SURE,
District Judge

Dated August 2, 1935.
Filed .....
[Endorsed] Filed Feb. 11, 1949.

DEFENDANTS' EXHIBIT No. 21

Warren Olney, Jr.,
Balfour Building,
San Francisco, California.

Pierce & Greer,
15 Broad Street,
New York City,
New York.

In the District Court of the United States for the Northern District of California, Southern Division

No. 26591-S

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER APPOINTING TRUSTEES

This cause coming on further to be heard this day pursuant to subdivision (e) of amendatory Section

Defendants' Exhibit No. 21—(Continued)

77 of Chapter VIII of the Acts of Congress relating to bankruptcy and to the Order of this Court entered herein August 31, 1935;

And it appearing to the Court that debtor has given notice as directed in said Order entered August 31, 1935, to the mortgage trustees, creditors and stockholders and has caused publication thereof for such period and in such newspapers as said Order directs of a hearing to be held this day at ten o'clock in the forenoon, at which hearing, or any adjournment thereof, the Court shall appoint one or more trustees of debtor's property, as provided in said amendatory Section 77; and the following parties having appeared herein, or communicated to this Court recommendations with respect to the appointment of such trustees:

Crocker First National Bank of San Francisco and Samuel Armstrong, successor trustees, under indenture securing debtor's First Mortgage 5% Bonds;

The Chase National Bank of the City of New York, as trustee under indenture securing debtor's General and Refunding Mortgage Bonds;

A. C. James Co., holder of certain of debtor's secured promissory notes;

Reconstruction Finance Corporation, holder of certain of debtor's secured promissory notes;

The Railroad Credit Corporation, holder of certain of debtor's secured promissory notes;

Fidelity-Philadelphia Trust Co, Trustee, of equipment obligations to Baldwin Locomotive Works;

Defendants' Exhibit No. 21—(Continued)

The Chase National Bank of the City of New York, as Trustee under agreement dated March 1, 1923, covering Equipment Trust Certificates;

The Chase National Bank of the City of New York, as Trustee under agreement dated March 15, 1924, covering Equipment Trust Certificates;

The Chase National Bank of the City of New York, as Trustee under agreement dated May 1, 1929, covering Equipment Trust Certificates;

The Western Pacific Railroad Corporation, holder of debtor's obligation for advances on open account;

The Western Realty Company, holder of debtor's obligation for advances made on open account;

The Western Pacific Railroad Corporation, holder of debtor's Preferred Capital Stock;

The Western Pacific Railroad Corporation, holder of debtor's common stock;

And it appearing to the Court that the creditors and stockholders of the debtor represent that the appointment of trustees herein should not disturb the continuity of operations by the corporate organization of the debtor and should be at minimum cost to the debtor;

And it further appearing to the Court that under the by-laws of the debtor, T. M. Schumacher, as Chairman of the Executive Committee, is invested with general charge and supervision of and over the affairs and business of the debtor, and, subject to the control of the Board of Directors and Executive Committee, is given general supervision and direc-

Defendants' Exhibit No. 21—(Continued)

tion of the debtor's business in all its departments and over all its officers, agents and employes;

And it further appearing to the Court that Charles Elsey, President of the debtor, is its chief operating officer, directing all of its operations as a common carrier, subject only to the supervision and direction of the Chairman of the Executive Committee;

And it further appearing to the Court that the Chairman of the Executive Committee has conducted all negotiations as to the formulation of pending form of reorganization of the debtor with representatives of holders of the First Mortgage Bonds and its junior creditors, all of whom are in the East, including Reconstruction Finance Corporation, which is undertaking to provide up to ten million dollars of new money to be expended in improving the property of the debtor and for working capital;

And it further appearing that Messrs T. M. Schumacher and Charles Elsey, if appointed trustees of the debtor, to serve with the additional trustee hereinafter mentioned; are willing to serve without compensation other than that which they are now receiving as such executive officers, and to perform all of their duties pertaining to such officers, so that the appointment of the trustees herein will be without cost to the estate of the debtor, except the salary or compensation of the additional trustee hereinafter mentioned;

Defendants' Exhibit No. 21—(Continued)

And it further appearing to the Court that under the provisions of subdivision (c) of said amendatory Section 77, it is necessary for the Court to appoint an additional trustee, who within one year prior hereto has not been an officer, director or employe of the debtor, any subsidiary corporation or any holding company connected therewith;

It Is Hereby Ordered:

1. That T. M. Schumacher, Chairman of the Executive Committee of the debtor; Charles Elsey, President of the Debtor; and Sidney M. Ehrman, who within one year prior to the date of this Order has not been an officer, director or employe of the debtor, any subsidiary corporation or any holding company connected therewith, be and they hereby are appointed trustees of the debtor's property, which appointments, as well as the other provisions of this Order, shall be effective as of the beginning of business on October 1, 1935, upon ratification thereof by the Interstate Commerce Commission, as provided in subdivision (c) of said amendatory Section 77.

2. That said trustees shall have all the title and shall exercise, subject to the control of this Court and consistent with the provisions of said amendatory Section 77, all of the powers of trustees appointed pursuant to Section 44 of said Act; and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in equity pro-

Defendants' Exhibit No. 21—(Continued)

ceeding; and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission, as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor, which business shall be conducted in the name of the debtor by its regularly elected or appointed corporate officers, agents and employes, but under and subject to the direction of said trustees.

3. That said trustees shall have all of the powers, rights, privileges, duties and obligations heretofore granted to or imposed upon the debtor pursuant to the Order of this Court entered herein August 2, 1935, and any and all orders supplementary thereto or amendatory thereof; and each and all of the orders heretofore entered in this proceeding shall, with respect to the said trustees and the property of the debtor, be of like force and effect as though said trustees were therein specifically named in the place of the debtor, all of said orders being hereby incorporated in and made a part of this Order by reference.

4. That within five days from and after October 1, 1935, each of said trustees shall execute and file with the Clerk of this Court a bond or bonds with one or more sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of Twenty-five thousand dollars, conditioned to the effect that they will well and truly perform

Defendants' Exhibit No. 21—(Continued)

the duties of their office and duly account for any moneys or properties which may come into their hands, and abide by and perform all things which they shall be directed by the Court to do.

5. That this Court reserves full right and jurisdiction to make from time to time such additional orders herein as to the Court shall seem proper, as well as any orders amplifying, extending, limiting or otherwise modifying this Order, and in all respects to regulate and control the conduct of said trustees.

Dated: September 23, 1935.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Feb. 11; 1949.

DEFENDANTS' EXHIBIT No. 22

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

OPINION AND ORDER CONFIRMING THE APPOINTMENT OF TRUSTEES AS APPOINTED BY THE COURT AND RATIFIED BY THE INTERSTATE COMMERCE COMMISSION

The above proceeding was initiated on August 2, 1935, by the filing of a petition by the debtor representing that it was unable to meet its financial obligations as they became due and praying for the opportunity to effect a reorganization under the provisions of Section 77 of the Bankruptcy Act.

At the time the petition was filed the Bankruptcy Act made it optional with the Court either to allow the debtor to remain in possession of and to continue to operate its railroad and other properties during the pendency of the reorganization proceeding, or to appoint a trustee or trustees for that purpose.

It was represented to the Court that there was no occasion to appoint a trustee or trustees; that Mr.

Defendants' Exhibit No. 22—(Continued)

Charles Elsey, a resident of this district and who maintained his office in San Francisco, was the President of the Company and in immediate charge of the debtor's railroad and properties; that he had been in the service of the Company for many years and was thoroughly familiar with its properties and its various problems; that he managed its affairs efficiently and economically; that he had not come into the service of the Company at the instance of any particular interest, nor did he represent any particular interest; that if no trustee were appointed, he would continue as President of the Company, to manage and operate its railroad and properties; and that he could be fully relied upon to do so faithfully and efficiently and in the interest of all parties concerned without distinction between them.

The Court inquired into the representations so made and examined Mr. Elsey under oath, and came to the opinion that the representations were true, that the control, operation and management of the debtor's properties could safely be left to him as the President of the debtor, and that no useful purpose would be served by the appointment of a trustee or trustees.

Because of this conclusion, the Court in its order approving the petition of the debtor as properly filed, refrained from appointing a trustee and authorized and directed the debtor to continue in the possession and operation of its properties. At the time the Court made this order it explicitly

Defendants' Exhibit No. 22—(Continued)

informed Mr. Elsey that the properties of the debtor were now in the custody of the Court and his primary obligation was to the Court and the Court relied upon him to see to it that the properties were properly and economically managed and operated, and received from Mr. Elsey his assurance that he so understood and would govern himself accordingly. Since that time the Court has had no reason to doubt the correctness of its opinion as to the truth of the representations made to it concerning Mr. Elsey, or its confidence in the assurances given by him.

Subsequently to the order referred to, the Bankruptcy Act was amended by Congress, making it mandatory upon the Court to appoint one or more trustees, and providing that if one who was connected with the debtor were appointed, there should also be appointed one who had no such connection, such appointment to be subject to confirmation by the Interstate Commerce Commission.

Immediately upon such amendment being made, the Court proceeded, on formal hearing in the manner required by the Act, to appoint trustees for the property of this particular debtor. The Court desired that at least one trustee should be a person residing within the district, experienced in railroad management and familiar with the railroad of the particular debtor and in whom the Court had confidence. Such a person was Mr. Elsey.

The large creditors of the debtor and the controlling stockholding interest in it, requested the

Defendants' Exhibit No. 22—(Continued)

appointment of Mr. T. M. Schumacher, Chairman of the Executive Committee of the debtor, representing that he had conducted all negotiations looking to the formulation of a plan of reorganization. Mr. Schumacher has his residence and his office in New York. The Court was willing to accede to this request, provided there was also appointed as trustee one who resided and had his office in this district and could attend to the immediate management and operation of the property.

The selection of Mr. Elsey and Mr. Schumacher required the selection of a third trustee not connected with the debtor. As such trustee the Court selected Mr. Sidney M. Ehrman, a lawyer of large experience, in whose discernment, judgment and integrity it had full confidence.

For the reasons stated, the Court appointed three persons named. This appointment being made, the Interstate Commerce Commission was petitioned to ratify it. The Commission has now made its order ratifying the appointment of Mr. Schumacher and Mr. Ehrman, but declining to ratify that of Mr. Elsey.

It is evident that looking at the trustees as a unit, a board, as it were, the composition of the board without Mr. Elsey is very different from that which the Court contemplated. The Court conceives that the primary duty of the trustees is to manage and operate the railroad and other properties of the debtor while they are in the custody of the Court, and for this reason the Court desired that

Defendants' Exhibit No. 22—(Continued)

one of the trustees should be a person who could devote himself on the ground to the immediate and active management of the debtor's railroad and property. Neither Mr. Schumacher or Mr. Ehrman is in a position to do this. The Court has also some doubt as to the feasibility, or at least the efficiency, of an administration by two trustees, the concurrence of both of whom is necessay for any action taken, and one of whom resides in San Francisco and the other in New York.

The Court has the power to revoke the appointments already made and to make new appointments conforming to what it believes the necessities of the case require, such new appointments, of course, to be subject, in turn, to ratification by the Commission. That course, however, would cause considerable delay, which is to be avoided if possible, and the Court believes that the particular object it had in mind by the appointment of Mr. Elsey can be substantially accomplished by the trustees employing him as their agent to manage the railroad and properties of the debtor. The Court has consulted with Mr. Elsey, who has expressed his willingness to act in that capacity.

It Is Therefore Hereby Ordered:

1. That T. M. Schumacher and Sidney M. Ehrman be and the same are the trustees of the properties of the debtor, duly appointed by this Court and ratified by the Interstate Commerce Commission.

Defendants' Exhibit No. 22—(Continued)

2. That each of said trustees shall forthwith and within ten (10) days from the date hereof execute and file with the Clerk of this Court a bond or bonds, with one or more sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of $25,000, conditioned to the effect that he will well and truly perform the duties of his office and duly account for any moneys or properties which may come into his hands and abide by and perform all things which he shall be directed by the Court to do.

3. That said trustees be and they are hereby instructed and directed to engage Charles Elsey as their agent to operate and manage the railroad and properties of the debtor.

4. That said trustees shall have all the title and shall exercise, subject to the control of this Court and consistent with the provisions of amendatory Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, all of the powers of trustees appointed pursuant to Section 44 of said Act; and, to the extent not inconsistent with said Section 77, the powers of a receiver in equity proceedings; and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as it now exists or may hereafter be amended, the power to conduct the business of the

Defendants' Exhibit No. 22—(Continued)

debtor, with authority to them to conduct such business to the extent they deem advisable in the name of the debtor and by its officers, agents, and employees.

5. That said trustees shall have all of the powers, rights, privileges, duties and obligations heretofore granted to or imposed upon the debtor by the order of this Court entered herein August 2, 1935, and any and all orders supplementary thereto or amendatory thereof; and each and all of the orders heretofore entered in this proceeding shall, except so far as the same are not inconsistent with the express provisions of this order, be of like force and effect with respect to the said trustees and the property of the debtor as though said trustees were therein specifically named in the place of the debtor, all of said orders being hereby incorporated in and made a part of this order by reference.

6. That this Court reserves full right and jurisdiction to make from time to time such additional orders herein as to the Court shall seem proper, as well as any orders amplifying, extending, limiting or otherwise modifying this order, and in all respects to regulate and control the conduct of said trustees.

Dated: November 9, 1935.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Feb. 11, 1949.

DEFENDANTS' EXHIBIT No. 23

Whitman, Ransom, Coulson & Goetz,
40 Wall Street,
New York (5), N. Y.

Original Filed Dec. 17, 1943.
With Clerk, U. S. Dist. Court,
San Francisco.

In the District Court of the United States for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER AUTHORIZING AND DIRECTING TRANSFER OF PREFERRED AND COMMON STOCK OF THE DEBTOR TO THE REORGANIZATION COMMITTEE AND APPROVING ACTION OF THE COMMITTEE IN JOINING IN A CONTRACT FOR SECURING CONTROL OF SUCH STOCK AND ACTS OF THE COMMITTEE IN CONNECTION WITH SUCH CONTRACT

The petition filed December 1, 1943, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization

of the debtor above named, for an order authorizing and directing transfer of the preferred and common stock of the debtor to the Reorganization Committee and approving action of the Committee in joining in a contract for securing control of such stock and other acts of the Committee in connection with such contract, came on duly to be heard and was heard this day and thereupon submitted.

The Court, being fully advised, finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated December 1, 1943, that all of the averments of said petition are true, that the transfer and delivery by The Western Pacific Railroad Corporation of the preferred and common stock of the debtor company to the Reorganization Committee is necessary for carrying out and making effective the plan of reorganzation of the debtor, and that it is for the best interests of the estate of the debtor that this order be made.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the Western Pacific Railroad Corporation, in order to carry out and make effective the plan of reorganization of the debtor, be and hereby is directed to assign, transfer and deliver or cause to be assigned, transferred and delivered to the Reorganization Committee or its nominee, all of the preferred and common stock of the debtor company; provided that such assignment, transfer and delivery

shall be made at the time and place fixed in a written request of the Reorganization Committee;

2. That the action of the Reorganization Committee in joining in and becoming a party to the agreement dated November 22, 1943, with The Western Pacific Railroad Corporation and its secured creditors, a copy of which was filed with the Court on December 1, 1943, be and the same hereby is in all respects approved;

3. That the Reorganization Committee is hereby authorized, in its discretion, to make written request upon The Western Pacific Railroad Corporation for the assignment, transfer and delivery of the preferred and common stock of the debtor company and for such other action by The Western Pacific Railroad Corporation as the Reorganization Committee may deem necessary or convenient for the purpose of carrying out and making effective the plan of reorganization of the debtor, and the Reorganization Committee is authorized to accept transfer of such stock for the purpose of carrying out and making effective the plan of reorganization of the debtor; and

4. That the Reorganization Committee be and hereby is authorized to file with the Interstate Commerce Commission such applications for authority or approval as may be appropriate in providing for the payment of stock transfer taxes out of the debtor's estate in respect of the transfer of the pre-

ferred and common stock of the debtor company if any such taxes shall lawfully be applicable.

Dated: December 17, 1943.

A. F. ST. SURE.

[Endorsed]: Filed Feb. 11, 1949.

DEFENDANTS' EXHIBIT No. 24A

Pillsbury, Madison and Sutro,
Standard Oil Building,
San Francisco, California.

Whitman, Ransom, Coulson & Goetz,
40 Wall Street,
New York 5, N. Y.

Filed Oct. 23, 1944.
C. W. Calbreath, Clerk.

In the District Court of the United States for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER APPROVING DESIGNATIONS BY THE REORGANIZATION COMMITTEE UNDER THE PLAN OF REORGANIZA-

Defendants' Exhibit 24A—(Continued)

TION OF THE DEBTOR, OF THE TRUSTEES, TRANSFER AGENTS, REGISTRARS, SCRIP AGENT, DEPOSITARY AND EXCHANGE AGENT AND ENGRAVER AND PRINTER OF SECURITIES FOR PURPOSES OF THE PLAN OF REORGANIZATION AND AUTHORIZING AGREEMENTS OR ARRANGEMENTS PROPOSED BY SAID COMMITTEE FOR THEIR COMPENSATION AND EXPENSES

The petition filed on September 28, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, for an order approving designations by the Reorganization Committee of the trustees, transfer agents, registrars, scrip agent, depositary and exchange agent and engraver and printer of securities for purposes of the plan of reorganization and authorizing agreements or arrangements proposed by said Committee for their compensation and expenses, duly came on to be heard and was heard on the 16th day of October, 1944, and has been submitted.

The Court being duly advised in the premises finds that due and proper notice of the hearing upon said petition in the form prescribed by the order of this Court dated and filed on the 29th day

Defendants' Exhibit 24A—(Continued)

of September, 1944, has been admitted by all parties named in said order and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) The determinations made by the Reorganization Committee as to the services which will be required in connection with the preparation and initial issuance of the new securities and the deposit of existing securities in connection with carrying out and making effective the plan of reorganization, and of the services to the reorganized company in connection with the securities to be issued under the plan, after its consummation, and the tentative selections made by said Committee of the banking institutions and of an engraver-printer to perform services in said respects, are appropriate for the purposes of the plan and should be approved; and

(b) The arrangements proposed by the Reorganization Committee for the compensation of the several banking institutions which will perform services in connection with the initial issuance of new securities and the consummation of the plan, on the general basis of per piece charges (plus, in some instances, certain expenses), subject to a maximum limit regardless of the number of bond, stock or scrip pieces that may actually be required, are reasonable and appropriate and should be approved.

Defendants' Exhibit 24A—(Continued)

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

(1) That the designations of banking institutions tentatively made by the Reorganization Committee, as listed below, be and hereby are approved, subject, in the instance of the Chase National Bank of the City of New York, as New York paying agent and registrar of the new first mortgage bonds, Crocker First National Bank of San Francisco, as San Francisco registrar of the general mortgage bonds and as San Francisco registrar of both the preferred and common stocks, and Wells Fargo Bank & Union Trust Co., as San Francisco transfer agent of both said stocks, to the determination of the Reorganization Committee that the charges which will be made to the reorganized company after the consummation of the plan will be satisfactory, namely: Banking Institutions Approved, Showing Location and Function.

First Mortgage

Crocker First National Bank of San Francisco, Trustee and Registrar, San Francisco.

The Chase National Bank of the City of New York, Paying Agent and Registrar, New York.

General Mortgage

The Chase National Bank of the City of New York, Trustee and Registrar, New York.

Defendants' Exhibit 24A—(Continued)

Crocker First National Bank of San Francisco, Registrar, San Francisco.

Preferred Stock and Common Stock

Central Hanover Bank and Trust Company, Transfer Agent, New York.

Wells Fargo Bank & Union Trust Co., Transfer Agent, San Francisco.

City Bank Farmers Trust Company, Registrar, New York.

Crocker First National Bank of San Francisco, Registrar, San Francisco.

Script for General Mortgage Bonds, Preferred Stock and Common Stock

City Bank Farmers Trust Company, Scrip Agent, New York.

Consummation of Plan

Guaranty Trust Company of New York, Depositary and Exchange Agent, New York.

(2) That the designation tentatively made by the Reorganization Committee of the Security Banknote Company as engraver and printer of the securities required for the consummation of the plan be and hereby is approved.

(3) That the Reorganization Committee be and hereby is authorized to make arrangements, by such Committee resolution or form of agreement as said

Defendants' Exhibit 24A—(Continued)

Committee upon advice of counsel may determine, for compensation to be paid out of the debtor's estate prior to the consummation of the plan, or thereafter by the reorganized company, to said banking institutions and said engraver-printer in connection with the preparation and initial issuance of the new securities and the deposit of existing securities required to carry out and make effective the plan, upon the general basis of a per piece charge (plus, in some instances, certain expenses), subject to a maximum limit regardless of the number of bond, stock or scrip pieces that may actually be required and subject to such modifications of the arrangements proposed in the petition as may be deemed by said Committee to be necessary or appropriate.

Dated: October 23, 1944.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Feb. 11, 1949.

DEFENDANT'S EXHIBIT No. 24B

Pillsbury, Madison & Sutro,
Standard Oil Building,
San Francisco, California.

Whitman, Ransom, Coulson & Goetz,
40 Wall Street,
New York 5, New York.

Filed Oct. 23, 1944
C. W. Calbreath, Clerk

In the District Court of the United States; for the Northern District of California Southern Division

No. 26591-S

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER MAKING AN ALLOWANCE TO BE PAID OUT OF THE DEBTOR'S ESTATE FOR CERTAIN EXPENSES INCURRED AND TO BE INCURRED IN CONNECTION WITH THE PROCEEDINGS AND PLAN OF REORGANIZATION BY THE REORGANIZATION COMMITTEE

The petition filed on September 28, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, for an order making an allowance to be paid out of the debtor's

Defendant's Exhibit No. 24B—(Continued)

estate for certain expenses incurred and to be incurred in connection with the proceedings and plan of reorganization by the Reorganization Committee, duly came on to be heard and was heard on the 16th day of October, 1944, and has been submitted.

The Court being fully advised in the premises, finds that due and proper notice of the hearing upon said petition in the form prescribed by the order of this Court dated and filed on the 29th day of September, 1944, has been admitted by all parties named in said order and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) That, pursuant to Section 77(c) (12) of the Bankruptcy Act, the Interstate Commerce Commission by its order dated September 7, 1944, has fixed the maximum limit for reasonable and necessary expenses of the Reorganization Committee, other than the fees and expenses of the attorneys for said Committee, in the amount of $197,111.23, of which the amount of $60,638.48 constitutes the maximum limit fixed for the contingent tax liability described in said order and the amount of $136,472.75 constitutes the maximum limit fixed for all other purposes, without limitation as to individual amounts with respect to component items, as described in said order;

(b) That for the purpose of enabling the Reorganization Committee to perform its proper functions in an orderly and expeditious manner, the procedure for auditing and payment of bills or

Defendant's Exhibit No. 24B—(Continued)

statements of expenditures, and for the advancement of funds to said Committee, which is set forth in paragraphs 4 and 5 of the petition upon which this order is made, is appropriate and advisable and should be approved.

(c) That certain expenses heretofore incurred by the Reorganization Committee, in the aggregate amount of $3,144.00, the detail of which was submitted to the Court upon the hearing, were properly incurred and are within the scope of the order of the Interstate Commerce Commission, dated September 7, 1944.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

(1) That an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred and to be incurred by the Reorganization Committee under the plan of reorganization of The Western Pacific Railroad Company, exclusive of fees and expenses of said Committee's counsel, is hereby made in the aggregate amount of $197,111.23, or so much thereof as may be required in carrying out the plan, of which the amount of $60,638.48, or so much thereof as may be required, is allowed for the contingent tax liability described in the order of the Interstate Commerce Commission of September 7, 1944, and the amount of $136,472.75, is allowed for all other expenses without limitation as to individual amounts with respect to component items, as described in said order;

(2) That the Trustees of the debtor's estate be

Defendant's Exhibit No. 24B—(Continued)

and hereby are directed to reimburse the Reorganization Committee and its officers and members out of the debtor's estate for certain expenditures heretofore incurred by them, in the aggregate amount of $3,144.00, the detail of which was submitted to the Court upon the hearing.

(3) That further payments of the actual and reasonable expenses of the Reorganization Committee (whether incurred before or after the date of this order) be made out of the debtor's estate by the Trustees thereof, so long as said Trustees are in control of the same, and thereafter by the reorganized company, by the following procedure:

(a) The Reorganization Committee shall approve bills or statements of expenditures by voucher or covering letter, as may be convenient, signed by the Chairman or Secretary of the Committee, and shall submit the same to the Treasurer for the Trustees of the debtor or of the reorganized company, as the case may be;

(b) The Auditor for the Trustees of the debtor or of the reorganized company, as the case may be, shall examine all such bills or statements and, if satisfied they are in order and that the items covered thereby are within the scope of the order of the Interstate Commerce Commission, dated September 7, 1944, shall approve them for payment, subject to the maximum limit of $136,472.75 contained in said order of said Commission, and said Treasurer shall then make payment of the same upon such approval by said Auditor;

Defendant's Exhibit No. 24B—(Continued)

(c) Said Auditor shall keep a separate and detailed account of all such bills and statements so honored and shall make reports thereof to the Court within a reasonable time after the close of each month in which any such bills or statements are honored;

(4) That funds for the payment of actual and reasonable expenses of the Reorganization Committee may be advanced to it, from time to time, out of the debtor's estate or by the reorganized company, as aforesaid, upon written request to said Treasurer, setting forth the purpose of such advances and signed by the chairman or secretary of said Committee. Said request shall be audited and reported to the Court by said Auditor under the procedure set forth in paragraph (3) of this order. Said Committee shall account to said Auditor, from time to time, for all advances and shall file with him all receipts or other evidences of expenditures paid from such advances, and shall return any unexpended portion thereof to said Treasurer.

(5) All such further payments and advances to the Reorganization Committee under the provisions of this order shall be subject to final approval and allowance by this Court, at such time or times and upon such showing as the Court may direct.

Dated, October 23, 1944.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Feb. 11, 1949.

DEFENDANT'S EXHIBIT No. 25

Allan P. Matthew,
1500 Balfour Building,
San Francisco, 4, California.

Filed April 30, 1945,
C. W. Calbreath, Clerk

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

NINTH AND FINAL REPORT AND ACCOUNTING BY THE TRUSTEES OF THE PROPERTY OF THE DEBTOR, AND PETITION FOR APPROVAL OF THEIR ACTS AND ACCOUNTS, FOR THEIR DISCHARGE AS TRUSTEES AND FOR THE EXONERATION OF THEIR BONDS

T. M. Schumacher and Sidney M. Ehrman, the Trustees of the properties of the Debtor above named, hereinafter referred to as the Trustees, hereby render their Ninth and Final Report and Accounting of Their Administration of the Properties of the Debtor, and Petition for the Approval of Their Acts and Accounts, for Their Discharge as Trustees and for the Exoneration of Their Bonds, as follows:

Defendant's Exhibit No. 25—(Continued)

I.

A statement of account showing the cash receipts and disbursements of the Trustees for the period from January 1, 1944, through December 31, 1944, is attached hereto as Exhibit 1. The Trustees have filed periodically with the Clerk of the Court during the year 1944, copies of monthly reports giving operating results and general statistics of the administration of the property and also monthly general balance sheets. The total railway operating revenues for the entire year of 1944 rose to $52,849,946.71 from the previous high of $50,360,509.25 experienced during the preceding year, an increase of $2,489,437.46. A comparison of such revenues for each of the twelve months of the calendar year 1944, covered by this report, with each of the corresponding months of the calendar year 1943, is shown in the following tabulation:

Total Railroad Operating Revenues

Period	1944	1943	Increase or (Decrease)
January	$ 4,177,091.30	$ 2,989,578.50	$ 1,278,512.80
February	2,755,104.81	2,836,933.05	(81,828.24)
March	4,558,775.54	3,672,138.61	886,636.93
April	4,681,363.78	3,666,868.50	1,014,495.28
May	4,654,846.84	4,000,095.45	654,751.39
June	3,939,439.05	4,218,061.84	(278,622.79)
July	3,605,985.91	4,786,908.83	(1,180,922.92)
August	4,291,967.85	5,257,723.48	(965,755.63)
September	5,120,837.60	4,945,353.58	175,484.02
October	5,446,573.73	4,798,450.96	648,122.77
November	4,961,522.43	4,646,685.92	314,836.51
December	4,656,437.87	4,632,710.53	23,727.34
Calendar Year	$52,849,946.71	$50,360,509.25	$ 2,489,437.46

Defendant's Exhibit No. 25—(Continued)

A statement showing the monthly operating revenues, expenses and other items leading to net income, for the calendar year 1944 is attached hereto as Exhibit 2. The volume of freight and passengers carried and revenues received during 1944 were the greatest in the history of the Debtor, and the year 1944 was the fourth consecutive year in which all of the Debtor Company's records for traffic volume and gross revenues were broken. The major portion of such business resulted from handling of wartime traffic. As shown in Exhibit 2 the net income for the year 1944 amounted to $10,313,502.49 as compared with net income for the preceding year of $18,505,499.84. (As reported in the eighth report and accounting, no Federal Income or Excess Profits Taxes were accrued in 1943.)

There is attached hereto as Exhibit 3 a statement showing changes in Capital Accounts due to acquisitions, improvements and retirements of property and investments in affiliated companies by months during the calendar year 1944. Capital Accounts were increased during 1944 in the net amount of $5,433,225.59.

II.

By its order of April 17, 1944, the court authorized the Trustees to do certain addition and betterment work then deemed requisite for normal improvement, operation and maintenance of the railroad of the Debtor during the year 1944 as set forth in the Petition filed by the Trustees on March 29, 1944. The total cost of such work was estimated at

Defendant's Exhibit No. 25—(Continued)

$2,639,269, of which $2,112,466 was estimated as chargeable to Capital Account. Due principally to war-time stringency of labor and materials, the Trustees were not able to perform all of the work authorized by the order of April 17, 1944, but progress was made on various projects contemplated by the order which resulted in total charges of $1,298,437.98 during the year, of which $1,025,216.66 represents charges to Capital Account.

As the year progressed, the Trustees were confronted with the necessity of performing certain additional improvement work not contemplated when the Court made its order of April 17, 1944. Such additional work was required, for the most part, by the continuing increase in traffic handled and by the need for facilities in connection with war activities and establishments of the Army, Navy and other war agencies. The amount expended during the year 1944 upon such additional work was $135,807.52 over and above the Contingency Item of $100,000 approved in said order of April 17, 1944. Of the amount so expended during 1944 the sum of $101,907.15 represented charges to Capital Account, over and above the similar charges of $75,000 included as part of said Contingency Item.

Thus the total charges during 1944 for work contemplated by the Court's order of April 17, 1944, together with the charges for such additional work, amounted to $1,534,245.50 of which $1,202,123.81 represents charges to Capital Account.

In addition to the expenditures enumerated in

Defendant's Exhibit No. 25—(Continued)

the foregoing paragraph, charges totalling $1,238,-137.66, of which $850,123.99 represents charges to Capital Account, were incurred during 1944 in connection with projects (exclusive of those enumerated in sections III, IV and V) authorized by various orders of the Court issued prior to 1944 which were carried forward or completed during the year 1944.

III.

By its order of May 3, 1943, the Court authorized the Trustees to install block signals and a centralized traffic control system for more expeditious handling of trains together with appurtenant necessary housing facilities in the Feather River Canyon area between Oroville and Portola, California, at an estimated total cost of $1,347,612. Work was commenced upon the project during 1943 and was carried forward during 1944. The expenditures upon the project during 1944 totalled $1,042,093.39 of which $999,244.69 was chargeable to Capital Account. The aggregate adjusted expenditures on the project during both 1943 and 1944 were $1,225, 721.60 of which $1,170,775.82 was chargeable to Capital Account. At the close of the year 1944 the greater part of the system was in operation, and at the date of filing this report it is anticipated that the entire system will be in full operation by the month of June, 1945.

IV.

By its order of July 21, 1941, the Court authorized the Trustees to acquire certain rolling stock to wit:

Defendant's Exhibit No. 25—(Continued)

3 Diesel-electric freight locomotives
350 steel box cars
300 steel flat cars
4 stainless steel passenger coaches

and to finance acquisition of such equipment by means of an Equipment Trust. The Diesel-electric freight locomotives were delivered during 1941 and 1942 and the 300 flat cars during 1942 and 1943. By its order of May 15, 1944, the Court authorized the Trustees to pay an estimated increase of $53,900 in the price for the 350 box cars because of advances in costs of materials and appliances. None of the box cars was delivered during 1944 but at the date of filing this report all of the cars have been received. The 1944 accounts were credited with $4,342.31 representing discounts on specialties embodied in these cars. The four stainless steel passenger cars authorized by said order of July 21, 1941, have not yet been constructed.

V.

By its order of November 22, 1943, the Court authorized the Trustees to purchase and acquire six 5400 H.P. Diesel-electric freight locomotives from Electro-Motive Division of General Motors Corporation, LaGrange, Illinois, at the approximate cost (including freight, taxes on freight charges, and coach fares for messengers) of $504,870 per locomotive, or an aggregate of $3,029,220 for the six locomotives, and to finance the purchase of such locomotives under some form of arrangement there-

Defendant's Exhibit No. 25—(Continued)

after to be determined which would provide for making a down payment of approximately 25% of the cost from funds on hand and borrowing the remainder on terms calling for repayment thereof within approximately five years.

By its order of June 26, 1944, the Court authorized the Trustees to finance the purchase of such Diesel-electric locomotives by a conditional sale agreement with The Chase National Bank of the City of New York in substantially the form submitted to the Court as Exhibit A attached to the petition of the Trustees filed June 13, 1944. The Trustees executed such a conditional sale agreement under date of June 1, 1944, and all of the six locomotives were delivered during the year 1944. The total cost of such locomotives was $3,030,878.11, of which amount $3,030,871.17 was chargeable to Capital Account.

VI.

By its order of May 1, 1944, the Court authorized the Trustees to make a contract through competitive bidding for the purchase of 100 freight cars of the so-called mill type of gondola design at an estimated cost of approximately $3,875 per car, f.o.b. manufacturer's plant, the method of financing the payment of the purchase price to be submitted to the Court for approval. Such a contract was made during 1944 with Mt. Vernon Car Manufacturing Company, the low bidder, at the price of $3,897.77 per car, f.o.b. manufacturer's plant at Mt. Vernon, Illinois. The Trustees concluded that the entire

Defendant's Exhibit No. 25—(Continued)

Illinois. The Trustees concluded that the entire purchase price of the cars should be paid in cash, thus eliminating the need for submission of any plan for financing the purchase price. None of the cars was delivered during 1944 but at the date of filing this report it is anticipated that deliveries thereof will be completed by June 1, 1945.

VII.

By its order of November 20, 1944, the Court authorized the Trustees to rehabilitate, modernize, enlarge and improve a certain freight facility of the railroad of the Debtor located at 8th and Brannan Streets, San Francisco, California, at an estimated cost of $58,246, and to amend the lease of said facility then outstanding. The work so authorized was commenced during the calendar year 1944 and the amount expended thereon during that year was $12,870.09, of which $9,860.26 was charged to Capital Account. At the date of filing this report such work has been completed and the lease of the facility has been amended as required by said order.

VIII.

Charges during 1944 for preliminary expenses incident to projects included in the program of improvement work for 1945 amounted to $3,990.27 of which $3,962.03 represents charges to Capital Account.

Accounting adjustments with respect to charges during years previous to 1944 resulted in total

Defendant's Exhibit No. 25—(Continued)

charges of $49,670.32 and a credit to Capital Account of $6,776.72.

Property retired during 1944 resulted in total charges of $15,411.29 with $107,734.86 being credited to Capital Account.

IX.

The total of all charges set forth in more detail in Sections II to VIII, both inclusive, in this report, is the net amount of $6,922,954.32 of which $5,977,332.06 represented net charges to Capital Account. Details of the latter amount as it was accrued monthly for Road and Equipment and Miscellaneous Physical Property Capital Accounts appear on page 1 of Exhibit 3 attached hereto.

X.

By its order of April 10, 1944, the Court authorized the Trustees to consent to the dissolution of Deep Creek Railroad Company, a subsidiary of the Debtor. Such consent was given and the dissolution of Deep Creek Railroad Company was accomplished during the year 1944.

XI.

The Salt Lake City Union Depot and Railroad Company (hereinafter called the "Depot Company") is a Utah corporation owning a passenger station and terminal facilities in Salt Lake City, Utah. At all times since long prior to the commencement of this proceeding one-half of the outstanding shares of common stock of the Depot Company have been owned by the Debtor and the other

Defendant's Exhibit No. 25—(Continued)

one-half thereof by The Denver and Rio Grande Western Railroad Company and its Reorganization Trustees.

By its order of March 20, 1944, in this proceeding the Court authorized the Debtor and the Trustees to take steps necessary to procure the amendment of the Articles of Incorporation of the Depot Company so that it would be authorized to issue shares of preferred stock having an aggregate par value of $600,000, subject to the approval of the Interstate Commerce Commission. By said order the Court also authorized the Trustees to purchase one-half of said shares of preferred stock for the sum of $300,000 in cash upon condition that the Reorganization Trustees of The Denver and Rio Grande Western Railroad Company should concurrently purchase the other one-half of such shares for an equal amount. The approval of the Interstate Commerce Commission was granted and all other conditions stated in said order of March 20, 1944, were fulfilled, and pursuant thereto the Trustees purchased 3,000 shares of the preferred stock of the Depot Company for the sum of $300,000 in cash during the year 1944. The Depot Company thereupon used funds obtained by the issuance and sale of its preferred stock to discharge all of the indebtedness secured by its first mortgage and to obtain a release thereof.

Thereafter and on June 10, 1944, the Depot Company elected to terminate the lease agreement under which its station and terminal facilities had been used and operated by the Debtor and by The Den-

Defendant's Exhibit No. 25—(Continued)

ver and Rio Grande Western Railroad Company prior to the commencement of this proceeding, which lease had never been affirmed by the Trustees.

By its order of July 24, 1944, the Court authorized the Trustees, subject to approval of the Interstate Commerce Commission, to enter into a lease of the station and terminal facilities of the Depot Company jointly with the Reorganization Trustees of The Denver and Rio Grande Western Railroad Company, such lease to be in substantially the form attached as Exhibit A to the petition of the Trustees filed in this proceeding July 5, 1944. Such proposed lease was thereafter approved by the Interstate Commerce Commission, and the lease was thereupon executed by all parties thereto under date of December 1, 1944.

By its order of September 18, 1944, the Court authorized the Trustees to make a final settlement with the Depot Company for the use of its premises by the Trustees for the period ending immediately prior to the effective date of the new lease hereinabove described. Such settlement has been accomplished.

XII.

By its order of March 3, 1944, the Court authorized the Trustees to establish, with funds derived from the earnings of the railroad of the Debtor during the year 1943, a "reserve fund for contingent tax liabilities" in the amount of $7,100,000 to be invested in United States Treasury Securities and to be used for payment of any Federal income and ex-

Defendant's Exhibit No. 25—(Continued)

cess profits taxes which might thereafter be found due for the year 1943. During the year 1944 such a fund was established and was invested in United States Treasury Securities.

By its order of May 15, 1944, the Court directed that as funds accumulated in the hands of the Trustees from month to month during the year 1944 for the payment of estimated Federal income and excess profits taxes accruing during that year, the Trustees should invest such funds from time to time in United States Treasury Savings Notes, Series C, to be used for the payment of such taxes as and when liability therefor should mature. Accordingly funds in the aggregate amount of $7,810,000 were invested by the Trustees in such Savings Notes during the year 1944.

XIII.

By its order of June 26, 1944, the Court authorized the Trustees to make, execute and deliver to certain named persons quitclaim deeds covering the right-of-way formerly occupied by the so-called Calpine Branch of the railroad of the Debtor, said Calpine Branch having been abandoned pursuant to this Court's order of February 26, 1940, and a subsequent order of the Interstate Commerce Commission. Such quitclaim deeds were made, executed and delivered during the year 1944.

XIV.

By its order of July 24, 1944, the Court authorized the Trustees to stipulate for judgment in a cer-

Defendant's Exhibit No. 25—(Continued)

tain condemnation action then pending in the District Court of the United States for the Northern District of California, Northern Division, entitled "United States of America, Plaintiff, vs. 450 Acres of Land in San Joaquin County, California, Irene Louise Brichet i, et al., Defendants" and numbered No. 4456. Suc. stipulation was given and judgment thereon was entered during the year 1944.

XV.

By its order of June 2, 1944, upon petition of the Trustees and the Reorganization Committee hereinafter described, the Court approved and authorized irrevocable agreements with the Commissioner of Internal Revenue of the United States for the establishment of depreciation accounting with respect to certain road properties of the railroad of the Debtor and certain subsidiaries of the Debtor. During the year 1944 agreements were made with the Commissioner of Internal Revenue in accordance with the authority granted by said order.

XVI.

A.—Leases by Trustees in Reorganization

Incidentally to the operation and maintenance of the railroad of the Debtor, the Trustees have made and entered into the following leases as Lessors during the period from January 1, 1944, to December 31, 1944, both inclusive.

1—Lease, dated January 1, 1944, for term ending December 31, 1944, with option of renewal, to Moore Dry Dock Company, covering several parcels of

Defendant's Exhibit No. 25—(Continued)

land at Oakland, California, at a rental of $46,522.25 per year.

2—Renewal of Lease, dated June 22, 1943, (Renewal dated March 24, 1944) for term April 15, 1944, to April 15, 1945, to Soule Steel Company, covering parcel of land at Army and Indiana Streets, San Francisco, California, at a rental of $625.00 per month.

3—Renewal of Lease, dated August 26, 1942, (Renewal dated May 31, 1944) for term July 1, 1944, to July 1, 1945, to United States of America, covering warehouse and land at northwest corner 9th and Brannan Streets, San Francisco, California, at a rental of $2,083.33 per month.

4—Lease, dated July 8, 1944, for term ending April 30, 1945, to L. H. Butcher Company, covering space in warehouse at 15th and Vermont Streets, San Francisco, California, at a rental of $640.63 per month.

5—Lease, dated August 9, 1944, for term ending June 14, 1949, to Merchant Shippers Association, covering warehouse at 4th and Oak Streets, Oakland, California, at a rental of $186.84 per month.

6—Lease, dated September 6, 1944, for term ending April 30, 1949, to F. E. Booth Company, Inc., covering 55,980 sq. ft. of land at 3rd and Marin streets, San Francisco, California, at a rental of $233.25 per month.

7—Lease, dated September 6, 1944, for term ending June 18, 1947, to Encinal Terminals, covering warehouse at San Leandro St. and 42nd Ave., Oakland, California, at a rental of $213.67 per month.

Defendant's Exhibit No. 25—(Continued)

B—Leases to Trustees in Reorganization

Incidentally to the operation and maintenance of the railroad of the Debtor, the Trustees have made and entered into the following leases as Lessees during the period from January 1, 1944, to December 31, 1944, both inclusive:

1—Lease to Trustees from General Motors Corporation, dated January 31, 1944, covering General Agent's offices in Detroit, Michigan, for three years from March 1, 1944, at a monthly rental of $188.00.

2—Lease to Trustees from Railway Exchange Building, Inc., dated March 14, 1944, covering General Agent's offices in St. Louis, Mo., for two years from May 1, 1944, at a monthly rental of $110.00.

3—Lease to Trustees from Nettie Aronson, dated June 17, 1944, covering Signal Department offices at 16 First Street, San Francisco, California, for one year from July 15, 1944, at a monthly rental of $125.00.

4. Lease to Trustees from Western Title Insurance Company, dated November 10, 1944, covering General Offices on 5th Floor at 516 Mission Street, San Francisco, California, for two years from November 15, 1944, at a monthly rental of $135.00 for the first year and $140.00 per month for the second year.

5. Lease to Trustees from Ollie Day, dated December 30, 1944, covering employees' rooming house at Elko, Nevada, for one year from November 1, 1944, at a monthly rental of $100.00.

Defendant's Exhibit No. 25—(Continued)

6—Lease to Trustees from Rosine F. Klueny, dated December 30, 1944, covering employees' rooming house at Winnemucca, Nevada, for one year from November 1, 1944, at a monthly rental of $150.00.

C—Deeds by Trustees in Reorganization

Pursuant to the Court's order of April 10, 1944, the Trustees sold and conveyed certain non-operative real property included in the estate of the Debtor and located in San Francisco, California, to Safeway Stores, Incorporated, by a grant deed dated April 18, 1944, for the sum of $7,189.77.

Pursuant to the Court's order of October 16, 1944, and the order of the Railroad Commission of the State of California dated October 3, 1944, the Trustees were authorized to sell and convey certain operative property included in the estate of the Debtor and located in San Joaquin County, California, to Woodbridge Vineyard Association by a grant deed dated November 20, 1944, for the sum of $671.25. The sale was not finally consummated and the title passed until March 5, 1945.

The Trustees have also made the following conveyances during the year 1944:

1—Quitclaim Deed, dated July 1, 1944, to J. J. McPherrin, conveying a strip of right of way on the abandoned Calpine Branch in California. No monetary consideration.

2—Quitclaim Deed, dated July 1, 1944, to United States of America, conveying a strip of right of

Defendant's Exhibit No. 25—(Continued)

way on the abandoned Calpine Branch in California. No monetary consideration.

3—Quitclaim Deed, dated July 1, 1944, to Veste Nelson, conveying a strip of right of way on the abandoned Calpine Branch in California. No monetary consideration.

4—Quitclaim Deed, dated July 1, 1944, to Giacomo Folchi, conveying a strip of right of way on the abandoned Calpine Branch in California. No monetary consideration.

5—Quitclaim Deed, dated July 1, 1944, to Letitia Webster Havey, conveying a strip of right of way on the abandoned Calpine Branch in California. No monetary consideration.

6—Quitclaim Deed, dated July 1, 1944, to Wilbur Dewey Johnson, conveying a strip of right of way on the abandoned Calpine Branch in California. No monetary consideration.

7—Quitclaim Deed, dated July 1, 1944, to Westover Company, conveying a strip of right of way on the abandoned Calpine Branch in California. No monetary consideration.

8—Quitclaim Deed, dated July 1, 1944, to Chas. W. Ede, conveying a strip of right of way on the abandoned Calpine Branch in California. No monetary consideration.

9—Quitclaim Deed, Dated July 1, 1944, to J. J. and O. B. Farrar, conveying a strip of right of way on the abandoned Calpine Branch in California. No monetary consideration.

10—Quitclaim Deed, dated September 11, 1944, to

Defendant's Exhibit No. 25—(Continued)

California Prune & Apricot Growers Association, to clear title of Grantee, property at San Jose, California. No monetary consideration.

D—Deeds to Trustees in Reorganization

The Trustees have also, incidentally to the operation and maintenance of the railroad of the Debtor, acquired certain real property during said period, as follows:

1—Quitclaim Deed, dated April 1, 1944, from Edwa D. Ewing Boggs to the Trustees for clearing title to land at Stockton, California. No monetary consideration.

2—Deed, dated April 12, 1944, from City of Elko to Trustees for railroad yard expansion at Elko, Nevada. Consideration $3,000.00.

3—Deed, dated July 12, 1944, from Ottò A. and Genevieve R. Riffel to Trustees for residence for railroad employee at Blairsden, California. Consideration $5,000.00.

4—Quitclaim deed, dated September 7, 1943, (although dated in 1943, transaction was not closed until 1944) from The Lang Company to Trustees for clearing title in connection with closing a street at Salt Lake City, Utah. No monetary consideration.

5—Deed, dated October 3, 1944, from City of Winnemucca to Trustees for railroad yard expansion at Winnemucca, Nevada. Consideration $450.00.

6. Deed, dated December 6, 1944, from Western Realty Company to Trustees for residence for rail-

Defendant's Exhibit No. 25—(Continued)

road employee at Spring Garden. Consideration $100.00.

E—Easements Acquired by Trustees in Reorganization

The Trustees have also, incidentally to the operation and maintenance of the railroad of the Debtor, acquired easements during the year 1944 over three separate pieces of real property for the purposes stated below, as follows:

1—Easement, dated July 31, 1942, (although dated in 1942, the transaction was not closed until 1944), from Peter, Paul, Inc., to Central Pacific Railway and Trustees, jointly, for right of way for Industrial Lead Track from the Joint Drill Track of the Southern Pacific Company and The Western Pacific Railroad Company at Oakland, California. No monetary consideration.

2—Easement, dated January 20, 1943, (although dated in 1943, the transaction was not closed until 1944), from Loose-Wiles Biscuit Company to Central Pacific Railway and Trustees, jointly, for right of way for Industrial Lead Track from the Joint Drill Track of the Southern Pacific Company and The Western Pacific Railroad Company at Oakland, California. No monetary consideration.

3—Easement, dated October 31, 1943, (although dated in 1943, the transaction was not closed until 1944), from Frederickson & Watson Construction Company and Riviera Packing Company to Central Pacific Railway and Trustees, jointly, for right of

Defendant's Exhibit No. 25—(Continued)

way for Industrial Lead Track from the Joint Drill Track of the Southern Pacific and The Western Pacific Railroad Company at Oakland, California. No monetary consideration.

F—Easements Granted by Trustees in Reorganization

The Trustees have also, incidentally to the operation and maintenance of the railroad of the Debtor, granted the following easements during the year 1944:

1—Easement, dated September 14, 1943, from Trustees to United States of America, for chlorinator house, pressure regulating station, water pipe lines and electric power line in connection with Bombing Base at Wendover, Utah. No monetary consideration.

2. Easement, dated February 25, 1944, from Trustees to Henry J. Kaiser Company for gravel conveyor at Radum, California. No monetary consideration.

3—Easement, dated June 26, 1944, from Trustees to American Telephone & Telegraph Company for underground conduit along right of way between Wendover and Barro, Utah. Consideration $611.18.

4—Easement, dated July 6, 1944, from Trustees to County of Plumas for highway to Keddie, California. No monetary consideration.

5—Easement, dated July 12, 1944, from Trustees to American Telephone and Telegraph Company for underground conduit crossings in vicinity of Barro, Utah. Consideration $28.60,

Defendant's Exhibit No. 25—(Continued)

6—Easement, dated September 28, 1944, from Trustees to E. I. Lane for roadway at Portola, California. No monetary consideration.

7—Easement, dated October 4, 1944, from Trustees to Oro Loma Sanitary District for sanitary sewer at three locations in the vicinity of San Leandro, California. No monetary consideration.

8—Easement, dated October 30, 1944, from Trustees to State of California for State Highway near Chilcoot, California. Considerations $51.10.

9—Easement, dated November 2, 1944, from Trustees to State of Nevada for State Highway near Preble, Nevada. No monetary consideration.

10—Easement, dated November 28, 1944, from Trustees to State of Utah for State Highway at Wendover, Utah. No monetary consideration.

11—Easement, dated December 12, 1944, from Trustees to Red River Lumber Co. for underground telephone line, power line, water pipe line and transformers at Mile Post 36.41 on the Northern California Extension, California.

XVII.

During the year 1944 the reorganization plan confirmed by the order of this Court dated October 11, 1943, was placed in effect under the direction of the Reorganization Committee consisting of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, whose designation as members of the Reorganization Committee was approved by said order of October 11, 1943.

Defendant's Exhibit No. 25—(Continued)

By its order of November 27, 1944, this Court among other things directed the revesting of the properties of the Debtor in the Debtor Company, and more particularly, directed the Trustees to execute, acknowledge and deliver to the Debtor Company on or before December 28, 1944, as requested by the Reorganization Committee, a deed substantially in the form attached to said order as Exhibit "A," releasing and transferring to the Debtor Company as of 12:01 a.m. Pacific War Time on December 29, 1944, title to all property, rights and interests of every kind and description held by them as such Trustees. Pursuant to such order and the request of the Reorganization Committee the Trustees executed and acknowledged such a deed and delivered it to the Debtor Company prior to December 28, 1944, thereupon divesting the Trustees of all title to all properties and assets held by them as Trustees in this proceeding and vesting such title to all thereof in the Debtor Company. In exchange for said deed the Trustees received from the Debtor Company an agreement, substantially in the form of Exhibit "D" attached to said order of November 27, 1944, whereby the Debtor Company assumed and agreed to perform all contracts, leases, agreements, liabilities and obligations of the Trustees remaining in effect on December 31, 1944. Paragraph 12 of said order of November 27, 1944, authorized and directed the Trustees to continue their control and operation of the Debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on

Defendant's Exhibit No. 25—(Continued)

December 31, 1944, at which time all right and duty of the Trustees to possess, control or operate said business and properties should cease. The Trustees did retain control and operation of the Debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on December 31, 1944, whereupon, as directed by said order, the Trustees ceased to possess, control and operate said business and properties, and all possession, control or operation of said business and properties or any thereof by the Trustees, or either of them, ceased and terminated. Possession, control and operation of all said business and properties were then and thereby transferred to and accepted by the Debtor Company at 12:00 o'clock midnight, Pacific War Time, on December 31, 1944.

At or prior to the end of the year 1944 the Trustees divested themselves of, and transferred and conveyed to and vested in the Debtor Company, all title to and all possession, control and operation of the business and properties theretofore held by the Trustees in this proceeding, all as required by orders of this Court. All duties, obligations, services and responsibilities of the Trustees in this proceeding have been duly and fully performed and completed, save only the execution of any further instruments of conveyance, transfer, substitution or release which may be requested by the Debtor Company in order to implement, consummate, confirm or further evidence the complete and effective transfer to the Debtor Company of all of the business, properties, assets, contracts, agreements, leases, actions, rights

Defendant's Exhibit No. 25—(Continued)

and claims heretofore held by the Trustees in this proceeding.

XVIII.

This proceeding has been pending in this Court continuously since August 2, 1935, and your petitioners have been the duly appointed, qualified and acting Trustees of the properties of the Debtor in this proceeding at all times since their appointment and qualification as such on November 13, 1935. During the intervening period of more than nine years the railroad of the Debtor has been operated by your petitioners under the control and supervision of this Court. Your petitioners have caused to be compiled a summary of the operations of the railroad, business and properties of the Debtor during the pendency of this proceeding. Copies of such summary will be furnished to this Court and to each of the parties to this proceeding upon or prior to the hearing upon this Report and Accounting.

Wherefore, the Trustees pray (1) that their Ninth and Final Report and Accounting and all of their acts and accounts be approved and confirmed; (2) that they be discharged as Trustees, reserving to them, jointly and to each of them separately, and to the survivor of them, the power and authority thereafter to execute and deliver such instruments of conveyance, transfer, substitution or release as may be requested by the Debtor Company from time to time in order to implement, consummate, confirm or further evidence the complete and effective release, transfer and conveyance to the Debtor Com-

Defendant's Exhibit No. 25—(Continued)

pany of all the business, properties, assets, contracts, agreements, leases, actions, rights and claims held by the Trustees in this proceeding, provided that the Trustees shall have the right but shall not be required to submit any such instruments to this Court for approval prior to the execution and delivery thereof, jurisdiction to be reserved by this Court for such purposes; (3) that notwithstanding their discharge the Trustees be authorized at any time upon the request of the Debtor Company to cooperate with the Debtor Company in any and every suit, litigation, proceeding, controversy or compromise in which their cooperation as such Trustees may appear necessary or desirable; (4) that the bonds hertofore given by the Trustees in this proceeding be exonerated; and (5) that such other or different order or orders be made as to the Court may seem meet and proper.

ALLAN P. MATTHEW,
Counsel for T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization.

State of California,
City and County of San Francisco—ss.

Sidney M. Ehrman, being first duly sworn, deposes and says that he is one of the Trustees named in and making the foregoing Ninth and Final Report and Accounting by the Trustees of the Property of the Debtor and Petition for Approval of Their Acts and Accounts, for Their Discharge as Trustees and for the Exoneration of their Bonds;

Defendant's Exhibit No. 25—(Continued)

that he has read the foregoing Ninth and Final Report and Accounting and Petition, including the exhibits attached thereto, and knows the contents thereof, and that they are true of his own knowledge.

/s/ SIDNEY M. EHRMAN.

Subscribed and sworn to before me this 30th day of April, 1945.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT 1

T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization of The Western Pacific Railroad Company

Statement of Cash Receipts and Disbursements
January 1, 1944, to December 31, 1944

Cash on hand and in banks January 1, 1944		$ 14,435,248.59
Receipts		
Agents and conductors	$28,085,007.26	
Foreign roads—Freight traffic balances	12,155,596.96	
Foreign roads—Passenger traffic balances	909,452.42	
Foreign roads—Car service	129,340.35	
Foreign roads—Freight claim settlements	399,844.05	
Individuals and companies	3,224,856.22	
Railway Express Agency, Inc.	219,481.70	
United States Government—Transportation charges	38,998,547.95	
Working fund advances	1,175.09	
Hospital fund collections	2,271.75	
Railway Express Agency, Inc.—Interest on advances	2,130.78	
Interest on bank balances, time deposits, etc.	1,475.40	

Defendant's Exhibit No. 25—(Continued)

Tidewater Southern Railway Co.— Principal of Note	508,278.61	
Tidewater Southern Railway Co.— Interest on Note	29,649.59	
Deep Creek Railroad Co.— Return of cash advances	23,935.55	
Standard Realty and Development Co.— Return of cash advances	60,000.00	
Central California Traction Co.— Return of cash advances	50,000.00	
Sacramento Northern Railway— Return of cash advances	170,000.00	
Oakland Terminal Railway—Proportion of income and profit and loss	18,653.34	
U.S. Government, Railroad Retirement Board—Services	24.00	
Cash collected for U.S. War Bonds sold	263,991.88	
Interest on Equipment Trust Funds invested in U.S. Government Bonds	11,750.00	
Collections from various sources in connection with consumation of the Plan of Reorganization		
Reconstruction Finance Corporation	7,075,000.00	
Crocker First National Bank of San Francisco	1,076,114.20	
Irving Trust Company of New York	982,437.13	94,399,014.23
Total Receipts		$108,834,262.82

Disbursements

Foreign roads—Freight traffic balances	$21,358,755.75	
Foreign roads—Passenger traffic balances	1,656,553.80	
Foreign roads—Car service traffic balances	1,877,187.04	
Foreign roads—Freight claim settlements	272,744.62	
Paychecks and payroll deductions	17,389,876.46	
Agents drafts on Treasurer for payment of steamship companies' charges and other purposes	2,710,272.45	
Drafts in settlement of freight claims	320,209.48	
Claim agents drafts	144,728.81	
Ticket redemption drafts	122,483.25	
Outside agency drafts	56,879.32	
Purchase of U.S. Government Savings Notes "C"	7,100,000.00	

Defendant's Exhibit No. 25—(Continued)

Audited Vouchers, exclusive of payroll deductions as per accompanying statements	35,127,996.71	
Deposited with the Guaranty Trust Company of New York for payment of cash adjustments in connection with exchange of securities at consummation of the Plan of Reorganization	12,681,258.52	$100,818,946.21
Cash on hand and in banks December 31, 1944		$ 8,015,316.61

Statement of Voucher Payments, Exclusive of Pay Roll Deductions, January 1st, 1944, to December 31st, 1944

Fuel oil	$ 2,705,528.91
Coal	319,271.17
Rail (New)	221,041.83
Rail (Relay)	1,788.27
Rail joints	31,078.71
Tie plates	23,880.02
Rail anchors and anti-creepers	8,549.58
Bolts, spikes and nuts	51,470.68
Crossings and other track material	1,791.00
Lock washers	2,817.92
Switch material	59,245.83
Rail bonds	4,279.12
Ballast	181,969.97
Lumber and ties	661,987.15
Culvert pipe	4,236.40
Stand pipe	771.42
Cement	18,977.29
Cross arms	5,588.64
Steel pipe	32,725.85
Wire	13,605.40
Water tanks	1,838.85
Cable	1,985.98
Pumps	8,501.32
Ranges	3,137.01
Smoke jacks	1,272.04
Signal material	4,316.26
Locomotive repair parts	191,464.85
Diesel locomotive repair parts	175,016.45
Lagging	3,107.91
Brass castings	58,580.41
Battery renewals	44,348.80
Iron and steel	86,368.79
Babbitt	7,305.20
Oakite and Okeamo	13,780.78
Tools	73,452.36

Defendant's Exhibit No. 25—(Continued)

Acetylene and oxygen	25,771.30
Solder	1,506.19
Car repair parts	50,171.45
Car wheels and axles	53,135.26
Brake shoes	34,512.60
Burlap	1,857.10
Canvas and duck	5,476.38
Blankets and mattresses	9,266.69
Shop machinery	52,082.79
Roadway machinery	34,238.78
Fusees and torpedoes	50,813.97
Rags and waste	22,214.61
Oil and grease	164,848.14
Chemicals for water treatment	35,225.16
Chemicals for killing weeds	8,118.01
Switch lists and train orders	2,588.46
Tickets	10,374.78
Timecards and time tables	3,968.46
Teletype sets	6,006.80
Dining car and hotel supplies	462,682.77
Hospital services and supplies	148,243.92
Ice, salt, and refrigeration expenses	506,870.07
Central traffic control equipment	643,465.48
Real estate	11,028.39
Fencing	6,234.61
Electrodes	230.63
Winpower electric plants	1,245.58
Steel piling	12,051.34
Ferry slip repair parts	1,165.22
Duplicating machine	2,673.69
Purchase of Capital Stock, The Salt Lake City Union Depot and Railroad Company—3000 shares 4% Preferred	300,000.00
Purchase of 4 Diesel electric switching locomotives, Nos. 555 to 558 inc.	311,419.68
Purchase of 10 Insulated box cars	9,500.00
Purchase of Hotel furniture and equipment at Portola	6,000.00
Purchase of six Diesel electric freight locomotives through conditional sale contract with The Chase National Bank, New York—25% of certified cost	782,820.00
Purchase of U.S. Treasury Savings Notes Series "C" Account Maintenance Fund	1,073,000.00
Account Federal Income Tax Accruals	7,810,000.00
Purchase of U.S. War Bonds sold for cash	263,991.88
U.S. War Bonds, undelivered	20,081.25
Tug service for car barges—San Francisco Bay	60,427.50
San Francisco Harbor—Rents, tolls and State Belt Ry. switching	175,368.26
Services of express messengers as train baggagemen	21,647.59

Defendant's Exhibit No. 25—(Continued)

Oroville shop, bus service for employes	9,600.00
Welding service	18,341.25
Contract telegraph service, Western Union	15,587.35
Threlkeld Commisary Co.—Operating deficits	129,126.41
Testing rails	9,461.20
Expenses Mexican National Laborers	72,222.17
Group Advertising	48,187.37
Repairs, tugs and barges	125,486.85
Foreign cars destroyed	25,896.67
Insurance premiums	200,739.89
Foreign roads, traffic balances	120,086.96
Overcharges refunded U.S. Government	670,313.49
Fire damage U.S. Government Forests	3,386.51
U.S. Government fines	1,168.20
Fire damage, Oroville packing house	5,442.34
Compensation of T. M. Schumacher as Reorganization Trustee	15,000.00
Expenses of T. M. Schumacher as Reorganization Trustee	2,432.64
Compensation of Sidney M. Ehrman as Reorganization Trustee	12,000.00
Compensation of Allan P. Matthew as General Counsel for Reorganization Trustees	18,000.00
New York Office, Salaries, rents and other expenses	34,839.65
Traveling, hotel, automobile, and similar expenses of officers and employes on behalf of The Western Pacific Railroad including all branches of company service approximately 400 individual accounts per month	373,869.30
Handling celery refuse at Terminous	2,241.00
Repairs Business Car No. 101	983.46
Fire hazard reduction U.S. National Forests	16,154.41
Excess mileage of tank cars	24,696.47
Damage claims Greyhound Bus Company	10,000.00
Payments to A—Southern Pacific Company	1,060,413.70
B—Atchison, Topeka and Santa Fe Railway Co.	45,510.71
C—Great Northern Railway Co.	261,964.13
D—McCloud River Railroad Co.	2,968.96
E—The Denver and Rio Grande Western Railroad Co.	1,139,822.94
F—The Salt Lake City Union Depot and Railroad Co. (For operation of joint facilities, repairs to Western Pacific equipment, and joint facility rents)	70,742.50
Advances to subsidiary companies to enable them to meet current obligations including operating expenses,	

Defendant's Exhibit No. 25—(Continued)

taxes, interest, and maintenance of adequate cash working funds		
Alameda Belt Line, Capital expenditures	$26,665.14	
Operations	68,084.86	94,750.00
Sacramento Northern Railway		220,000.00
Central California Traction Company		48,000.00
Interest—Equipment Trust, Series of 1937		39,375.00
Principal—Equipment Trust, Series of 1937		155,000.00
Interest—Equipment Trust Series of 1941		37,100.00
Principal—Equipment Trust Series of 1941		265,000.00
Interest—Conditional Sale Contract with The Chase National Bank covering six steam freight locomotives		14,335.50
Principal—Conditional Sale Contract with The Chase National Bank covering six steam freight locomotives		181,080.00
Interest—Conditional Sale Contract with The Chase National Bank covering three Diesel electric freight locomotives		18,333.00
Principal—Conditional Sale Contract with The Chase National Bank covering three Diesel electric freight locomotives		226,800.00
Interest—Conditional Sale Contract with The Chase National Bank covering six Diesel electric freight locomotives		14,633.49
Principal—Conditional Sale Contract with The Chase National Bank covering six Diesel electric freight locomotives		187,200.00
Interest—Trustees Certificates		124,369.54
Principal—Trustees Certificates		300,000.00
Interest on Central California Traction Co. Bonds, viz: Payment of semi-annual interest due April 1, and October 1, 1944, upon Central California Traction Company 5% First Mortgage Bonds in the face amount of $270,000, which matured April 1, 1936, are owned by The Western Pacific Railroad Company and are now pledged with and in the possession of Irving Trust Company as Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, dated as of January 1, 1932, as collateral under said mortgage, being interest from October 1, 1943, to and including September 30, 1944, on said bonds, at the same interest rate as said bonds bore prior to maturity.		13,500.00
Interest and principal collected on Tidewater Southern Railway Company Note, deposited with Irving Trust Company of New York, Trustee, The Western Pacific Railroad Company, General and principal		508,278.61
Refunding Mortgage interest		29,649.59
Crocker First National Bank of San Francisco, and Samuel Armstrong, Trustees, The Western Pacific Railroad		

Defendant's Exhibit No. 25—(Continued)

Company, First Mortgage Deposits in lieu of mortgaged property sold	
Safeway Stores, Land in San Francisco	7,189.77
Deposits of rentals collected	
Moore Dry Dock Company, Oakland	7,834.79
Advances to the Reorganization Committee	15,987.71
Rentals for general offices and outside agencies	99,752.08
Rental for Oakland waterfront land	2,000.00
Rental for United States tank cars (Mileage)	5,11[illegible]3
Rental for locomotives	104,049.6[illegible]
Rental for buses	2,462.31
Taxes, State, County, etc.	1,039,057.21
Taxes, Sales	34,528.40
Federal Income tax collections	2,29[illegible]656.51
Federal Transportation tax collections	9[illegible],326.01
Payments account of Railroad Retirement Board	1,201,294.17
Payments account of Social Security Board Unemployment Reserves	553,900.00
Payments to contractors account of improvements, etc.	
Extension of operators quarters at Pulga	977.00
Oakland commissary	1,238.39
Passenger platform Sacramento	6,068.25
Freight Shed, San Jose	808.90
Roundhouse, and drop table, Oroville	54,820.76
Roundhouse, Elko	41,532.10
Roundhouse, Stockton	12,071.50
Roundhouse, Oakland and new turntable	71,384.17
Freight house, Stockton	14,808.15
Stationery store Oakland	2,567.76
Yard tracks, Portola	44,284.80
Yard Office, Oroville	8,990.69
Painting, Bridges Various	4,220.64
Buildings, Fruitv[illegible]e, Livermore	1,158.00
Buildings, Oakland	2,332.00
Buildings, various, Eastern Division	31,636.75
Warehouse San Francisco	1,077.00
Alterations, Freight office, San Francisco	4,512.00
Passenger station, Stockton	1,729.00
Packing shed, Thornton	2,531.00
Packing shed, San Jose	11,157.98
Ticket office, Sacramento station	3,516.43
Grading Oroville Yard	2,491.00
Buena Vista	375.00
Herlong	1,500.00
Oakland	1,188.04
San Francisco	11,677.67
Elko Yard	12,203.43
Winnemucca Yard	11,287.12

Defendant's Exhibit No. 25—(Continued)

Payments to contractors account of improvements, etc. (Cont.)

Construction Roadway Oakland Mole	19,107.80
Signal tower, Keddie	4,537.25
Frame dwellings, various points	16,282.11
Depot, Warner	6,394.00
Carmen's house Stockton	845.00
Pipeline, Sacramento Shops	1,233.00
Foundations, Central Traffic Control	19,261.75
Culverts, various points	29,404.90
Roof, Freight Platform, San Francisco	345.37
Section facilities, various points	47,404.25
Station platform, Pleasanton	2,988.58
Frame buildings, Nevada	7,642.38
Bunkhouse, Chilcoot	2,686.00
Depot, Wells	7,043.02
Passing track, Carlin	691.26
Track, San Francisco	1,178.00
Flood gate, Marysville	912.00
Tin shop, Elko	427.18
Trainmaster's office, Salt Lake City	867.61
Toolhouse, Oakland	564.19
Drain, San Francisco Freight house	1,589.45
Rest room, General Store Sacramento	1,523.30
Barrier posts, Oakland	611.57
Operators quarters, Warner	1,424.00
Warehouses, Oakland	61,612.00
Driveway, Pleasanton	807.00
Yard office, San Francisco	8,566.00
Section facilities, San Francisco	16,862.50
Toilet, Stockton Yard	2,350.62
Section facilities, Oakland	25,156.37
Oil house, San Francisco	490.00
Section facilities, Eastern Division	43,286.00
Yard tracks, Elko	25,763.53
Diesel enginehouse, San Francisco	24,000.00
Dispatchers office, Keddie	16,183.71
Passing track Dyke	4,912.00
Transformer house, Portola	595.00
Driveway Oakland Warehouses	6,676.45
Concrete platform, Oroville	5,571.37
Elevator, Sacramento Store	3,970.00
Platform, Decota	3,631.17
Division office, Sacramento	2,952.00
Dwelling, Spring Garden	5,367.75
Interchange office, San Francisco	1,414.50
Garage, Oakland	990.45
Fuel reservoir, Sacramento	4,266.00
Car inspectors building, Stockton	3,357.00
Oil tank, Wendover	7,177.50

Defendant's Exhibit No. 25—(Continued)

Payments to contractors account of improvements, etc. (Cont.)

Construction Repairs Packing sheds, Milpitas	671.62
Platform, Sacramento	454.00
Bridge 178.18	24,039.87
Bridge, 363.35	33,579.37
Passenger station, Sacramento	7,529.43
Buildings, Reno	547.25
Freight house and shed, San Francisco	10,471.33
Embankments, Eastern Division	120,700.52
Warehouses, San Francisco	5,188.24
Dock, Oakland Mole	57,224.69
25th St. Wharf, San Francisco	67,128.64
Wharf, Stockton	11,398.13
Lumber shed, Sacramento	2,015.00
Hotel, Portola	3,171.00
Freight house, Stockton	5,846.49
Tunnel No. 15	97,748.60
Station, Marysville	17,688.83
Roadway, Crescent Mills	3,953.87
Clearing Slide, Virgilia	15,895.90
Re-arrangement of tracks, Oakland	1,890.00
Roadway, San Jose	713.63
Oakland Commissary	1,324.62
Roadway, David	9,962.19
Roadway, Carboard	2,344.03
Roundhouse, Oroville	11,965.05
Freight house, Winnemucca	1,040.00
Clearing slide, Red Rock	2,153.28
Re-locate carmen's shed, San Francisco	546.83
Onion platform, Stockton	782.65
Yard track, San Francisco	993.88
Roundhouse, Oakland	4,976.50
Loading platform, Stockton	1,819.45
Roadway, Oakland Mole	4,838.40
Freight house, Oroville	1,063.39
Platform, San Francisco	576.16
Packing shed, Terminous	15,326.26
Auto platform, San Francisco	750.00
Pipe Line, Senoke Creek	4,757.10
Embankments various locations	17,961.66
Warehouse, Stockton	2,475.00
Dispatchers Circuit Western Division	1,470.00
Stock yard, Winnemucca	914.98
Pipe Line, Cottonwood Springs	2,309.72
Removing rocks, San Francisco	619.35
Salvaging wire from Sacramento Northern Railway	399.50
Digging drainage ditch, Sacramento	647.50
Drilling well, Jungo	5,360.00
Lighting fixtures, various stations	7,371.00
Harvesting ice crop, Carlin	32,906.81

Defendant's Exhibit No. 25—(Continued)

Payments to contractors account of improvements, etc. (Cont.)			
Erection temporary camp, San Francisco			4,241.00
Paving and street work, San Francisco			11,751.79
Oakland			5,718.96
Stockton			7,333.12
Marysville			1,738.10
San Jose			3,503.22
Fitting up city ticket office, San Francisco			540.75
Fees and expenses of financial institutions as Trustees, Agents, etc., as follows:			
The Chase National Bank of New York			
Equipment Trust Series "D"			
Services in redemption of certificates	$73.00		
Services account of cremation	1.10		
Services in execution of assignment	75.00		
Expenses in execution of assignment	27.00	176.10	
The Western Pacific Railroad Company, First Mortgage			
Services as Attorney in fact for Samuel Armstrong, Individual Trustee	200.00		
Services as Registrar	150.00		
Services in execution of release from Mortgage	100.00		
Expenses in execution of release from Mortgage	40.00		
Services account register and transfer of bonds	10.20		
Services account authentication of bonds	26.00		
Expenses postage and insurance	12.05	538.25	714.35
Crocker First National Bank, San Francisco, Trustee			
The Western Pacific Railroad Company, First Mortgage			
Services as Trustee	2,464.50		
Services in execution of release from Mortgage	150.00		
Expenses in execution of release from Mortgage	155.00	2,769.50	
Services account safekeeping Sacramento Northern Railroad Bonds	2,606.74		5,376.24
Irving Trust Company, New York, Trustee			
The Western Pacific Railroad Company			
General and Refunding Mortgage			
Services as Trustee	612.50		
Expenses as Trustee	208.64	821.14	

Defendant's Exhibit No. 25—(Continued)

Fees and expenses of financial institutions as Trustees, Agents, etc. (Cont.)			
Services in execution of release from Mortgage	50.00		
Expenses in execution of release from Mortgage	29.32	79.32	900.46
Central Hanover Bank and Trust Company, New York			
Equipment Trust Series of 1937			
Services as Trustee	225.00		
Services as Registrar	100.00		
Services account retirement of certificates	193.75		
Services paying interest	46.31	565.06	
Equipment Trust Series of 1941			
Services as Trustee	235.00		
Services as Registrar	100.00		
Services account retirement of Certificates	331.25		
Services paying interest	46.38	712.63	1,277.69
Legal services and expenses, exclusive of services of General Counsel for Trustees and his office, and of services and expenses of the regular legal staff of the Company, as follows:			
Fabian and Clendennin, Salt Lake City, Utah	Services	1,200.00	
	Expenses	.83	1,200.83
Morley, Griswold and Milton J. Reinhart, Elko, Nevada	Services	160.00	
	Expenses	36.32	196.32
Farnsworth and Van Cott, Salt Lake City, Utah	Services	51.00	
	Expenses	1.50	52.50
J. S. Halley, Reno, Nevada	Services		75.00
J. E. Robinson, Reno, Nevada	Services		100.00
George Lalise, Reno, Nevada	Services		50.00
S. C. Young, Quincy, California	Services	75.00	
	Expenses	23.81	98.81
Hinsdale, Otis, Johnson and Ware, Sacramento, California	Services	2,350.00	
	Expenses	133.62	2,483.62
Neumiller and Ditz, Stockton, California	Services	635.00	
	Expenses	117.98	752.98
Seth Milligan, Gridley, Calif.	Services		25.00

Defendant's Exhibit No. 25—(Continued)

Legal Services and Expenses, etc. (Cont.)			
Jesse E. Nichols, Oakland, Calif.	Services	100.00	
	Expenses	14.00	114.00
Hynes, Browser and Ottonello, Oakland, California	Services		200.00
Brown, Rosson, and Gillis, Oakland, California	Services	2,935.00	
	Expenses	51.12	2,986.12
McCutcheon, Thomas, Matthew, Griffiths and Green, San Francisco	Expenses		220.17
Dunne and Dunne, San Francisco	Services	6,375.00	
	Expenses	167.34	6,542.34
Moran and Mielke, San Francisco	Services	750.00	
	Expenses	201.92	951.92
A. C. Wollenberg, San Francisco	Services	475.00	
	Expenses	39.00	514.00
Miscellaneous			2,087,921.13
Total Audited Vouchers			$35,127,996.71

Miscellaneous voucher payments include items of expenditure for the following, among various others:

Gasoline
Memberships in railroad, commercial and civic associations and organizations
Screws, nails, etc.
Postage, telephone, telegraph, electric light and power service and water service
Stationery and printing, blueprints, printers supplies, etc.
Hardware
Stockyard service charges at various points
Lighting supplies, electric supplies and materials
Locomotive repair parts ordinary
Car repair parts ordinary
Track fastenings ordinary
Frogs and switches ordinary
Paints, oils, varnishes and glass
Castings—Steel, iron, brass and bronze
Building materials and supplies
Sand and gravel
Payments to foreign lines (other than those hereinbefore specified for repairs to Western Pacific equipment)
Payments to other lines and terminals for switching
Advertising, miscellaneous
Freight pick-up and delivery service and drayage at various points
Pipe fittings ordinary
Auto supplies and parts
Explosives
Metals for various purposes
Car seals, and various other car and train supplies
Signal materials and supplies ordinary

Defendant's Exhibit No. 25—(Continued)

Furniture
Office Supplies
Services of various companies for checking and handling freight
Track motor cars and parts
Water pumps and parts
Dry goods
Rubber goods
Inspection of lumber, ties, nails and other materials
Repairs to miscellaneous buildings
Fire protection equipment
Freight charges on company material in freight forwarder's pool shipments
Marine and ship chandlery supplies

Accounting Department
San Francisco, California

Defendants' Exhibit No. 25—(Continued)

EXHIBIT 2

T. M. Schumacher and S. M. Ehrman
Trustees in Reorganization

The Western Pacific Railroad Company—Debtor

Revenues, Expenses and Income
Period January 1, 1944, to December 31, 1944, Inclusive

Month	Total Railway Operating Revenues	Total Railway Operating Expenses	Tax Accruals	Hire of Equipment and Joint Facility Rents—Net Debit	Net Railway Operating Income	Other Income (Accruals)	T In (Acc
	(1)	(2)	(3)	(4)	(5)	(6)	(
January	$ 4,177,091.30	$ 2,380,876.52	$1,061,266.41	$ 180,619.36	$ 554,329.01	$ 35,903.85	$ 59
February	2,755,104.81	2,307,457.74	143,692.69	63,720.66	240,233.72	41,205.40	28
March	4,558,775.54	2,756,181.32	1,104,906.59	171,733.96	525,953.67	46,605.59	57
April	4,681,363.78	2,508,098.49	1,465,859.79	132,631.21	574,774.29	42,366.45	61
May	4,654,846.84	2,586,478.10	1,360,098.80	91,676.69	616,593.25	42,312.07	65
June	3,939,439.05	2,674,229.12	440,527.28	104,652.08	720,030.57	46,772.14	76
July	3,605,985.91	2,623,915.60	162,169.10	130,738.78	669,162.43	34,505.00	70
August	4,291,967.85	2,899,031.99	725,399.13	153,598.15	513,938.58	38,716.80	55
September	5,120,837.60	2,859,702.73	1,287,199.61	201,723.17	772,212.09	38,295.27	81
October	5,446,573.73	2,936,269.89	1,483,897.75	247,287.72	779,118.37	35,010.85	81
November	4,961,522.43	2,779,702.91	195,786.07	216,637.28	1,769,396.17	54,866.65	1,82
December	4,656,437.87	2,885,469.49	*1,088,328.78*	261,433.36	2,597,863.80	29,901.89	2,62
Jan. to Dec., Inclusive	$52,849,946.71	$32,197,413.90	$8,362,474.44	$1,956,452.42	$10,333,605.95	$486,461.96	$10,82

Italics denote red figures.

-(Continued)

Ehrman
ion
pany—Debtor
ıcome
1, 1944, Inclusive

Other Income Accruals)	Total Income (Accruals)	Miscellaneous Deductions From Income (Accruals)	Net Income
(6)	(7)	(8) (See Note)	(9) (See Note)
35,903.85	$ 590,232.86	$ 32,528.61	$ 557,704.25
41,205.40	281,439.12	68,241.62	213,197.50
46,605.59	572,559.26	50,132.96	522,426.30
42,366.45	617,140.74	43,140.72	574,000.02
42,312.07	658,905.32	55,849.45	603,055.87
46,772.14	766,802.71	45,182.63	721,620.08
34,505.00	703,667.43	54,491.78	649,175.65
38,716.80	552,655.38	36,955.94	515,699.44
38,295.27	810,507.36	50,975.78	759,531.58
35,010.85	814,129.22	11,459.17	802,670.05
54,866.65	1,824,262.82	42,245.35	1,782,017.47
29,901.89	2,627,765.69	15,361.41	2,612,404.28
486,461.96	$10,820,067.91	$506,565.42	$10,313,502.49

Note: Columns 8 and 9 exclude accruals for deductions from income for interest not being paid by Reorganization Trustees and amortization of discount on First Mortgage Bonds, as follows:

Month	Amount
January	$ 275,282.91
February	274,335.31
March	275,282.93
April	274,809.10
May	275,282.92
June	274,809.27
July	275,282.92
August	275,282.94
September	274,809.09
October	275,282.92
November	274,809.10
December	275,283.09
Jan. to Dec., Inclusive	$3,300,552.50

Defendant's Exhibit No. 25—(Continued)

EXHIBIT No. 3

T. M. Schumacher and Sidney M. Ehrman,
Trustees in Reorganization of
The Western Pacific Railroad Company

Changes in Capital Accounts Due to Acquisitions of Property, Improvements and Retirements as reported to the Interstate Commerce Commission

Period January 1st, 1944, to December 31st, 1944

Year	Month	Acquisitions	Retirals	Net Additions
		Road and Equipment		
1944	January	$ 395,918.14	$ *4,969.20*	$ 390,948.94
1944	February	131,231.24	*17,183.79*	114,047.45
1944	March	226,630.35	*35,042.50*	191,587.85
1944	April	266,550.07	*5,699.88*	260,850.19
1944	May	209,179.63	*7,425.63*	201,754.00
1944	June	340,260.18	*11,153.13*	329,107.05
1944	July	1,737,506.09	*20,870.87*	1,716,635.22
1944	August	1,292,370.64	*16,127.40*	1,276,243.24
1944	September	215,981.78	*30,967.46*	185,014.32
1944	October	303,027.78	*16,475.25*	286,552.53
1944	November	795,855.66	*79,621.41*	716,234.25
1944	December	254,475.78	*28,400.03*	226,075.75
January 1st to December 31st, 1944, Incl.		$6,168,987.34	$ *273,936.55*	$5,895,050.79

Defendant's Exhibit No. 25—(Continued)

Miscellaneous Physical Property

1944	January	$ 58.69	$	$ 58.69
1944	February	2,662.74	*14,059.02*	*11,396.28*
1944	March	22,576.04	.....	22,576.04
1944	April	1,253.74	.....	1,253.74
1944	May	3,241.87	.....	3,241.87
1944	June	32,336.27	.....	32,336.27
1944	July	11.24	.....	11.24
1944	August	354.22	.....	354.22
1944	September	6,838.60	.....	6,838.60
1944	October	5,074.43	*1,008.51*	4,065.92
1944	November	23,399.80	*500.00*	22,899.80
1944	December	44.45	*3.29*	41.16
January 1st to December 31st, 1944, Incl.		$ 97,852.09	$ *15,570.82*	$ 82,281.27

Italics denote red figures.

Investments in Affiliated Companies

Capital Stock

Year	Month	Acquisitions	Retirals	Net Additions
1944	April	$ 300,000.00	$	$ 300,000.00
January 1st to December 31st, 1944, Incl.		$ 300,000.00	$	$ 300,000.00

Notes

1944	November	$	$ *508,278.61*	$ *508,278.61*
January 1st to December 31st, 1944, Incl.		$	$ *508,278.61*	$ *508,278.61*

Advances

1944	January	$ 266.93	$ *888.31*	$ *621.38*
1944	February	266.93	*23,925.25*	*23,658.32*
1944	March	266.93	*230,000.00*	*229,733.07*
1944	April	266.93	.....	266.93
1944	May	266.93	.....	266.93
1944	June	220,266.93	.....	220,266.93
1944	July	266.93	.....	266.93
1944	August	266.93	*198.89*	68.04
1944	September	266.93	.....	266.93
1944	October	266.93	*888.31*	*621.38*
1944	November	266.93	.....	266.93
1944	December	266.93	*303,310.86*	*303,043.93*
January 1st to December 31st, 1944, Incl.		$ 223,203.16	$ *559,211.62*	$ *336,008.46*
Total Investments in Affiliated Companies		$ 523,203.16	$*1,067,490.23*	$ *544,287.07*

Defendant's Exhibit No. 25—(Continued)

Other Investments

Capital Stock

1944 October	$	$ *100.00*	$ *100.00*
January 1st to December 31st, 1944, Incl.	$	$ *100.00*	$ *100.00*

Notes

1944 June	$ 226.21	$	$ 226.21
1944 September	81.59	.....	81.59
1944 November	.....	*27.20*	*27.20*
January 1st to December 31st, 1944, Incl.	$ 307.80	$ *27.20*	$ 280.60
Total Other Investments	$ 307.80	$ *127.20*	$ 180.60

Italics denote red figures.

Recapitulation

January to December, 1944, Inclusive

Year Month	Acquisitions	Retirals	Net Additions
Total Acquisitions			$6,790,350.39
Total Retirements			*1,357,124.80*
Grand Total—Net Additions			$5,433,225.59

Italics denote red figures.

[Endorsed]: Filed Feb. 11, 1949.

DEFENDANT'S EXHIBIT No. 26

Allan P. Matthew,
1500 Balfour Building,
San Francisco 4, California.

Original Filed May 21, 1945, With Clerk, U. S. Dist. Court, San Francisco.

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER APPROVING AND CONFIRMING NINTH AND FINAL REPORT AND ACCOUNTING BY THE TRUSTEES OF THE PROPERTY OF THE DEBTOR, APPROVING AND CONFIRMING THEIR ACTS AND ACCOUNTS, DISCHARGING THEM AS TRUSTEES AND EXONERATING THEIR BONDS

The Ninth and Final Report and Accounting by T. M. Schumacher and Sidney M. Ehrman, the Trustees of the properties of the Debtor above named, and the petition of said Trustees for approval of their acts and accounts, for their discharge as Trustees and for the exoneration of their

Defendant's Exhibit No. 26—(Continued)

bonds, filed herein on April 30, 1945, came on regularly for hearing on May 21, 1945, and it appearing and the Court finding:

1. That said Trustees have given notice of hearing by mailing and publication as directed by the order of this Court made on April 30, 1945;

2. That the allegations of said Ninth and Final Report and Accounting and of said petition are true;

3. That as directed by the order of this Court made on November 27, 1944, and as requested by the Reorganization Committee, said Trustees executed, acknowledged and delivered to the Debtor Company, prior to December 28, 1944, a deed substantially in the form attached to said order as Exhibit "A," releasing and transfering to the Debtor Company as of 12:01 a.m., Pacific War Time, on December 29, 1944, title to all property, rights and interest of every kind and description held by them as such Trustees, thereupon and thereby divesting the Trustees of all title to all properties and assets held by them as Trustees in this proceeding and vesting such title to all thereof in the Debtor Company;

4. That in exchange for said deed, referred to in the immediately preceding paragraph hereof, said Trustees received from the Debtor Company an agreement, substantially in the form of Exhibit "D" attached to said order of November 27, 1944,

Defendant's Exhibit No. 26—(Continued)

whereby the Debtor Company assumed and agreed to perform all contracts, leases, agreements, liabilities and obligations of the Trustees remaining in effect on December 31, 1944;

5. That as authorized and directed by said order of this Court made on November 27, 1944, said Trustees continued their control and operation of the Debtor's business and properties until 12:00 o'clock midnight, Pacific War Time, on December 31, 1944, whereupon all possession, control and operation of said business and properties by the Trustees ceased and terminated, and possession, control and operation of all said business and properties were transferred to and accepted by the Debtor Company;

6. That at or prior to the end of the year 1944 said Trustees divested themselves of, and transferred and conveyed to and vested in the Debtor Company, all title to and all possession, control and operation of the business and properties theretofore held by the Trustees in this proceeding, all as required by orders of this Court; and

7. That all duties, obligations, services and responsibilities of said Trustees in this proceeding have been duly and fully performed and completed, save only the execution of any further instruments of conveyance, transfer, substitution or release which may be requested by the Debtor Company for the purpose of implementing or consummating the complete and effective transfer to the Debtor Com-

Defendant's Exhibit No. 26—(Continued)

pany of all of the business, properties, assets, contracts, agreements, leases, actions, rights and claims heretofore held by said Trustees in this proceeding.

Now, Therefore, the Court being fully advised in the premises, It Is Hereby Ordered, Adjudged and Decreed:

1. That said Ninth and Final Report and Accounting by said Trustees and all of their acts and accounts alleged and set forth in said Ninth and Final Report and Accounting be and the same are hereby approved and confirmed;

2. That said Trustees be, and they hereby are, discharged, reserving, however, to the Trustees, jointly and to each of them separately, and to the survivor of them, the power and authority hereafter to execute and deliver such instruments of conveyance, transfer, substitution or release as may be requested by the Debtor Company from time to time in order to implement, consummate, confirm or further evidence the complete and effective release, transfer and conveyance to the Debtor Company of all the business, properties, assets, contracts, agreements, leases, actions, rights and claims held by the Trustees in this proceeding; provided, however, that said Trustee shall have the right, but shall not be required, to submit any such instruments to this Court for approval prior to execution and delivery thereof, jurisdiction being hereby reserved by the Court for such purposes; and

Defendant's Exhibit No. 26—(Continued)

3. That notwithstanding their discharge said Trustees be, and they hereby are, authorized, jointly and separately, at any time upon the request of the Debtor Company, to cooperate with the Debtor Company in any and every suit, litigation, proceeding, controversy or compromise in which their cooperation as such Trustees may appear necessary or desirable; and

4. That the bonds heretofore given by said Trustees severally for the faithful discharge of their duties and responsibilities be, and the same hereby are, exonerated, and said Trustees and Fidelity and Deposit Company of Maryland, the surety upon each of said bonds, be and they hereby are released from all liability on said bonds.

Dated: May 21, 1945.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Feb. 11, 1949.

DEFENDANT'S EXHIBIT No. 28

Allan P. Matthew,
1500 Balfour Building,
San Francisco 4, California.

Filed Feb. 1944
C. W. Calbreath, Clerk

(Original filed Feb. 21, 1944.
With Clerk, U. S. Dist. Court San Francisco.)

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER PROVIDING FOR HEARING UPON PETITION FOR AUTHORITY TO ESTABLISH RESERVE FUND FOR CONTINGENT TAX LIABILITIES

Upon due consideration of the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the Debtor above named, for authority to establish a reserve fund for contingent tax liabilities,

It Is Hereby Ordered as follows:

1. That said petition be and it hereby is set for

hearing before this Court on March 3, 1944, at 10 o'clock a.m.

2. That said Trustees be and they hereby are directed to give notice of the said hearing substantially in the following form:

Legal Notice

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

Notice of Hearing Upon Petition for Authority to Establish Reserve Fund for Contingent Tax Liabilities

Notice Is Hereby Given, pursuant to the order of the above-named court, that a hearing will be held before the Honorable A. F. St. Sure, Judge of the above-entitled court, at the Court Room of the said Judge in the United States Post Office and Court House Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on March 3, 1944, at 10 o'clock, a.m., upon the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization of The Western Pacific Railroad Company, the Debtor above

named, for authority to establish a reserve fund for contingent tax liabilities.

T. M. SCHUMACHER and
SIDNEY M. EHRMAN,
Trustees in Reorganization of The Western Pacific Railroad Company.

3. That the said notice be given by mailing prior to the 24th day of February, 1944, a copy of this order and a copy of said petition to the following parties:

1. Crocker First National Bank of San Francisco and Samuel Armstrong.
2. Irving Trust Company, as Trustee under Indenture securing Debtor's General and Refunding Mortgage Bonds.
3. A. C. James Co.
4. Reconstruction Finance Corporation.
5. The Railroad Credit Corporation.
6. The Chase National Bank of the City of New York, as Trustee under Agreement dated May 1, 1929, covering Equipment Trust Certificates.
7. The Western Pacific Railroad Corporation.
8. The Western Pacific Railroad Company.
9. The Western Realty Company.
10. Central Hanover Bank and Trust Company, as Trustee under Agreement dated February 1, 1937, covering Equipment Trust Certificates.
11. Central Hanover Bank and Trust Company,

as Trustee under Agreement dated August 1, 1941, covering Equipment Trust Certificates.

Dated: February 21, 1944.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANT'S EXHIBIT No. 29

M. C. Sloss,
Sloss, Turner & Finney,
1300, One Eleven Sutter,
San Francisco, California.

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER GRANTING PETITION OF INTERVENTION OF THE WESTERN PACIFIC RAILROAD CORPORATION

The petition of The Western Pacific Railroad Corporation, a corporation, an unsecured creditor and the sole stockholder of the above-named debtor, filed herein on December 7, 1939, praying that it be

permitted to intervene for all purposes in the above-entitled proceeding, came on regularly this day for hearing.

The petitioner appeared and was represented by M. C. Sloss and Sloss, Turner & Finney, its counsel. No person appeared in opposition to said petition or made any objection to the granting of the same. Evidence, oral and documentary, was adduced in support of said petition from which it appeared and the Court finds that service of said petition and of notice of the time and place fixed for the hearing of the same by the order of this Court made and filed December 7, 1939, was made upon all persons named in said order, and in accordance therewith; that the allegations of said petition are true, and that good and sufficient cause exists for granting said petition and permitting the intervention sought thereby;

Wherefore, in consideration of the law and the premises, It Is Hereby Ordered that said petition be and the same is hereby granted; that said The Western Pacific Railroad Corporation be and it is hereby granted leave to intervene, for all purposes, in the above-entitled proceeding, and that it be and it is hereby admitted to said proceeding as and constituted a general party therein, with the right, as such party, to receive notice, to file notices, pleadings and other papers, to be heard by testimony or argument, and to take such other action in said proceeding as a party thereto, as it may deem proper,

but without prejudice to any action heretofore had or taken in said proceeding.

Dated: December 11, 1939.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANTS' EXHIBIT No. 30

Original Filed Mar. 18, 1946.
With Clerk, U. S. Dist. Court, San Francisco.

In the District Court of the United States for the Northern District of California, Southern Division

No. 26591-S

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

PETITION OF REORGANIZATION COMMITTEE FOR APPROVAL OF THEIR EXPENSES AND FOR A FINAL ORDER DISCHARGING THE COMMITTEE AND TERMINATING THE PROCEEDINGS

Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee designated to put into effect and carry out the plan of reorganization of The Western

Defendants' Exhibit No. 30—(Continued)

Pacific Railroad Company, debtor above named, hereby represent to the Court and petition as follows:

1. The designation of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, petitioners herein, as members of the Reorganization Committee of The Western Pacific Railroad Company, was approved by this Court by order entered October 11, 1943, confirming the plan of reorganization of said Company, and petitioners were directed to put into effect and carry out the plan of reorganization and the orders of the Court relative thereto under and subject to the supervision and control of the Court.

2. Pursuant to said order, petitioners, as such Reorganization Committee, proceed to carry out and put into effect the plan of reorganization under the supervision and control of the Court. By a report filed November 5, 1943, petitioners reported to the Court as to the selection of officers and counsel, designation of mailing address and adoption of by-laws for the Reorganization Committee; and by various petitions herein and testimony at hearings before the Court, petitioners have from time to time reported to the Court as to the various steps taken in carrying out and putting into effect the plan of reorganization.

3. By an order entered November 27, 1944, this Court fixed the date for the consummation of the plan of reorganization, directed the revesting of the

Defendants' Exhibit No. 30—(Continued)

properties of the debtor in The Western Pacific Railroad Company and authorized and directed the carrying out of the plan. Pursuant to the provisions of said order:

(a) The Certificate of Amendment to the Articles of Incorporation of The Western Pacific Railroad Company was, on December 22, 1944, filed with the Secretary of State of the State of California, and subsequently copies thereof were filed, as required by law, with the Secretaries of State of Nevada and Utah and in the several counties of the States of California, Nevada and Utah in which the railroad and properties of the debtor are located;

(b) T. M. Schumacher and Sidney M. Ehrman, Trustees in reorganization, continued their operation and control of the business and properties of the railroad company until twelve (12) o'clock midnight, December 31, 1944, and thereupon the control and operation of said business and properties by such Trustees ceased and The Western Pacific Railroad Company resumed the control and operation of its business and properties;

(c) T. M. Schumacher and Sidney M. Ehrman, Trustees in reorganization, executed, acknowledged and delivered to The Western Pacific Railroad Company the deed provided for in paragraph 4 of the order entered November 27, 1944;

(d) Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage, dated June 26, 1916, executed by The Western Pacific Railroad Company to First

Defendants' Exhibit No. 30—(Continued)

Federal Trust Company and Henry E. Cooper, Trustees (Crocker First National Bank of San Francisco and Samuel Armstrong, Successor Trustees), executed, acknowledged and delivered to The Western Pacific Railroad Company the deed of release and satisfaction of mortgage described in paragraph 5 of said order and performed all other acts directed to be performed by them in said paragraph 5;

(e) Irving Trust Company of New York, as Trustee under the General and Refunding Mortgage, executed by The Western Pacific Railroad Company February 29, 1932, as of January 1, 1932, to the Chase National Bank of the City of New York, Trustee (Irving Trust Company, Successor Trustee), executed, acknowledged and delivered to The Western Pacific Railroad Company the deed of release and satisfaction of mortgage described in paragraph 6 of said order and performed all other acts directed to be performed by them in said paragraph 6;

(f) The Western Pacific Railroad Company and its officers executed and delivered the Agreements and Indentures described in paragraph 8 of said order;

(g) The Western Pacific Railroad Company has assumed obligations and agreed to perform contracts, leases and agreements as provided in paragraph 9 of said order, and has made payments in various amounts of expenses and costs of administration of this proceeding, allowances, and other

Defendants' Exhibit No. 30—(Continued)

rentals, costs and expenses as provided in paragraph 10 of said order;

(h) The Western Pacific Railroad Company, on December 29, 1944, executed, issued and delivered, or caused to be made available for delivery, to the holders of the Company's existing First Mortgage Bonds and to the Company's secured creditors the new securities of the reorganized Company and made payments in cash to said bondholders and secured creditors, all in accordance with and as provided in paragraph 11 of said order;

(i) Pursuant to the provisions of paragraph 14 of said order, the Reorganization Committee caused to be prepared, published and mailed a notice to the holders of First Mortgage Bonds and secured notes of The Western Pacific Railroad Company, and in all other respects have put into effect and carried out the plan of reorganization and the orders of this Court relative thereto.

4. Pursuant to the arrangements made by the Reorganization Committee with Guaranty Trust Company of New York for the services of said Company as Depositary and Exchange Agent, and the letter of instructions from The Western Pacific Railroad Company relating to the deposit and exchange of securities (all as reported to this Court at a hearing on November 27, 1944) said Guaranty Trust Company of New York has made substantial and satisfactory progress in effecting the delivery and exchange of securities and the payment of cash, as directed in paragraph 11 of said order entered

Defendants' Exhibit No. 30—(Continued)

November 27, 1944, and will continue to act in carrying out such directions. Said Guaranty Trust Company of New York has reported to petitioners the securities and cash delivered and exchanged to the close of business on January 31, 1946, and the securities and cash remaining to be delivered. A copy of the report of said Guaranty Trust Company is annexed hereto as Exhibit "A."

5. The available net income of the debtor and its subsidiaries for the years 1939 to 1943, inclusive, as determined and found by this Court by order filed September 25, 1944, has been applied by The Western Pacific Railroad Company as directed in ordering paragraphs 5 and 6 of said order. Pursuant to ordering paragraph 17 of the order of this Court filed November 27, 1944, The Western Pacific Railroad Company has determined and applied the available net income of the Company for the calendar year 1944 in accordance with the provisions of subdivision L of the plan of reorganization and the provisions of said paragraph 17.

6. T. M. Schumacher and Sidney M. Ehrman, Trustees in reorganization, rendered their final account to this Court on April 30, 1945, and petitioned for their discharge and the release of their sureties. By order of this Court filed May 21, 1945, the accounts of said Trustees were approved, the Trustees were discharged and their sureties were exonerated and released.

7. Appeals were taken to the Circuit Court of

Defendants' Exhibit No. 30—(Continued)

Appeals for the Ninth Circuit by The Railroad Credit Corporation and by The Western Pacific Railroad Corporation from certain provisions of this Court's order filed September 14, 1944, construing the plan of reorganization in various respects and reconciling inconsistencies therein. Said appeals were argued on July 31, 1945, and on December 7, 1945, the rulings from which appeals were taken were affirmed by said Circuit Court of Appeals.

8. By order entered herein May 21, 1945, this Court made allowances of compensation to various parties in interest and their counsel (other than the Reorganization Committee and its counsel) and authorized and directed The Western Pacific Railroad Company to pay forthwith each and all of the allowances so made and said allowances were thereafter duly paid by said Company as directed in said order.

9. By order entered herein December 10, 1945, this Court made allowances to Whitman, Ransom, Coulson & Goetz, and to Pillsbury, Madison and Sutro, as counsel for the Reorganization Committee, and authorized and directed The Western Pacific Railroad Company to pay forthwith said allowances, and said allowances have been paid in full by said Company pursuant to said order.

10. By order filed herein October 23, 1944, this Court made an allowance in the aggregate amount of $197,111.23 for certain expenses incurred and to be

Defendants' Exhibit No. 30—(Continued)

incurred in connection with the proceedings and plan of reorganization by the Reorganization Committee (exclusive of the fees and expenses of the Committee's counsel). Of said allowance, $60,638.48 was ear-marked to provide for a contingent tax liability if payment thereof should be required, and $136,472.75 was allowed for other expenses of the Reorganization Committee without limitation as to individual amounts with respect to component items. Said order also directed the Trustees of the debtor's estate to reimburse the Reorganization Committee and its officers and members out of the debtor's estate for certain expenses theretofore incurred by them in the aggregate amount of $3,144.00, the detail of which was submitted to the Court upon the hearing, and provided that further payments of the actual and reasonable expenses of the Reorganization Committee (whether incurred before or after the date of said order) should be made out of the debtor's estate by the Trustees thereof so long as said Trustees were in control of the same, and thereafter by the reorganized company in accordance with the procedure directed in said order. Said order provided further that all further payments and advances to the Reorganization Committee under the provisions of the order should be subject to final approval and allowance by the Court at such time or times, or upon such showing as the Court may direct. There is submitted herewith and made a part hereof as Exhibit "B" a summary of the expenses of the Reorganization Committee, its officers and members, incurred in carrying out and

Defendants' Exhibit No. 30—(Continued)

putting into effect the plan of reorganization under the supervision and control of this Court (exclusive of the fees and expenses of the Committee's counsel). The detail of these expenses will be submitted at the hearing upon this petition. It is not anticipated that there will be any further expenses chargeable to the Committee, although provision should be made in the order upon this petition for such expenses and for the contingency of the assertion of the tax liabilities referred to above or other items not presently known. The expenses shown in Exhibit "B" were necessarily incurred by the Reorganization Committee, its officers and members, in carrying out and putting into effect the plan of reorganization and the Committee believes that said expenses were in every case reasonable in amount and within the allowance authorized by the order of this Court entered October 23, 1944.

Wherefore, your petitioners pray for an order of this Court

1. Determining that the plan of reorganization of The Western Pacific Railroad Company has been carried out and put into effect by petitioners as the Reorganization Committee in this proceeding in accordance with the provisions of the plan of reorganization and the orders and directions of this Court;

2. Approving and allowing the payments and advances to the Reorganization Committee as set forth in Exhibit "B" annexed hereto;

Defendants' Exhibit No. 30—(Continued)

3. Providing that The Western Pacific Railroad Company shall reimburse, indemnify and hold harmless the members of the Reorganization Committee, or any person employed by them, against any loss or expense arising out of or in connection with carrying out and putting into effect in good faith the plan of reorganization, including without limitation of the generality of said provision the contingent tax liability described in the order of the Interstate Commerce Commission of September 7, 1944, and allowed in the order of this Court entered October 23, 1944;

4. Discharging petitioners as members of the Reorganization Committee of The Western Pacific Railroad Company;

5. Terminating these proceedings, subject to such reservations of jurisdiction as may be appropriate, except as otherwise provided in the order of this Court entered May 21, 1945, discharging the Trustees in reorganization; and

6. Granting such other and further relief as may be proper in the premises.

Respectfully submitted,

FELIX T. SMITH,

PILLSBURY, MADISON AND SUTRO.

WHITMAN, RANSOM, COULSON & GOETZ,

Counsel for petitioners.

Defendants' Exhibit No. 30—(Continued)

State of New York,
County of New York—ss.

Robert E. Coulson, being duly sworn, deposes and says:

That he is a member of the Reorganization Committee of The Western Pacific Railroad Company; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

ROBERT E. COULSON.

Sworn to before me this 5th day of March, 1946.

/s/ BEATRICE C. CUNNINGHAM,
Notary Public,
New York County.

Commission expires March 30, 1946.

Defendants' Exhibit No. 30—(Continued)

EXHIBIT "A"

Report of Securities Surrendered, Securities Issued, Cash Disbursed and Securities to Be Surrendered and Securities and Cash to Be Disbursed Thereagainst, as of the Close of Business January 31, 1946, Under The Western Pacific Railroad Company Plan of Reorganization Effective as of January 1, 1939

Securities of The Western Pacific Railroad Company Issued and Cash Disbursed

Securities Surrendered	Principal Amount	Principal Amount of General Mtge. 4½% Income Bds. Ser. "A" Due 1/1/2014		Principal Amt. First Mtge. 4% Bonds Ser. "A" Due 1/1/1974	Shares of Pfd. Stk. Ser. "A"		Shares of Common Stock		Special Cash Payment	Cash Adjustment on Gen. Mtge. 4½% Income Bd. Ser. "A"	Cash Adjustment on Pfd. Stk. Ser. "A"	Cash Adjustment on Common Stock
		Fully Reg. Bonds	Bearer Serip		Full Shares	Bearer Serip 5ths	Full Shares	Bearer Serip 100ths				
The Western Pacific Railroad Company First Mortgage 5% Gold Bonds due March 1, 1946, Fully Reg. and with Cpn. due 3/1/34 and s/c/a or affidavit & indemnity agreement for missing coupons	$48,802,000	$19,512,900	$ 7,900		292,735	385	227,149	756,340		$4,392,180.00	$4,629,357.87	$2,051,148.21
Ditto with Cpn. due 9/1/35 and s/c/a	10,000	4,000			60	33	560			900.00	948.60	302.04
Coupons due 3/1/34 and 9/1/34 detached from $10,000 principal amount of The Western Pacific Railroad Company First Mtge. 5% Gold Bonds due 3/1/46	500					8	740					78.66
Claim of Reconstruction Finance Corporation												
The Western Pacific Railroad Company 3% Certificates of Indebtedness due 12/1/1939	10,000,000											
The Western Pacific Railroad Company Notes due 3/ 1/35	699,000											
due 6/29/35	734,584											
due 8/ 1/35	136,045											
due 8/30/35	1,293,440											
due 3/25/36	99,931											
The Western Pacific Railroad Company Gen. & Ref. Mtge. Bonds Ser. "A" dated 1/1/32 due 1/1/57	8,750,000											
The Western Pacific Railroad Company Gen. & Ref. Mtge. Bonds Ser. "B" dated 7/1/32 due 1/1/57	2,000,000	1,185,200		$10,000,000	17,778		15,788			266,670.00	281,070.18	142,092.00
Claim of the Railroad Credit Corporation												
The Western Pacific Railroad Company Notes due 2/28/34	1,303,000											
due 5/24/35	1,293,439											
The Western Pacific Railroad Company Gen. & Ref. Mtge. Bonds Ser. "A" dated 1/1/32 due 1/1/57	2,000,000											
The Western Pacific Railroad Company Gen. & Ref. Mtge. Bonds Ser. "B" dated 7/1/32 due 1/1/57	2,000,000	154,000	80.00		2,416	2	34,988		$ 72.00	34,668.00	38,203.28	314,892.00
Claim of A. C. James Company												
The Western Pacific Railroad Company Notes due 3/28/35	4,504,000											
due 3/28/35	347,000											
due 5/31/35	148,800											
The Western Pacific Railroad Company Gen. & Ref. Mtge. Bds. Ser. "A" dated 1/1/32 due 1/1/57	4,249,500	163,600	80.00		2,567		37,635		100.00	36,828.00	40,584.27	338,715.00
Refund to the Company on 4,400 shs. of common stock which will not be issued												39.60
Total		$21,019,700	$8,060.00	$10,000,000	315,556	387	315,601	757,640	$172.00	$4,731,246.00	$4,990,164.20	$2,847,267.51

Defendants' Exhibit No. 30—(Continued)

EXHIBIT "A"—(Continued)

Payment of Interest and Dividends on the Western Pacific Railroad Company Securities Issued

	Interest Due for the Year 1944 on General Mtge. 4½% Income Bonds Ser. "A" Due 1/1/2014		Dividends on Preferred Stock Series "A"		Dividends on Common Stock
Paid on Bonds issued on exchanges	$5,836.50	Paid on Full Shares of Stock issued on exchanges	$4,110.00	Paid on Full Shares of Stock issued on exchanges	$1,828.50
Paid to City Bank Farmers Trust Company for Interest on Bonds represented by Outstanding Scrip	148.50	Paid to City Bank Farmers Trust Company for dividends on Full Shares represented by Outstanding Scrip	133.75	Paid to City Bank Farmers Trust Company for Dividend on Full Shares represented by Outstanding Scrip	756.75
				Paid to Company for Dividend on 4,400 shares which will not be issued	6.60
Total	$5,985.00		$4,243.75		$2,591.85

The Western Pacific Railroad Company Securities and Cash to Be Disbursed

Securities to Be Surrendered	Principal Amount		Principal Amount of 4½% General Mtge. Income Gold Bonds Ser. "A" Due 1/1/2014	Shares of Pfd. Stk. Ser. "A"	Shares of Common Stock	Cash Adjustment on Gen. Mtge. 4½% Income Gold Bds. Ser. "A" Due 1/1/2014	Cash Adjustment on Preferred Stock Ser. "A"	Cash Adjustment on Common Stock
The Western Pacific Railroad Company 1st Mtge. 5% Gold Bonds due 3/1/46	$478,100	(Approximately 9/10ths of 1% (which percentage) applies to the securities to be issued)	$191,240	2,868–6/10ths	2,232–727/1000ths	$43,029.00	$45,352.42	$20,094.39
To be delivered to The Railroad Credit Corporation					437			3,933.00
Total			$191,240	2,868–6/10ths	2,669–727/1000ths	$43,029.00	$45,352.42	$24,027.39

Interest to Be Disbursed on General Mtge. 4½% Income Gold Bonds Ser. "A" Due 1/1/2014	Dividends to Be Disbursed on Preferred Stock Series "A"	Dividends to Be Disbursed on Common Stock
(*)$8,685.00	(*)$10,770.00	(*)$6,053.32

(*) These balances include funds which are to be paid to City Bank Farmers Trust Company, scrip agent, on bonds, full shares of Preferred Stock, Series "A" and Common Stock issued by them against the combination of scrip certificates.

Defendants' Exhibit No. 30—(Continued)

EXHIBIT "B"

The Western Pacific Railroad Company
Summary of Expenses of
Reorganization Committee

	Amounts Estimated	Amounts Paid to Date
1. Charges and expenses of Trustees, Registrar and other agents in connection with issuance and exchange of securities	$ 36,625.00	$25,515.46
2. Charges of Trustees, Registrar and other agents in connection with exchange of temporary securities for definitives	19,700.00	9,536.57
3. Charges and expenses of Trustees under previously existing mortgages	11,564.50	6,677.59
4. Statutory fees in connection with mortgages	3,500.00	2,715.66
5. Statutory fees in connection with amendment of articles of incorporation	962.50	12.45
6. Stock Exchanges' listing fees	13,350.00	12,834.00
7. Cost of engraving and printing new securities	14,470.75	8,182.31
8. Cost of printing new mortgages, Reorganization Committee record and other documents	6,500.00	15,605.96
9. Traveling and other expenses of Reorganization Committee and their agents (other than Counsel)	8,000.00	3,834.16
10. Miscellaneous	21,800.00	2,664.68
Total, exclusive of amount for contingent tax liabilities	$136,472.75	$87,578.84
11. Amount for contingent tax liabilities	60,838.48	
Total authorization under Court Order filed October 23, 1944	$197,111.23	

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANTS' EXHIBIT No. 31

Original filed Mar. 18, 1946,
With Clerk, U. S. Dist. Court, San Francisco.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER PROVIDING FOR HEARING UPON PETITION OF REORGANIZATION COMMITTEE FOR APPROVAL OF THEIR EXPENSES AND FOR A FINAL ORDER DISCHARGING THE COMMITTEE AND TERMINATING THE PROCEEDINGS

Upon due consideration of the petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western Pacific Railroad Company, for an order approving their expenses, discharging the Committee and terminating the proceedings,

It Is Hereby Ordered as follows:

1. That said petition be and it hereby is set for hearing before this Court on March 28, 1946, at 10 o'clock a. m.

2. That said Reorganization Committee be and they hereby are directed to give notice of the said hearing substantially in the following form:

Legal Notice

In the District Court of the United States for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

NOTICE OF HEARING UPON PETITION OF REORGANIZATION COMMITTEE FOR APPROVAL OF THEIR EXPENSES AND FOR A FINAL ORDER DISCHARGING THE COMMITTEE AND TERMINATING THE PROCEEDINGS

Notice Is Hereby Given, pursuant to the order of the above-named Court, that a hearing will be held before the Honorable A. F. St. Sure, Judge of the above-entitled Court, at the Court Room of the Court House Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on March 28, 1946, at 10 o'clock a.m. upon the petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western

Pacific Railroad Company, for approval of their expenses and for a final order discharging the Committee and terminating the proceedings.

Whitman, Ransom, Coulson & Goetz
Counsel for the Reorganization Committee
of
The Western Pacific Railroad Company

3. That the said notice be given by mailing or delivering prior to the 20th day of March, 1946, a copy of this order and copy of said petition, together with copies of the Exhibits submitted therewith, to the following parties:

1. Crocker First National Bank of San Francisco and Samuel Armstrong.

2. Irving Trust Company.

3. A. C. James Co.

4. Reconstruction Finance Corporation.

5. The Railroad Credit Corporation.

6. The Chase National Bank of the City of New York.

7. The Western Pacific Railroad Corporation.

8. The Western Pacific Railroad Company.

9. The Western Realty Company.

10. Allan P. Matthew, as counsel for the Reorganization Trustees.

11. The Institutional Bondholders Committee (Cravath, Swaine & Moore, counsel).

12. T. M. Schumacher, Esq.

13. Sidney M. Ehrman, Esq.

14. Guaranty Trust Company of New York.

Dated, March 18, 1946.

/s/ A. F. ST. SURE.

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANTS' EXHIBIT No. 32

Original Filed Mar. 28, 1946.
With Clerk, U. S. Dist. Court, San Francisco.

In the District Court of the United States for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

FINAL ORDER

The petition filed March 18, 1946, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the duly constituted Reorganization Committee designated to carry out the plan of reorganization of The Western Pacific Railroad Company above

Defendants' Exhibit No. 32—(Continued)

named, for an order approving their expenses, discharging the Committee and terminating the proceedings duly came on to be heard on March 28, 1946, and was heard and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed March 18, 1946, and that all of the allegations and representations contained in the petition are true. The Court further finds and concludes:

(a) All of the business, assets and property constituting the debtor's estate of every kind and character, real, personal and mixed, and all of the right, title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees in Reorganization, vested in and became the absolute property of The Western Pacific Railroad Company on December 29, 1944, free and clear of all rights, claims, interests, liens and encumbrances of the former stockholders and creditors of the debtor company and all other persons, except as otherwise provided and directed in the order of this Court in this proceeding dated and entered November 27, 1944; and The Western Pacific Railroad Company is released and discharged forever from all of its debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented and allowed in these proceedings, and said reorganized Company is free and clear of all such rights, claims, interests, liens, encumbrances, debts, obligations and

Defendants' Exhibit No. 32—(Continued)

liabilities, except as otherwise expressly provided in said order.

(b) The plan of reorganiaztion of The Western Pacific Railroad Company, which was duly confirmed by order of this Court dated and entered October 11, 1943, has been fully and properly carried out and put into effect in accordance with the terms and provisions of said plan and the orders of this Court heretofore entered in this proceeding; all acts and things required by the order of this Court dated and entered November 27, 1944, to be done or performed in order to consummate said plan, have been properly done or performed; the exchange of more than 99% of the principal amount of securities of the reorganized company has been effected in accordance with the plan of reorganization and the orders of this Court; and adequate and proper arrangements have been made for the exchange of the remainder of said securities.

(c) The reasonable and necessary expenses of the Reorganization Committee in carrying out and putting into effect the plan of reorganization, as disclosed by Schedule "B" annexed to the petition for this order, filed by said Committee and supported by evidence introduced at the hearing upon said petition, exclusive of the fees and expenses of the attorneys for said Committee, which have heretofore been approved and allowed by order of this Court filed December 10, 1945, are within the maximum limits approved by the Interstate Commerce

Defendants' Exhibit No. 32—(Continued)

Commission and authorized by this Court by order filed October 23, 1944, and should be finally approved and allowed.

(d) Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the duly constituted Reorganization Committee, have fulfilled their functions, faithfully performed their duties as members of the Reorganization Committee and now have no further duties and should be discharged.

(e) The plan of reorganization having been carried out and put into effect in accordance with the terms of the plan and the orders of this Court, a final decree should be entered in this cause, subject only to the reservations of the jurisdiction hereinafter made in this decree.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed:

1. That these proceedings be and they hereby are terminated subject only to the reservations of jurisdiction hereinafter made by the Court in this order, and the reservations of jurisdiction contained in the order of this Court discharging the Trustees of the Debtor's estate, dated and entered May 21, 1945.

2. That the expenses incurred by the Reorganization Committee in consummating, carrying out and putting into effect the plan of reorganization, as shown by the summary which is attached as Exhibit "B" to the petition for this order, filed by the Reorganization Committee, are hereby in all respects finally approved and allowed.

Defendants' Exhibit No. 32—(Continued)

3. That the actions of the Reorganization Committee in putting into effect and carrying out the plan of reorganization and the orders and directions of this Court relative thereto, are hereby approved, ratified and confirmed.

4. That Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the members of the Reorganization Committee herein, be and each of them is hereby discharged and relieved from all further duties herein.

5. That the order of this Court dated and entered November 27, 1944, in this proceeding shall remain in full force and effect in so far as said order has not been fully carried out.

6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before Decem-

Defendants' Exhibit No. 32—(Continued)

ber 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing any portion of the property, real, personal, or mixed, of any kind or character, now or hereafter belonging to or being in the possession of said Company, and from interfering with or taking steps to interfere with said Company, its officers and agents, or the operation of the lines of railroad or properties or the conduct of the business of said Company, by reason or on account of any obligation or obligations incurred by the Debtor or by the Trustees of the Debtor's estate on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), and all such persons, firms and corporations are also hereby restrained and enjoined from prosecuting against the Reorganization Committee, or any of them, their agents or attorneys, or against the Trustees of the Debtor's estate, or either of them, their agents or attorneys, or against the said Company, its agents or attorneys, any suit or proceeding arising out of, or based on, any act or acts done or omitted to be done in putting into effect and carrying out the plan of reorganization or any order of this Court entered in these proceedings.

7. The Western Pacific Railroad Company is hereby ordered and directed to reimburse, indemnify

Defendants' Exhibit No. 32—(Continued)

and hold harmless the members of the Reorganization Committee, or any of them, or any person employed by them, against any loss or expense arising out of or in connection with carrying out and putting into effect in good faith the plan of reorganization, including, without limitation of the generality of the foregoing, the contingent tax liability described in the order of the Interstate Commerce Commission of September 7, 1944, and allowed in the order of this Court, entered October 23, 1944.

8. The Western Pacific Railroad Company is hereby directed to give notice of the entry of this final order by mailing, postage prepaid, a copy of this order to the Trustees of the debtor's estate, the Reorganization Committee, each party of record in the reorganization proceedings before this Court or the Interstate Commerce Commission (or the counsel for each such party), and to cause promptly to be published a notice of the entry of this final order, setting forth in said notice the complete text of this order as certified by the clerk of this Court, such publication to be made once in each of the following: A daily newspaper of general circulation in the City of San Francisco, California; a daily newspaper of general circulation in the City of New York, New York; and a daily newspaper of general circulation in the City of Chicago, Illinois. Proof of such service and publication shall be filed by said Company with the Clerk of this

Defendants' Exhibit No. 32—(Continued)

Court within thirty days after the completion of the same.

9. The Court hereby reserves jurisdiction to take such further proceedings as may be proper or necessary to enforce and make effective any direction or other provision contained in the order of this Court, filed November 27, 1944, in this proceeding, to enforce and make effective the terms and provisions of this final decree and, if necessary, to give instructions to the Western Pacific Railroad Company, upon application by said Company, with respect to carrying out the provisions of said order filed November 27, 1944, in this proceeding, to ensuch further proceedings as may be proper or necessary in connection with any appeal or appeals prosecuted from any order of this Court, in this proceeding; and to take such further proceedings as may be necessary or proper in connection with any expenses or liabilities within the provisions of the order of this Court filed October 23, 1944, or otherwise, which may hereafter be asserted against the Reorganization Committee, its agents or attorneys, in connection with carrying out and putting into effect the plan of reorganization.

10. Except as hereby specifically provided in the reservations of jurisdiction set forth in Paragraph 9 above, and except as provided in the reservations of jurisdiction of the order of this Court filed May 21, 1945, discharging the Trustees of the debtor's estate, the reorganization proceedings in

Defendants' Exhibit No. 32—(Continued)

this Court, entitled in the Matter of the Western Pacific Railroad Company, Debtor, No. 26591-S, are hereby terminated and the case is closed.

Dated: March 28, 1946.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANTS' EXHIBIT No. 33

Reorganization Plan
of
The Western Pacific Railroad Company
(233 I.C.C. 409)

"P. The existing securities of the debtor shall be treated as follows:

* * *

5. The A. C. James Company shall receive in respect of its claim in the principal amount of $4,999,800, together with $1,249,950 of the interest accrued and unpaid thereon to January 1, 1939, $163,724 of income-mortgage 4½-percent bonds, series A; $256,756 of 5-percent preferred stock, series A; and 37,635 shares of common stock, being an amount of common stock which bears to the amount of common stock allotted to the claim of the Railroad Credit Corporation the same proportion that the principal amount of general and re-

funding mortgage bonds of the debtor held by the A. C. James Company as collateral for said claim, bears to the principal amount of such bonds held by the Railroad Credit Corporation as collateral for its claim."

(233 I.C.C. at 452)

Summary of result of foregoing treatment of A. C. James Company's claim:

Amount of Claim:		
Principal		$4,999,800
Interest to January 1, 1939		1,249,950
Total Claim		$6,249,750
Securities received:		
Income Bonds	$ 163,724	
Preferred Stock (at par)	256,756	
Common Stock (37,635 shares at $62)*	2,333,370	
Total Receipts		2,753,850
Deficiency		$3,495,900

* The price the Commission used in allocating common stock to Railroad Credit Corporation on account of its claim.

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANTS' EXHIBIT No. 34

Memorandum for Mr. Matthew
From Mr. Enersen
March 1, 1944

For Hearing March 3d

The Western Pacific Railroad Company
Reorganization

Contingent Tax Liability Reserve Fund

Memorandum for Hearing
March 3, 1944

Statement to the Court

1. Notice: Notice has been given as required by the order for hearing and an affidavit to that effect is on file.

2. Subject Matter: By this petition the Trustees seek authority to establish a contingent tax liability reserve fund in the amount of $7,100,000 to provide for the payment of any Federal income and excess profits tax liability which may be found due for the taxable year 1943.

3. Explanatory Statement: If the operations of the railroad of the Debtor should be subject to Federal income and excess profits taxes without regard to the income or loss of the affiliated corporations, the tax liability for 1943 would be approximately $7,000,000. For several years, however, consolidated Federal income and excess profits tax returns have been filed covering the operations of the railroad of the Debtor and the operations of

Defendants' Exhibit No. 34—(Continued)

all of the affiliated corporations, including The Western Pacific Railroad Corporation, the owner of all of the capital stock of the Debtor Company. During the taxable year 1943 certain of the affiliated corporations had very substantial net losses which more than offset the net income of the Debtor company. The largest net loss was that of the Western Pacific Railroad Corporation and its net loss was primarily attributable to the fact that upon confirmation of the plan of reorganization of the Debtor company the Debtor's corporate stock owned by the holding company became valueless. The Trustees have been advised by their accountants and tax counsel that there is no Federal income or excess profits tax due for the year 1943. However, the accountants and tax advisers have also stated that in view of the substantial amount involved the Commissioner of Internal Revenue may dispute their conclusions, with the result that there may be litigation regarding the matter. The Trustees believe that it is prudent to establish a funded reserve adequate to provide for the payment of the maximum possible tax which may be found to be due.

I desire to call Mr. Elsey to testify regarding this matter.

Testimony

1. What would be the maximum Federal income and excess profits tax liability for the Company if it filed a separate return for the year 1943, accord-

Defendants' Exhibit No. 34—(Continued)

ng to the computations of the Company's accountants and tax advisers?

Approximately $7,000,000.

2. Please explain to the Court the reason why it is believed no tax will be due under the consolidated return method of reporting the income and losses of the several affiliated corporations.

Consolidated returns have been filed by the debtor company and its affiliated corporations for several years, as permitted by the Federal income and excess profits tax laws. During the calendar year 1943 certain members of the group sustained very substantial losses, particularly The Western Pacific Railroad Corporation. That company sustained a very large loss when the stock of the debtor company owned by it became valueless upon confirmation of the Western Pacific reorganization plan in 1943. The aggregate net losses of the affiliated corporations for the year 1943 more than offset the net income of the debtor company for the same year. According to our advisers no tax is due for 1943 for that reason.

3. Do you believe, however, that it is prudent to establish a funded reserve to provide for the payment of any tax which may ultimately be found due?

Yes, I believe a funded reserve should be established for this purpose. Tax questions are seldom free from doubt. While we are confident

Defendants' Exhibit No. 34—(Continued)

of our conclusion in this instance, nevertheless, in view of the substantial amount here involved, the Internal Revenue Bureau may desire to litigate the matter. I think the debtor company should set aside out of 1943 earnings a sufficient amount so that it will be able to pay the highest possible tax which might conceivably be found due if the Commissioner should prevail in such litigation.

4. What is the attitude of the Trustees about the matter?

They have approved my recommendation that we establish a funded reserve of $7,100,000 out of 1943 earnings of the railroad of the Debtor.

5. How do you believe that the fund should be held?

I should think that it ought to be invested in United States Treasury securities.

Concluding Statement.

The Trustees are asking for an order authorizing the establishment of this reserve fund out of 1943 earnings of the railroad, the fund to be invested in United States Treasury securities. Counsel for the First Mortgage Trustees and counsel for the Reorganization Committee are present in Court and I believe they are prepared to state the position of their respective principals upon this matter.

B. E.

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANTS' EXHIBIT No. 15

Western Union
Telegram Form

1944, Jan. 9 AM 10 47

CDU264 CAK=CD NewYork NY 29 12 1P
Charles Elsey
Western Pacific Railroad Co
526 Mission St SFran

Letter twenty-fourth, telegram twenty-eighth, regarding federal tax matter. Very interesting. I approve making appropriate entries on books in December and your proposap create contingency fund and its investment in government securities and you are authorized instruct Matthew file petition with court for formal approval.

T M SCHIMACHER.

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANTS' EXHIBIT No. 35-B

Heller, Ehrman, White & McAuliffe
Attorneys and Counselors at Law
Nevada Bank Building
San Francisco

Subject: Your file 073

January 26, 1944

Mr. Charles Elsey
The Western Pacific Railroad Company
526 Mission Street
San Francisco, 5

Dear Mr. Elsey:

In reply to your letter of January 24, 1944, num-

bered as above, my approval is extended to the creation of a contingent fund and its investment in securities of the United States to provide for any possible adverse ruling on federal income taxes for the year 1943, such fund to be held until a final determination of the question in issue. If Mr. Schumacher concurs kindly instruct Mr. Matthew to obtain an order of court giving us authority in the matter.

Yours very truly
/s/ SIDNEY M. ERHMAN.

cc Mr. Allan P. Matthew

cc Mr. T. M. Schumacher

[Stamped]: The Western Pacific Railroad Co. President—Jan. 28, 1944.

[Endorsed]: Filed Feb. 15, 1949.

DEFENDANTS' EXHIBIT No. 37-A

At 40 Wall Street
New York 5, N. Y.
September 27, 1946

Messrs. Whitman, Ransom, Coulson & Goetz
40 Wall Street
New York 5, N. Y.

Gentlemen:

In order to protect any equitable interests that The Western Pacific Railroad Corporation may have in the reserves set up by The Western Pacific

Railroad Company on account of tax deductions, as well as in any refunds of tax payments arising from claims filed by the Corporation, we propose to file a Bill of Complaint in the District Court of the United States, for the Northern District of California, Southern Division, asking that these reserves and refunds, if any, be impounded pending an accounting and an equitable determination to ascertain what, if any, interests the Corporation may have therein.

Appreciating that your firm has acted as tax counsel for both the Company and the Corporation in the filing of Consolidated Tax Returns and in the proceedings now pending before the Internal Revenue Department, we would, of course, not wish to take any steps which would in any way prejudice the claims made in these returns. We would therefore appreciate your advice on this, and would be glad to have any suggestions you may make for the full protection of the interests of the Corporation therein.

I would be glad to arrange a conference between your Mr. Polk and our counsel to discuss this matter further.

Yours very truly,

.....

President.

[Endorsed]: Filed Feb. 17, 1949.

DEFENDANTS' EXHIBIT No. 37B

The Western Pacific Railroad Corporation
51st Floor 40 Wall Street
New York 5, N. Y.

Mr. F. C. Nicodemus, Jr.
40 Wall Street
New York 5, N. Y.

Mr. A. Perry Osborn
20 Exchange Place
New York 5, N. Y.

Gentlemen:

Herewith, for your information, is copy of reply from Mr. James K. Polk of the firm of Whitman, Ransom, Coulson & Goetz, to my letter of September 27, 1946, copy of which was sent to you, relative filing of claim against The Western Pacific Railroad Company and its subsidiaries for participation in federal tax benefits for the years 1942, 1943 and the first four months of 1944.

Yours very truly,

/s/ M. J. CURRY.

Enclosure

[Endorsed]: Filed Feb. 17, 1949.

DEFENDANTS' EXHIBIT No. 37-C

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York
(Copy)

October 4, 1946

Mr. M. J. Curry, President
The Western Pacific Railroad Corporation
40 Wall Street
New York 5, N. Y.

Dear Sir:

This refers to your letter of September 27, 1946, addressed to this firm. The undersigned has been acting as tax counsel in connection with pending tax questions arising under Federal consolidated returns made by the Western Pacific group for the period ended April 30, 1944, and prior open years. In presenting the issues as to these tax matters to the Treasury Department it will be necessary to develop the facts fully and the Treasury Department is clearly entitled to any relevant information. There would, therefore, seem to be no reason why any development of facts in a separate litigation instituted by your Company in the United States District Court in California would present necessary embarrassment in connection with the tax questions.

Very truly yours,

JAMES K. POLK.

[Endorsed]: Filed Feb. 17, 1949.

DEFENDANTS' EXHIBIT No. 41

The Western Pacific Railroad Company

Federal income and excess profits taxes for years 1942 and 1943 and the first four months of 1944 on the basis of assuming that The Western Pacific Railroad Company had filed separate returns and had the benefit of its own net operating loss carry-overs and excess profits credit carry-overs (computed as though it had filed separate returns in prior years) and the additional deductions from income as shown in the note below

Period	Income tax	Excess profits tax	Total
1942	$3,331,638.25		$3,331,638.25
1943	3,136,913.38		3,136,913.38
First four months of 1944	558,078.49	$702,478.26	1,260,556.75
	$7,026,630.12	$702,478.26	$7,729,108.38
Income tax for 1942 allocated on consolidated return			4,144,828.87
Difference			$3,584,279.51

Notes:

(1) The computations of the taxes tabulated above are based on the returns filed. However, the computations give effect to correction of certain errors (immaterial in the returns as filed) and to Revenue Agent's conclusions contained in reports dated June 12, 1947, covering examination of the years 1940 and 1941. The computations also give effect to the following deductions for the years indicated, which were not claimed in the returns filed:—

	1941	1942	1943	First four months of 1944
Accelerated amortization		$127,531.24	$ 259,654.81	$522,741.10
United States Government freight cutbacks and refunds	$50,000.00	780,000.00	1,060,000.00	40,000.00
Partial bad debt loss on Sacramento Northern Railway notes and advances			8,526,690.72	

(2) No excess profits taxes were allocated on consolidated returns.
No (declared value) excess-profits taxes were paid during the period.

February 16, 1949.

[Endorsed]: Feb. 17, 1949.

DEFENDANTS' EXHIBIT No. 43

The Western Pacific Railroad Company

Federal income and excess profits taxes for years 1942 and 1943 and the first four months of 1944 on the basis of assuming that The Western Pacific Railroad Company had filed separate returns and had the benefit of its own net operating loss carry-overs and excess profits credit carry-overs (computed as though it had filed separate returns in prior years) and the additional deductions from income as shown in the note below

Period	Income tax	Excess profits tax	Total
1942	$3,179,638.25		$3,179,638.25
1943	2,932,913.38		2,932,913.38
First four months of 1944	558,078.49	$693,928.26	1,252,006.75
	$6,670,630.12	$693,928.26	$7,364,558.38
Income tax for 1942 allocated on consolidated return			4,144,828.87
Difference			$3,219,729.51

Notes:

(1) The computations of the taxes tabulated above are based on the returns filed. However, the computations give effect to correction of certain errors (immaterial in the returns as filed) and to Revenue Agent's conclusions contained in reports dated June 12, 1947, covering examination of the years 1940 and 1941. The computations also give effect to the following deductions for the years indicated, which were not claimed in the returns filed:—

	1941	1942	1943	First four months of 1944
Accelerated amortization		$127,531.24	$ 259,654.81	$522,741.10
United States Government freight cutbacks and refunds	$80,000.00	1,160,000.00	1,570,000.00	50,000.00
Partial bad debt loss on Sacramento Northern Railway notes and advances			8,526,690.72	

(2) No excess profits taxes were allocated on consolidated returns.
No (declared value) excess-profits taxes were paid during the period.

February 16, 1949

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 44

The Western Pacific Railroad Company

Federal income taxes for years 1942 and 1943 and the first four months of 1944 on the basis of assuming that The Western Pacific Railroad Company had filed separate returns and had the benefit of its own net operating loss carry-overs and excess profits credit carry-overs (computed as though it had filed separate returns in prior years) and the additional deductions from income as shown in the note below

Period	Tax
1942	$2,895,638.25
1943	2,120,913.38
First four months of 1944	522,723.30
	$5,539,274.93
Income tax for 1942 allocated on consolidated return	4,144,828.87
Difference	$1,394,446.06

Notes:

(1) The computations of the taxes tabulated above are based on the returns filed. However, the computations give effect to correction of certain errors (immaterial in the returns as filed) and to Revenue Agent's conclusions contained in reports dated June 12, 1947, covering examination of the years 1940 and 1941. The computations also give effect to the following deductions for the years indicated, which were not claimed in the returns filed:—

	1941	1942	1943	First four months of 1944
Accelerated amortization		$127,531.24	$ 259,654.81	$522,741.10
United States Government freight cutbacks and refunds	$50,000.00	780,000.00	1,060,000.00	40,000.00
Partial bad debt loss on Sacramento Northern Railway notes and advances			8,526,690.72	
United States Government reparations claims		1,090,000.00	2,540,000.00	910,000.00

(2) No excess profits taxes would have been payable on separate returns and no excess profits taxes were allocated on consolidated returns.

No (declared value) excess-profits taxes were paid during the period.

February 16, 1949

[Endorsed]: Filed Feb. 18. 1949.

DEFENDANTS' EXHIBIT No. 45

The Western Pacific Railroad Company

Federal income taxes for years 1942 and 1943 and the first four months of 1944 on the basis of assuming that The Western Pacific Railroad Company had filed separate returns and had the benefit of its own net operating loss carry-overs and excess profits credit carry-overs (computed as though it had filed separate returns in prior years) and the additional deductions from income as shown in the note below

Period	Tax
1942	$2,743,638.25
1943	1,916,913.38
First four months of 1944	518,723.30
	$5,179,274.93
Income tax for 1942 allocated on consolidated return	4,144,828.87
Difference	$1,034,446.06

Notes:

(1) The computations of the taxes tabulated above are based on the returns filed. However, the computations give effect to correction of certain errors (immaterial in the returns as filed) and to Revenue Agent's conclusions contained in reports dated June 12, 1947, covering examination of the years 1940 and 1941. The computations also give effect to the following deductions for the years indicated, which were not claimed in the returns filed:—

	1941	1942	1943	First four months of 1944
Accelerated amortization		$127,531.24	$ 259,654.81	$522,741.10
United States Government freight cutbacks and refunds	$80,000.00	1,160,000.00	1,570,000.00	50,000.00
Partial bad debt loss on Sacramento Northern Railway notes and advances			8,526,690.72	
United States Government reparations claims		1,090,000.00	2,540,000.00	910,000.00

(2) No excess profits taxes would have been payable on separate returns and no excess profits taxes were allocated on consolidated returns.

No (declared value) excess-profits taxes were paid during the period.

February 16, 1949

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 46

The Western Pacific Railroad Corporation

Federal income taxes for the years 1922 to 1944, inclusive, on the basis of assuming that The Western Pacific Railroad Corporation had filed separate tax returns and comparison thereof with taxes allocated to that Company on the basis of consolidated returns filed

Year	Tax on separate return (1)	Tax allocated on consolidated return (2)	Excess of tax on separate return over tax allocated on consolidated return
1922	Nil	Nil	Nil
1923	Nil	Nil	Nil
1924	$ 57,030.24	Nil	$ 57,030.24
1925	41,297.55	Nil	41,297.55
1926	21,094.40	$10,429.61	10,664.79
1927	10,551.55	10,330.90	220.65
1928	22,023.22	Nil	22,023.22
1929	56,386.32	39,158.90	17,227.42
1930	56,692.98	Nil	56,692.98
1931	76,232.09	Nil	76,232.09
1932	100,209.54	Nil	100,209.54
1933	83,544.25	Nil	83,544.25
1934	82,334.04	Nil	82,334.04
1935	46,499.56	Nil	46,499.56
1936	Nil	Nil	Nil
1937	Nil	Nil	Nil
1938	Nil	Nil	Nil
1939	Nil	Nil	Nil
1940	Nil	Nil	Nil
1941	Nil	Nil	Nil
1942	Nil	Nil	Nil
1943	Nil	Nil	Nil
1944	Nil	Nil	Nil
	$653,895.74	$59,919.41	$593,976.33

Notes:

(1) 1922 was the first year as to which corporations had an election to file separate or consolidated returns.

(2) The amounts shown in this column are the same as those shown in Schedule 1 of Price, Waterhouse & Co. report dated January 5, 1949.

(3) No excess profits taxes would have been payable on separate returns and no excess profits taxes were allocated on consolidated returns.

No (declared value) excess-profits taxes were paid during the period.

January 14, 1949.

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 47

The Western Pacific Railroad Corporation

Federal income taxes for the years 1922 to 1944, inclusive, on the basis of assuming that The Western Pacific Railroad Company had filed separate tax returns and comparison thereof with taxes allocated to that Company on the basis of consolidated returns filed

Year	Tax on separate return (1)	Tax allocated on consolidated return (2)	Excess of tax on separate return over tax allocated on consolidated return
1922	$ 100,962.08	$ 82,663.92	$ 18,298.16
1923	215,568.99	Nil	215,568.99
1924	151,455.91	Nil	151,455.91
1925	310,286.32	310,477.26	(190.94)
1926	365,076.26	358,720.53	6,355.73
1927	94,051.47	98,569.77	(4,518.30)
1928	78,156.58	99,322.29	(21,165.71)
1929	57,219.42	14,153.75	43,065.67
1930	Nil	Nil	Nil
1931	Nil	Nil	Nil
1932	Nil	Nil	Nil
1933	Nil	Nil	Nil
1934	Nil	Nil	Nil
1935	Nil	Nil	Nil
1936	Nil	Nil	Nil
1937	Nil	Nil	Nil
1938	Nil	Nil	Nil
1939	Nil	Nil	Nil
1940	Nil	Nil	Nil
1941	Nil	Nil	Nil
Totals	$1,372,777.03	$963,907.52	$408,869.51

Notes:

(1) 1922 was the first year as to which corporations had an election to file separate or consolidated returns.

(2) The amounts shown in this column are the same as those shown in Schedule 1 of Price, Waterhouse & Co. report dated January 5, 1949.

(3) No excess profits taxes would have been payable on separate returns and no excess profits taxes were allocated on consolidated returns.

No (declared value) excess-profits taxes were paid during the period.

February 15, 1949.

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 49B
(Identification Only)

Witness.....
Exhibit.....

In the District Court of The United States for the Northern District of California Southern Division

The Western Pacific Railroad Corporation vs. The Western Pacific Railroad Company et al, No. 26508-G

Record of Weekly Sales of Preferred and Common Shares of The Western Pacific Railroad Company on New York Stock Exchange Jan. 1, 1945, to Oct. 31, 1946, as published in "The Commercial and Financial Chronicle" of New York. (Weeks begin Saturday and end Friday.)

	Preferred			Common		
Week Ending	High (Dollars)	Low	Volume (Shares)	High (Dollars)	Low	Volume (Shares)
1945						
January 5	73	64¼	9100	38	30½	11200
January 12	73¼	71	3700	37¾	34⅜	5500
January 19	70¾	65	3800	35	32	10300
January 26	68¼	64½	3500	36¼	31½	5400
February 2	68¼	65½	2200	35⅞	33	3900
February 9	69	66¼	1800	35¾	33½	3800
February 16	70⅛	67⅛	1400	36¼	34	3200
February 23	71	69¼	1700	36½	35	3000
March 2	76½	70½	3100	37¼	34½	4800
March 9	77½	73	2200	37⅜	33⅜	3100
March 16	76½	74	600	36½	34½	1900
March 23	78	75¼	1900	41¼	36⅝	10300
March 30	76⅝	74½	1700	39⅞	36¼	5600
April 6	76	73½	600	39	38	2200
April 13	77	75	900	39¾	38¼	3100
April 20	79⅞	77	1600	41⅞	39¼	8100
April 27	85	79½	2700	45½	41¼	10800
May 4	86	83	1500	45¾	42	3800
May 11	84	81	1200	44½	41	3100
May 18	85	82	900	43⅝	41⅝	1500
May 25	82⅞	82	200	43	41½	3200
June 1	85½	82⅞	300	44¾	43	5900
June 8	86	84½	900	46⅝	43⅜	5100
June 15	88	86¼	1200	46¾	45	6900
June 22	91	87	2000	51	46¾	8200
June 29	92	90	2500	53⅜	48⅝	13200
July 6	89	86¼	3100	52¾	47½	10200
July 13	90	86¾	9200	57⅛	52¾	13100

Week Ending	Preferred High (Dollars)	Preferred Low (Dollars)	Preferred Volume (Shares)	Common High (Dollars)	Common Low (Dollars)	Common Volume (Shares)
1945						
July 20	90	85	2600	53	47½	2900
July 27	85¾	81	4100	49⅜	45¼	5700
August 3	89	84¾	3300	49	45½	1100
August 10	89	86⅜	4600	49½	45⅜	3800
August 17	88	85	1000	46	44	1800
August 24	85	81	2400	44	39	6300
August 31	86	85	700	48	43½	3200
September 7	86⅞	85¾	900	49	47	1300
September 14	87¼	85⅞	1500	47¾	46½	1200
September 21	86¼	84⅜	900	48¾	44¼	2700
September 28	87	85	1000	48¾	47½	1500
October 5	88¾	87	2900	48¼	47	1100
October 12	88½	87¾	1700	49¼	46	5200
October 19	89¾	87	6000	51	49	5300
October 26	89⅞	88	3400	51	49	3600
November 2	90	89	2800	51½	48	4900
November 9	90⅜	89	2400	53¼	51¼	3800
November 16	90⅝	89½	1600	52¼	48¾	3300
November 23	90½	89	1600	52	49	2500
November 30	90	87⅞	1400	55⅞	49	5900
December 7	88½	86¼	900	55⅞	53⅝	2600
December 14	90	86½	2100	53½	51½	1800
December 21	89½	87	1300	52½	49	1700
December 28	89	88	600	51	48	1600
1946						
January 4	91	87¾	1200	49½	47	2300
January 11	91⅞	90½	1200	51½	48⅝	4300
January 18	92	90⅞	1900	53⅝	49¾	4400
January 25	91½	90¼	1100	53⅜	50¼	3300
February 1	94¾	90¾	3600	55¾	53½	3600
February 8	96	94½	2100	56	52	5400
February 15	96½	96¼	1100	53½	51	1800
February 22	96½	93	1500	54½	48⅜	2900
March 1	95	92⅛	900	49¾	48	2600
March 8	95	93⅜	1100	50	46½	1700
March 15	94	93½	1000	50	48	1900
March 22	96½	95	1000	48½	47½	700
March 29	97	93⅞	900	54	48	3800
April 5	99	96½	2800	55¼	51¾	2800
April 12	100	98½	1400	53¾	51	2900
April 19	100½	99⅞	1400	53¼	51	900
April 26	101	100⅛	700	53	51½	3200
May 3	100½	99	1200	54	52½	1000
May 10	99½	98¼	500	53½	50¾	1400

Week Ending	Preferred High (Dollars)	Preferred Low (Dollars)	Preferred Volume (Shares)	Common High (Dollars)	Common Low (Dollars)	Common Volume (Shares)
1946						
May 17	99	98	800	51 7/8	50 3/4	1200
May 24	98 7/8	98	300	55 3/4	51	5700
May 31	98 1/4	97 3/4	200	55 3/4	54	2500
June 7	98 3/4	97 3/4	1100	54 3/4	53	1700
June 14	99 1/2	98	700	56 1/2	53	4600
June 21	99 1/2	99	600	56 1/2	54	4100
June 28	97 1/2	95	700	54	50 3/4	700
July 5	98 1/2	96 1/2	500	52	51 3/4	200
July 12	97 1/2	95 1/2	1000	52	50	1800
July 19	97 1/2	96	1000	51	49 3/4	700
July 26	98 1/2	94 1/2	900	50 1/4	48	700
August 2	98	94	1200	48 1/4	47	1600
August 9	98	96	300	47 1/2	47 1/2	200
August 16	97 5/8	96 1/2	500	48	47 3/4	200
August 23	98	97 1/2	300	48	46	200
August 30	94	90 3/4	700	44 1/4	41 1/4	1200
September 6	90	87	300	42	32 1/8	3400
September 13	81 1/4	76	800	36 1/2	33	6200
September 20	81	80	900	35 1/2	29 3/4	9400
September 27	76 1/2	75	400	34 1/4	27	6800
October 4	76	75 1/4	400	34	32 1/2	2800
October 11	77 3/4	71	1300	33	29 1/4	4200
October 18	78	76 1/8	300	37	31 1/2	4500
October 25	79	76 1/4	600	35 3/8	34	1900
November 1	79	77 1/8	500	36	30 1/2	2900

DEFENDANTS' EXHIBIT No. 50

69278

Treasury Department
Washington 25

(Copy)

Office of Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue
And Refer To IT:P:CA WTS

Dec. 9, 1947

Atchison, Topeka & Santa Fe Railway Company
Chicago, Illinois

Attention: Mr. W. E. Davis
General Auditor

Gentlemen:

Reference is made to your letter dated March 20, 1947, in which you submit a statement of facts with respect to charges for transportation of war-time commodities for the Government.

The facts submitted indicate that beginning in 1941 and continuing throughout the war years you transported military and naval forces and property for the Government for the prosecution of the war. Transportation charges were collected from the various Government departments and reported as taxable income. At the time of rendering the bills for the transportation charges, you state that it was known to you, as well as the Government departments, that the bills were excessive because such

Defendants' Exhibit No. 50—(Continued)

bills did not reflect the lower rates in accordance with the land grants and also due to the fact that many shipments of property were of a secret nature and the contents thereof were not known to you. Furthermore, many shipments contained new commodities on which rates had not been established. It was the custom for the Government departments to pay the bills for transportation charges as presented with the understanding that adjustments would be made in accordance with section 322 of the Transportation Act of 1940 when such bills were audited by the General Accounting Office.

In accordance with section 321(a) of the Transportation Act of 1940, the Government was entitled to special rates for the transportation of military and naval forces and also military and naval property. Transportation of the military and naval forces and property is eligible for net land grant rates as provided in the several Granting Acts and Equalization Agreements. Section 322 of the same Act provides that payment for transportation of mail, persons or property for or on behalf of the United States shall be made upon presentation of the bills therefor prior to audit or settlement by the General Accounting Office. The right is reserved, however, for the General Accounting Office to deduct the amount of any overpayment for such transportation from any amount subsequently due to the carrier.

According to the schedule submitted with your

Defendants' Exhibit No. 50—(Continued)

letter, it appears that the General Accounting Office began auditing the bills for the transportation charges as early as 1942, in which year demand was made for the first refunds of the excessive transportation charges. These refunds are effective for each of the years 1942 to 1946, inclusive, and additional refunds will probably be demanded for subsequent years. During these years the amounts of the refunds were taken as deductions in your Federal tax returns. The statement submitted by you shows that excessive transportation charges were received during the years 1941 to 1945, inclusive, in the amount of $22,170,000 and that this amount was refunded during the years 1942 to 1946, inclusive.

You state that by reason of the delay in the audit of the transportation bills by the General Accounting Office the charges collected have been subjected to high excess profits tax rates whereas the repayments have extended into the post-war years when the tax rates are much lower. Due to the repayments made, the Government has paid out and you have collected only the correct transportation charges but due to the high excess profits tax rates during the war years you feel that you have suffered a penalty because of circumstances which were entirely beyond your control. It is your view that taxable income for the several years involved should be adjusted and thus neutralize the effect of the receipt and repayment of the excessive charges.

Section 43 of the Internal Revenue Code provides that:

Defendants' Exhibit No. 50—(Continued)

"The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred', dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *"

The facts presented by you show conclusively that by reporting the transportation charges as income on the accrual basis and deducting the repayments in the year in which repaid, the taxable income for the years involved is not clearly reflected and thus a large net tax is incurred due to the high tax rates during the war years.

In view of the facts and circumstances presented by you, under the authority conferred in section 43 permission is granted to allocate the repayments of the excessive transportation charges to the years in which the charges were reported as taxable income. Such adjustments may not be made in a prior year or years where the statutory period of limitation for assessing deficiencies or filing claims for refund as provided in section 322 of the Code has expired or a final closing agreement has been executed.

In this connection it is understood that you agree as follows:

1. All amounts received by you as transportation charges from the Federal Government departments

Defendants' Exhibit No. 50—(Continued)

and agencies shall be included in taxable income on the accrual basis.

2. All refunds of transportation charges made by you to the Federal Government shall be allowed as deductions in the year or years in which such transportation charges were reported as income and any deductions claimed by you in the year or years such refunds were made will be disallowed.

3. For the years 1941 to 1946, inclusive, the amount of interest on refunds of income and excess profits taxes shall be allowed only to the extent of, and limited to, the amount of interest on deficiencies resulting from these adjustments.

The adjustments agreed to above will not include any items which are the subject of presently pending claims filed on behalf of the United States by the Attorney General before the Interstate Commerce Commission for refunds from the railroads, including the Atchison, Topeka & Santa Fe Railway Company, for excessive charges for the transportation of war-time freight.

Notification from you of your agreement with this letter will constitute authority for disposition of the issues for the years involved.

Please reply within fifteen days, for the attention of IT:P:CA-WTS.

Very truly yours,

/s/ GEO. J. SCHOENEMAN,
Commissioner.

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 51
(Identification only)

Redistribution of the debits to freight revenue made during the period May 1944 to July 1948, inclusive, resulting from government cutbacks and refunds on government shipments terminated on the Western Pacific, segregated to year in which traffic moved

Year Shipment Moved	Amount
1939	$ 62.33
1940	1,535.67
1941	53,600.86
1942	784,927.86
1943	1,062,694.64
Jan. to Apr. 1944	35,716.03
May to Dec. 1944	48,473.42
1945	44,401.65
1946	4,236.04
1947	454.11
1948	84.23
Total	$2,036,186.84

DEFENDANTS' EXHIBIT No. 53
(Identification only)

The Western Pacific Railroad Company

43 Exchange Place,
New York, November 28, 1923.

Mr. C. M. Levey, President,
The Western Pacific Railroad Company,
Mills Bldg., San Francisco, California.

Dear Mr. Levey:

I am enclosing herewith two statements showing the taxable income, as reported to the Commissioner of Internal Revenue by The Western Pacific Railroad Corporation on consolidated returns for the years 1921 and 1922, and proposed allocation of the taxes to the various companies, the income of which is included in the returns.

The total tax for 1921 ($31,813.09) was originally paid by The Western Pacific Railroad Company and of the tax for 1922 ($114,929.64) three-quarters has been paid by The Western Pacific Railroad Corporation, which company will pay the remaining one-quarter which will be due December 15, 1923. The method of allocation, viz., prorating the entire amount among the companies showing taxable income, is, so far as we are able to determine, the practice followed by other companies making consolidated returns.

If this plan meets with your approval, The Western Pacific Railroad Company can pay to The West-

ern Pacific Railroad Corporation from New York funds:

Tax for 1922	$77,037.34	
Less tax paid by W.P.R.R.Co. in excess of proporation for 1921	9,836.61	
Net amount to pay		$67,200.73
In addition, The Western Pacific R.R. Corporation should receive from:		
Western Realty Co.—1922 Tax		390.76
Standard R.&D. Co.—1922 Tax		206.87

The amounts due from other subsidiary companies will be carried by The Western Pacific Railroad Corporation pending settlement with the various companies or adjustments as may be deemed advisable upon determination of proposed reorganization of Denver System and the clearing up of pending Sacramento Northern situation.

This proposed adjustment is on the basis of tax returns as originally filed, copies of which are on file in Mr. DeGraff's office, and is subject to revision as may finally be determined by adjustments in the amount of taxable income due to examination of the accounts by the Treasury Department.

Yours truly,

/s/ S. R. BALDWIN.

DEFENDANTS' EXHIBIT No. 54

Mr. F. C. Nicodemus, Jr.,
40 Wall Street,
New York, N. Y.

Dear Mr. Nicodemus:

As you know the by-laws of this Corporation provide that the annual meeting of stockholders be held in Wilmington, Delaware, on the first Tuesday in October of each year, which this year falls on October 1st.

The annual meeting last year, you will recall, was convened on the scheduled date and adjourned sine die. Upon advice of counsel and concurrence of our Board, notices of the meeting were sent to stockholders unaccompanied by proxy or proxy statement, the latter a requirement of the S. E. C.

I should like to have your opinion as to how this year's meeting should be handled, that is, will we pursue the same course as we did last year, sending out notices only, or should we proceed in the regular way? If we do the latter, it will entail considerable labor and expense and it will be necessary at next Wednesday's meeting of the Board to name a Proxy Committee, approve form of proxy and a proxy statement.

Defendants' Exhibit No. 54—(Continued)

Won't you please give me the benefit of your advice in this at your early convenience, and oblige.

Yours very truly,

/s/ M. J. CURRY.

[Marginal Notes]: $5,000? Amt. paid to P. & Greer plus accrual of legal services to Sloss. Election of directors 10 to 2 to fill vacancies. Amt. expended for printing and mailing.

Pierce & Greer
40 Wall Street
New York

August 28, 1940.

Mr. M. J. Curry,
Secretary and Treasurer,
The Western Pacific Railroad Corporation,
37 Wall Street,
New York City.

Dear Mr. Curry:

This refers to your letter of August 23, 1940, with reference to the annual meeting of stockholders of the Corporation scheduled to be held Tuesday, October 1st, next, at Wilmington, Delaware.

It is our judgment that you should this year pursue the same course you pursued last year. That is, issue the notice in the usual form but do not name a proxy committee or request proxies. If a quorum fails to appear, you may again pursue the same course as last year, that is, after meeting on the

Defendants' Exhibit No. 54—(Continued)

scheduled date adjourn sine die for lack of quorum.

Very truly yours,

/s/ F. C. NICODEMUS, JR.

[Stamped]: Received Aug. 28, 1940 Western Pacific Railroad Corporation.

August 2, 1941.

Mr. F. C. Nicodemus, Jr.,
40 Wall Street,
New York, N. Y.

Dear Mr. Nicodemus:

As you know, the By-laws of this Corporation provide that the annual meeting of stockholders be held in Wilmington, Delaware, on the first Tuesday in October of each year, this year being October 7th.

I should like to have your opinion as to how this meeting should be handled; that is, should we pursue the same course as we have in the past two years and send out Notice of Meeting only to the stockholders, or, should we send out notice of Meeting accompanied by Proxy and Proxy Statement. The latter method of handling would, of course, entail considerable labor and expense and it will be necessary to have a Board Meeting to name a Proxy Committee, approve form of Proxy and Proxy Statement.

Defendants' Exhibit No. 54—(Continued)

Will you please let me have the benefit of your advice in this matter, and oblige.

Yours very truly,

/s/ M. J. CURRY.

Pierce & Greer
40 Wall Street
New York

August 18, 1941.

Mr. M. J. Curry
Secretary and Treasurer
The Western Pacific Railroad Corporation
37 Wall Street
New York City

Dear Mr. Curry:

Mr. Nicodemus has asked me to reply to your letter of August 2, 1941, with reference to the annual meeting of stockholders of The Western Pacific Railroad Corporation to be held in Wilmington, Delaware, on October 7, 1941.

We are both of the opinion that this annual meeting should be handled in the same way as the annual meetings of the past two years, that is, a notice of meeting, omitting form of Proxy and Proxy Statement, should be mailed to the stockholders.

If a quorum should fail to appear it would be

Defendants' Exhibit No. 54—(Continued)

in order, as in past years, to adjourn the meeting sine die for lack of a quorum.

Yours very truly,

/s/ H. BRUA CAMPBELL.

[Initialed]: JFW.

[Stamped]: Received Aug. 19, 1941 Western Pacific Railroad Corporation.

[Stamped]: M. J. C. Aug. 19, 1941.

August 3, 1942.

Messrs. Pierce & Greer
40 Wall Street
New York, N. Y.

Gentlemen:

As you know, the By-Laws of this Corporation provide that the Annual Meeting of Stockholders be held in Wilmington, Delaware, on the first Tuesday in October of each year—this year the date being October 6th. [In Pencil]: 5th 1943.

In this connection, I should like to know whether, in your opinion, it would be proper to pursue the same course as we have during the past three years; that is, mail to the stockholders a notice of meeting, omitting form of Proxy and Proxy Statement, and, if a quorum should fail to appear, to adjourn the meeting sine die for lack of quorum.

Yours very truly,

/s/ M. J. CURRY.

Defendants' Exhibit No. 54—(Continued)

Pierce & Greer
40 Wall Street
New York

August 8, 1942.

Mr. M. J. Curry
President
The Western Pacific Railroad Corporation
37 Wall Street
New York City

Dear Mr. Curry:

We have your letter of August 3, 1942, with reference to the annual meeting of stockholders of the Corporation to be held this year pursuant to the provisions of the By-Laws on October 6th, being the first Tuesday in October.

In our opinion it will be proper to pursue the same course as has been taken during the past three years, namely, seasonably to mail to the stockholders a notice of meeting, omitting form of Proxy and Proxy Statement, and if a quorum should fail to appear to adjourn the meeting sine die for want of a quorum.

Yours very truly,

PIERCE & GREER.

[Initialed]: JFW.

[Stamped]: Received Aug. 8, 1942 The Western Pacific Railroad Corporation.

[Stamped]: M.J.C. Aug. 8, 1942.

Defendants' Exhibit No. 54—(Continued)

5

August 5, 1943.

Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Gentlemen:

As you know, the By-Laws of this Corporation provide that the Annual Meeting of Stockholders be held in Wilmington, Delaware on the first Tuesday in October of each year—this year the date being October 5th.

In view of the conditions surrounding the corporation, will you please advise what action we should take in the matter.

Yours very truly,

/s/ M. J. CURRY.

Defendants' Exhibit No. 54—(Continued)

Pierce & Greer
40 Wall Street
New York

September 10, 1943.

Mr. M. J. Curry
President
The Western Pacific Railroad Corporation
37 Wall Street
New York, 5, N. Y.

Dear Mr. Curry:

Referring to you letter to our firm dated August 5, 1943, with respect to the Annual Meeting of Stockholders of The Western Pacific Railroad Corporation, Mr. Nicodemus and I believe that in compliance with the provisions of the By-Laws of the Corporation the Secretary should seasonably mail the required notice of such meeting to the stockholders of the Company and that all that need be said in such notice is that the Annual Meeting of Stockholders of the Corporation will be held pursuant to the provisions of the By-Laws on Tuesday, October 5, 1943 at 12 o'clock noon at the principal office of the Corporation, No. 100 West 10th Street, Wilmington, Delaware, for the election of Directors of the Corporation.

Yours very truly,

/s/ H. BRUA CAMPBELL.

Defendants' Exhibit No. 54—(Continued)

[Marginal Notes]: JFW. OK to handle accdly /s/ MJC.

[Stamped]: M.J.C. Sept. 10, 1943.

[Stamped]: Received Sept. 10, 1943 The Western Pacific Railroad Corporation.

August 4, 1944.

Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Attention Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

The by-laws of this corporation provide that its annual meeting should be held the first Tuesday in October of each year (being October 3rd this year) at 12 o'clock noon, at its corporate office, the Corporation Trust Company, Wilmington, Delaware.

As you know, in the past four years, due to conditions surrounding the corporation, we merely mailed notices of the meetings to stockholders of record as of a specified date. Meetings were held each year but due to lack of quorum were adjourned sine die.

Subsequent to the annual meeting for 1943, special meetings of the stockholders were held on Decem-

Defendants' Exhibit No. 54—(Continued)

ber 28, 1943, which recessed to various dates thereafter and finally adjourned, and on April 20, 1944, when that certain agreement between the Corporation and its three secured creditors was submitted and approved by a majority vote of the stockholders present in person or represented by proxy.

The provisions of the said agreement, as you know, have since been carried out, which included the transfer of the capital stock of The Western Pacific Railroad Company to the Reorganization Committee, etc.

In view of the aforementioned facts and other pending matters, I should like to receive your opinion as to what we should do in connection with the forthcoming meeting. It occurs to me it would be appropriate, when mailing the notices, to also include a letter over the President's name, advising the stockholders of the status of the Corporation's affairs. Do you agree?

Yours very truly,

/s/ M. J. CURRY.

Note: Saw Mr. Nicodemus today and asked for a reply to this letter and he said he would turn it over to Mr. Campbell for handling.

/s/ JFW.

8/23/44.

Defendants' Exhibit No. 54—(Continued)

Pierce & Greer
40 Wall Street
New York 5, N. Y.

September 6, 1944.

Mr. M. J. Curry
President
The Western Pacific Railroad Corporation
37 Wall Street
New York 5

Dear Mr. Curry:

Mr. Nicodemus has asked me to reply to your letter of August 4, 1944, with reference to the annual meeting of stockholders of the Corporation which under its By-Laws is scheduled to be held on Tuesday, October 3, 1944, at 12 o'clock noon, at the principal office of the Corporation, 100 West 10th Street, Wilmington, Delaware, for the election of directors.

Mr. Nicodemus believes that the Corporation should do as it did last year, that is, have the Secretary mail to the stockholders the required notice of meeting in the customary form. He does not favor sending out to the stockholders with the above notice of meeting a letter designed to inform them as to the status of the Corporation's affairs.

Yours very truly,

/s/ H. BRUA CAMPBELL.

Defendants' Exhibit No. 54—(Continued)

[Stamped]: Received Sept. 7, 1944 Western Pacific Railroad Co.

[Stamped]: M.J.C. Sept. 7, 1944.

MJC:LB

10 Perth Avenue
New Rochelle, N. Y.
August 3, 1945

Corporation Trust Company
100 West 10th Street
Wilmington 99, Delaware

Attention: Mr. Alfred Jervis

Dear Mr. Jervis:

This acknowledges receipt of your letter dated July 31 in regard to the annual meeting of The Western Pacific Railroad Corporation to be held October 2, 1945, at its corporate office in Wilmington, Delaware.

We will give this necessary attention and communicate further with you in the near future.

Yours very truly,

/s/ M. J. CURRY.

Defendants' Exhibit No. 54—(Continued)

Pierce & Greer
40 Wall Street
New York 5, N. Y.

August 10, 1945.

Mr. M. J. Curry
President
The Western Pacific Railroad Corporation
Room 5205, 40 Wall Street
New York 5, N. Y.

Dear Mr. Curry:

Mr. Nicodemus has asked me to reply to your letter of August 3, 1945, enclosing copy of letter dated July 31, 1945, addressed to you by the Corporation Trust Company, 100 West 10th Street, Wilmington, Delaware, with reference to the Annual Meeting of Stockholders of The Western Pacific Railroad Corporation which under its By-Laws should be held on Tuesday, October 2, 1945, at the principal office of the Corporation, 100 West 10th Street, Wilmington, Delaware, for the election of Directors.

It is Mr. Nicodemus' view as well as my own that the Corporation should proceed as it did last year, that is, have the Secretary mail to the stockholders the required notice of meeting in the customary form. It will doubtless be feasible for you to arrange to have he meeting conducted by representatives of the Corporation Trust Company in which

Defendants' Exhibit No. 54—(Continued)

event I assume that you will furnish them the information requested in the second paragraph of their letter to you of July 31, 1945, and will also arrange with said Company, as Transfer Agent, to file at the place where the meeting is to be held at least ten days before the meeting the required certified alphabetical list of stockholders entitled to vote at said meeting.

Yours very truly,

/s/ H. BRUA CAMPBELL.

[Stamped]: Received Aug. 10, 1945.

[Stamped]: M.J.C. Aug. 10, 1945.

51st Floor
40 Wall Street
New York 5, N. Y.
August 5, 1946

Messrs. Pierce and Greer, Counsel
40 Wall Street
New York 5, N. Y.

Attention—Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

Herewith is copy of a letter dated July 31, 1946, from The Corporation Trust Company, Wilmington, Delaware, with reference to the annual meeting of this Corporation which is to be held in that city on Tuesday, October 1, 1946.

Defendants' Exhibit No. 54—(Continued)

I shall appreciate your early advice as to the procedure to be followed in connection with the forthcoming annual meeting.

As you know, for the past several years, annual notices of the meeting of the stockholders of record as of a specified date have been sent out. Meetings were held each year but due to lack of quorum were adjourned sine die.

Yours very truly,

THE WESTERN PACIFIC
RAILROAD CORPORATION.

/s/ M. J. CURRY,
President.

[Marginal Note]: Notice of meeting to stockholders of record as of September 11, 1946.

The Corporation Trust Company
Wilmington 99,
100 West 10th Street
Wilmington 7581.

October 1, 1946.

Mr. M. J. Curry, President
The Western Pacific Railroad Corporation
10 Perth Avenue
New Rochelle, New York

Dear Sir:

The annual meeting of stockholders of your company was held at this office today at 12:00 Noon. The meeting was attended by Mr. Russell M. Van-

Defendants' Exhibit No. 54—(Continued)

Kirk of Farlee & Co. who represented in person his personal holdings of 4,500 shares of preferred stock, the holdings of Farlee & Co. of 2,141 preferred shares, that of Joan M. VanKirk the holder of 1,000 preferred shares, and John H. VanKirk the holder of 1,000 preferred shares. Mr. Harold S. Baird was also present in person representing 1,100 shares. This made the total representation in person 9,741 shares and your proxy, which you sent us for 10 shares, brought the total representation in person and by proxy to 9,751 shares.

The meeting was adjourned sine die without taking any action.

We are preparing the minutes of the meeting which we will send you tomorrow.

For your information, we might state that Mr. VanKirk made a transcript of a number of the stockholders from the list which was made available at the meeting.

Yours very truly,

THE CORPORATION TRUST COMPANY.

/s/ L. H. HERMAN,
Assistant Secretary.

LHH:RCW

[Marginal Notes]: Noted MCV 10/3/46 copy del'd to Mr. Nicodemus 10/3/46.

[Stamped]: Received Oct. 3, 1946 The Western Pacific Railroad Corporation.

Defendants' Exhibit No. 54 (Continued)

The Corporation Trust Company

October 2, 1946.

(Copy)

Re: The Western Pacific Railroad Corporation

Mr. Russell Van Kirk
c/o Farlee & Co.
37 Wall Street
New York, New York

Dear Mr. Van Kirk:

In reference to your inquiry at the annual meeting yesterday, the cost of addressing and mailing postal cards to stockholders of the above named corporation will amount to $25.00 per thousand. It is estimated there are presently approximately 4400 stockholders so that the cost will amount to approximately $111.00.

As explained, the approval of the corporation should be attained before we can address and mail any communication to stockholders. It will also be necessary to furnish a sufficient supply of the postal cards to be addressed and mailed.

We are forwarding a copy of this letter to Mr. Curry, Pesident of the corporation, as a matter of information.

Very truly yours,

THE CORPORATION TRUST COMPANY.

Defendants' Exhibit No. 54—(Continued)

/s/ H. E. GRANTLAND,
Assistant Secretary.

HEG:EMT

cc Mr. M. J. Curry

[Stamped]: Received Oct. 4, 1946, The Western Pacific Railroad Corporation.

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 55

March 8, 1945.

State of Delaware
Office of the Attorney General
Dover, Delaware

Att. Hon. William H. Bennethum:

Gentlemen:

Referring to your letter dated February 4, 1945, in regard to franchise taxes for 1942 and 1943, in arrears:

As there has been no improvement in the financial condition of this corporation from what it was when we addressed a letter to your State Tax Department on March 27, 1943, a copy of which was forwarded to you with our letter dated March 21, 1944, this is to respectfully request that you grant a one-half rate for the years 1942 and 1943 and reduce the statutory interest rate from 12% to 4%

Defendants' Exhibit No. 55—(Continued)

per annum, as was agreed to covering the years 1940 and 1941 and, at the same time, extend to July 1, 1945, the time for payment thereof.

Inasmuch as April 1st is the deadline for the payment of the 1942 tax, your early and favorable consideration of this request will be very much appreciated.

Yours very truly,

/s/ M. J. CURRY.

cc The Corporation Trust Company
100 West Tenth St.
Wilmington 99, Delaware
Att. Mr. L. H. Herman
Wilmington Asst. Secy.

bcc. Messrs. Pierce & Greer—Att. Mr. F. C. Nicodemus, Jr.

June 28, 1944.

The Corporation Trust Company
100 West Tenth Street
Wilmington 99, Delaware.

Attention Mr. L. H. Herman, Wilmington
Assistant Secretary.

Gentlemen:

Your letter of June 15, 1944:

Herewith this Corporation's check No. 33, payable to the order of State of Delaware, State Tax

Defendants' Exhibit No. 55—(Continued)

Department in the sum of $1,363.50 ($1,262.50 principal and $101.00 penalty interest—July 1, 1942 to July 1, 1944) in payment of delinquent 1941 franchise tax.

It will be appreciated if you will handle this for credit and furnish us with proper receipt.

Yours very truly,

/s/ M. J. CURRY.

bcc. Mr. F. C. Nicodemus, Jr.

March 21, 1944.

State of Delaware
Office of Attorney General
Dover, Delaware.

Att. Hon. William H. Bennethum, Deputy Attorney General.

Gentlemen:

Referring further to your letter dated February 4, 1944, and to our letter dated February 10, 1944, to the Corporation Trust Co., Wilmington, Del., with copy to you, in regard to franchise taxes in arrears:

As the financial condition of this Corporation is practically unchanged from what it was when we addressed a letter to your State Tax Department, Wilmington, Del., on March 27, 1943, (copy attached) relative to franchise taxes for the year 1940, in arrears, and your Tax Department Board

Defendants' Exhibit No. 55—(Continued)

granted a one-half rate for the years 1940 and 1941 and reduced the statutory rate to 4% per annum, and also granted an extension of time for payment of the 1940 tax to July 1, 1943, this is to respectfully request a similar extension to July 1, 1944, for payment of the 1941 tax.

A prompt response will be very much appreciated.

Yours very truly,

/s/ M. J. CURRY.

cc. Corporation Trust Company
100 West 10th Street
Wilmington, Delaware.
Messrs. Pierce & Greer.

[Marginal Note]: Mr. Campbell read this while in my office and said "Fine"—"Okay."

/s/ MJC.

3/22/44

April 12, 1943.

State of Delaware
State Tax Department
843 King Street
Wilmington, Delaware.

Att. Mr. P. M. Bourdon, Secretary.

Dear Sirs:

I am in receipt of your letter of April 9th, in reply to mine of March 27, 1943, relative to this

Defendants' Exhibit No. 55—(Continued)

Corporation's franchise taxes for the years 1940 and 1941, in which you advise that your Board has granted the one-half rate for those years and reduced the statutory interest rate from 12 per cent to 4 per cent per annum, and has also granted an extension to July 1, 1943, pending disposition of this matter in order to avoid forfeiture of our charter on April 1, 1943.

This action on the part of your Board is very much appreciated and, as stated in my letter to you of April 8th, it will be presented at the next meeting of our Board of Directors for consideration.

Yours very truly,

/s/ M. J. CURRY.

cc. The Corporation Trust Company
100 West Tenth St.
Wilmington, Delaware.
Att. Mr. L. H. Herman.

bcc. Mr. F. C. Nicodemus, Jr.
With copy of letter from the State Tax Board.

M. J. CURRY.

Defendants' Exhibit No. 55—(Continued)

Pierce & Greer
40 Wall Street
New York

January 21, 1942

Mr. M. J. Curry
Secretary
The Western Pacific Railroad Corporation,
37 Wall Street
New York City

Dear Sir:

Replying to your letter of January 2, 1942, we enclose herewith a memorandum dealing with the possible consequences to the Corporation of delinquency in the payment of Delaware franchise taxes.

We suggest that this memorandum be submitted to the Board at its next meeting as the report of counsel on the matter. Mr. Campbell expects to attend the meeting and will be glad to make an oral report on the subject covered by the memorandum should the Board so desire.

Yours very truly,

PIERCE & GREER.

[Stamped]: Received Jan. 21, 1942, The Western Pacific Railroad Corporation.

Defendants' Exhibit No. 55—(Continued)

The Western Pacific Railroad Corporation

Memoradum as to effect of non-payment of Delaware franchise taxes

At a meeting of the Board of Directors of The Western Pacific Railroad Corporation, held on December 18, 1941, the Chairman reported that the Delaware franchise taxes for the years 1939 and 1940, due July 1, 1940 and July 1, 1941, respectively, in the amount of $2,525 each, have not been paid and that interest is accruing thereon at the rate of 1% per month from said due dates, and further that under the Delaware Statutes payment of the 1939 tax, plus accrued interest, must be made not later than April 1, 1942, or the Corporation's charter will be voided.

Whereupon, after discussion, the Board adopted the following reolution:

> "Resolved, that the question of payment of these taxes be referred to Counsel, for investigation, to determine what effect it may have on the Corporation if payment is not made and to report to the Board the result of such investigation at its next meeting."

The statute which voids the charter of a Delaware corporation for failure to pay its franchise tax for two years is Section 71 of the Delaware Franchise Tax Law, reading as follows:

Defendants' Exhibit No. 55—(Continued)

"If any corporation, accepting the provisions of the Constitution of the State of Delaware and coming under the provisions of the General Corporation Law of this State, or any corporation which has heretofore filed or may hereafter file a certificate of incorporation under the provisions of the said law, shall for two consecutive years neglect or refuse to pay the State any franchise tax or taxes, which has or have been, or shall be assessed against it, or which if is required to pay under the provisions of this Article, the charter of such corporation shall be void, and all powers conferred by law upon such corporation are declared inoperative, unless the State Tax Board shall for good cause shown to it, give further time for the payment of such tax or taxes, in which case a certificate thereof shall be filed by the said Board in the office of the State Tax Department stating the reason therefor."

Then follows Section 72 of the Franchise Tax Law, which directs the State Tax Department to report such delinquent corporations to the Governor and further directs the Governor forthwith to issue his proclamation declaring that the charters of these corporations are repealed. Said Section 72 reads as follows:

"On or before the First Tuesday of January in each year, the State Tax Department shall

Defendants' Exhibit No. 55—(Continued)

report to the Governor a list of all the corporations, which for two years next preceding such report, have failed, neglected or refused to pay the franchise taxes assessed against them or due by them, under the laws of this State, and the Governor shall forthwith issue his proclamation declaring that the charters of these corporations are repealed."

Section 73 of the Franchise Tax Law provides that the proclamation of the Governor be filed in the office of the Secretary of State, that it be advertised and that a certified copy thereof be transmitted to the Recorder of each County in the State and that

"* * * each Recorder shall, upon receipt of such certified copy, forthwith mark in brief upon the margin of the record of the Certificate of Incorporation named in said proclamation, which is of record in his office, the fact that the charter of said corporation is repealed, and the date of said repeal."

Section 74 of the Franchise Tax Law provides that any corporation, firm, company, association, person or persons

"* * * who shall exercise or attempt to exercise any power under the Certificate of Incorporation of any corporation, which shall have been proclaimed by the Governor, after

Defendants' Exhibit No. 55—(Continued)

the issuance of such proclamation, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding One Thousand Dollars ($1,000) or by imprisonment not exceeding one (1) year, or both, in the discretion of the Court."

If the charter of a Delaware corporation be repealed pursuant to the above statutes for the non-payment of franchise taxes, does it follow under the Delaware law that such corporation has ceased to exist, that it is dead and cannot be revived?

It has been held that where a charter is repealed for non-payment of taxes, there is a dissolution by operation of law. (Berle v. Crutcher, 60 F. (2d) 440 (C.C.A. 8th)).

But in and by Section 42 of the Stock Corporation Law, the Delaware Legislature has declared that corporations after dissolution shall continue for purposes of suit. Said Section reads as follows:

"All corporations, whether they expire by their own limitations, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing

Defendants' Exhibit No. 55—(Continued)

the business for which said corporation shall have been established; provided, however, that with respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to such expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-year period and until any judgments, orders, or decrees therein shall be fully executed."

Moreover, Section 74 of the Stock Corporation Law sets up the machinery whereby a corporation whose charter has become inoperative by law for non-payment of taxes may procure a restoration of its charter, and provides that such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by such corporation, its officers and agents during the time when such charter was inoperative or void or after its expiration by limitation, with the same force and effect and to all intents and purposes as if said charter had at all times remained in full force and effect.

It is clear from the foregoing that to allow the 1939 franchise tax of The Western Pacific Railroad

Defendants' Exhibit No. 55—(Continued)

Corporation to remain unpaid after April 1, 1942, will not result in the complete and final extinguishment of said corporation.

The scope and effect of the statutory provisions above referred to have been considered and defined in the following leading cases:

Watts v. Liberty Royalties Corporation, 106 F. (2d) 941

Eastman Gardiner & Co. v. Warren, 109 F. (2d) 193

In Watts v. Liberty Royalties Corporation, it was held that a Delaware corporation does not cease to exist on suspension or forfeiture of its charter for non-payment of annual license fees and that it may bring proceedings for reorganization under the Federal Bankruptcy Act (77B) even after the three years allowed by the Delaware law to wind up its affairs, in view of the Delaware statutes providing for revival or reinstatement of the charter.

The appellant contended that the corporation was prohibited from maintaining a voluntary action for reorganization by the fact that more than three years prior to the filing of its petition its charter had been forfeited for the non-payment of fees to the state of Delaware, and claimed that the failure to pay such fees automatically forfeited and cancelled its charter and its corporate franchises and that the only power the corporation possessed thereafter was to wind up its affairs within the three

Defendants' Exhibit No. 55—(Continued)

year period provided for by the laws of Delaware.

The Court, after referring to the various applicable Delaware statutes (which have been referred to in this memorandum) said:

> "These sections of the Delaware code, when read together, are entirely inconsistent with the theory that a corporation whose charter has been suspended or forfeited for the failure to pay fees is dead and that it has ceased to exist. The Supreme Court in the Illinois case says that such a corporation, under the Illinois law, is ended for all time and for all purposes. That is not so under the laws of Delaware. If it were, life could not be breathed into the corpse, it could not be revived nor reinstated, nor could all things done by the corporation during its period of suspension be validated by its reinstatement.
>
> Provisions similar to those in the Delaware law are found in the laws of many of the states and have frequently been interpreted by the courts. It has generally been held that where charter laws provide for a cancellation and forfeiture of a corporate charter and corporate powers for failure to pay fees and also provide for a reinstatement of the powers of the corporation and for restoration of its charter upon the payment of its fees, the penalty provisions providing for the forfeiture of its charter rights are largely for the purpose of

Defendants' Exhibit No. 55—(Continued)

collecting the charter fees and do not end the life of the corporation. (Citing California, Oregon, Washington and Colorado cases.)

So long as a corporation may be reinstated by the payment of delinquent fees and have validated all of its acts that were done while its powers were suspended, the corporation is not dead. Its powers are only in suspension and reinstatement of its charter restores it to all of its powers and validates all of its acts, including the acts done while its charter was suspended. The corporation had power to institute this proceeding for its reorganization under Section 77B."

Eastman, Gardiner & Co. v. Warren was an action against a Delaware corporation for personal injuries sustained by the appellee. The trial court upheld a demurrer to a special plea in abatement, alleging that the appellant, the Delaware corporation, had no legal existence because, since the institution of the action it had been dissolved under the laws of that State, and the plea further set forth that prior to such dissolution the corporation had sold all of its assets and distributed the proceeds to its debtors, paying only a portion of its indebtedness; that the corporation owned no property, either real, personal or mixed, that none was distributed to its stockholders, and that therefore the Court below was without jurisdiction to proceed further in the cause. In holding that the judgment of the

Defendants' Exhibit No. 55—(Continued)

lower Court should be affirmed, the Circuit Court of Appeals said in its opinion:

> "The argument of appellant ignores the fact, of which we take judicial notice, that the statutes of Delaware extended appellant's life as a corporation for three years for the purpose of suing and being sued. See section 2074 of the Revised Code of Delaware for 1935. As an additional safeguard, section 2078 of said code expressly provides that dissolution shall be no cause for abatement of any action pending on the date of the dissolution of any corporation. Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 411, 84 A. 229. Section 2075 permits the appointment of receivers, but their appointment is not mandatory. Statutes prolonging the existence of a dissolved corporation are remedial and should be given a liberal construction. Helvering v. South Penn. Oil Co., 62 App. D. C. 373, 68 F. 2d 420.
>
> It is contended that the above statutes do not apply where the corporation, before dissolution, disposed of all of its assets to its creditors. No decision of the State of Delaware is cited to show that the courts of that state have so construed its statutes, and our reading thereof does not lead us to such conclusion. We think the allegations of the plea did not prevent appellee from prosecuting his suit, and the judgment of the district court should be affirmed."

Defendants' Exhibit No. 55—(Continued)

April 18, 1945.

Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Attention Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

Enclosed, for your information, is copy of letter dated April 16, 1945, from the State Tax Board of Delaware, in regard to adjustment of franchise taxes in arrears.

Yours very truly,

/s/ M. J. CURRY.

bcc. Messrs. Whitman, Ransom, Coulson & Goetz.

April 18, 1945.

State of Delaware
State Tax Department
843 King Street
Wilmington 99, Delaware.

Attention Mr. P. M. Bourdon, Secretary.

Dear Sirs:

This will acknowledge, with thanks, receipt of your letter dated April 16, 1945, in regard to adjustment in this Corporation's account in connec-

Defendants' Exhibit No. 55—(Continued)

tion with franchise taxes for the years 1942 and 1943.

Yours very truly,

/s/ M. J. CURRY.

cc. Secretary of State
State Tax Department
Dover, Delaware
Corporation Trust Company
100 West Tenth St.
Wilmington 99, Delaware.
Att. Mr. L. H. Herman, Wilmington Asst. Secy.
Mr. F. C. Nicodemus, Jr.

bcc. Messrs. Whitman, Ransom, Coulson & Goetz.

March 23, 1945.

Mr. James K. Polk
Whitman, Ransom, Coulson & Goetz
40 Wall Street
New York 5, N. Y.

Dear Mr. Polk:

You have copy of our letter dated February 21, 1945, addressed to Messrs. Pierce & Greer, Counsel for this Corporation, in regard to Delaware franchise taxes for the years 1942 and 1943, in arrears.

I now enclose copy of our letter dated March 8th, to office of Attorney General, State of Delaware, and copy of reply, dated March 22nd, from the Secretary of the State Tax Board, together with

Defendants' Exhibit No. 55—(Continued)

two copies of form 1105, to be filled in, signed, sworn to and returned not later than March 29th.

Will you please supply the pertinent facts required and return to me for execution and acknowledgment and forwarding, and oblige.

Yours very truly,

/s/ M. J. CURRY.

cc. Mr. F. C. Nicodemus, Jr.

"Petition for commutation of Franchise Taxes."

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 56

The Western Pacific Railroad Company
Mills Building, 220 Montgomery Street
San Francisco, California

File A-29-1
February 8, 1941

Mr. M. J. Curry, Vice President,
The Western Pacific Railroad Company,
37 Wall Street,
New York City, N. Y.

Dear Sir:

Are you now in a position to reply to my letter of December 18, 1940, quoted as follows:

"While the Excess Profits Tax on declared value basis provides for individual returns for corpora-

Defendant's Exhibit No. 56—(Continued)

tions, it is noted that the Excess Profits, Second Revenue Act of 1940 which is in addition to the former tax, provides under Section 730, for consolidated returns which may include all affiliated companies without restriction to railroad companies as in the case with income tax returns.

Will you please advise if it is the intention of the corporation to file a consolidated return for 1940 under this Excess Profits Tax, Second Revenue Act of 1940?"

Yours truly,

/s/ D. C. DeGRAFF.

[Stamped]: Received Feb. 13, 1941. The Western Pacific Railroad Corporation.

February 10, 1941

Air Mail.
Mr. D. C. DeGraff, General Auditor,
The Western Pacific Railroad Company,
Mills Building,
San Francisco, California.

Dear Mr. DeGraff:

Referring to your letter of December 18, 1940, regarding the intention of this corporation to file a consolidated return for 1940 under the Excess Profit Tax Second Revenue Act of 1940.

I have given this matter careful thought and de-

Defendant's Exhibit No. 56—(Continued)

liberation and feel that in accordance with the provisions of Section 730a the most equitable arrangement would be for us to dispense with the filing of a consolidated return in this particular instance.

Will you please forward copies of your completed returns as filed with the Internal Revenue Department.

Very truly yours,

s/ M. J. CURRY.

[Marginal Note]: Disregard, will file Form 1121.

[Western Union Telegram Form]

1941 Mar PM 6 42

FU2 CAK—San Francisco, Calif. 6 1026A

M J Curry, Vice President:

The Western Pacific Railroad Co 37 Wall St NYK:

Do You Wish Me to Prepare Tentative Declared Value Excess Profits Tax Returns for Each of the Four Railroad Companies Included in Consolidated Income Tax Return or Will the Final Returns I Presume You Will Have Prepared in New York Same as Last Year File All Requirements in this Respect. Presume Also You Have Secured Extension of Time for Filing These Returns and Consolidated Income Tax Return.

D. C. DeGRAFF.

Defendant's Exhibit No. 56—(Continued)

Western Union Telegram Form

Day Letter

New York, March 7, 1941

D. C. DeGraff
Western Pacific Railroad Company
Mills Building
San Francisco, Calif.

Telegram 6th relative tax returns. Find in look-into matter, our accountant, who resigned in February, misunderstood just what is required. Holding company will file consolidated return as in previous years. Extension date for filing has been granted to June sixteenth. You may therefore disregard our letter February tenth and telegram March third prepare and forward air mail two copies tentative declared value excess profits tax returns for each of four railroad companies which we will attach to the Corporation's tentative consolidated return which will be filed on or before March fifteenth. Also please forward Forms eleven twenty-two as you have done in past.

M. J. CURRY.

Defendant's Exhibit No. 56—(Continued)

Western Union Telegram Form

New York, March 1, 1945

D. C. DeGraff
Western Pacific Railroad Company
526 Mission Street
San Francisco, Calif.

Extensions to June 15th have been received for filing following consolidated income and excess profits tax returns: For the Corporation for entire year and its subsidiaries for period January 1 to May 1, 1944; Western Pacific Company and its subsidiaries covering period May 1st to end of year; Western Realty and its subsidiary covering period May 1 to end of year. Mr. Polk suggests you follow procedure outlined herein:

By March 15th we will file here tentative consolidated returns for Corporation for entire year including its subsidiaries to May 1st and you will file in San Francisco tentative consolidated return of Company and its subsidiaries from May 1st to end of year and consolidated return of Western Realty and its subsidiary from May 1st to end of year. As you know, one-fourth estimated tax liability must be paid at that time. These tentative returns are not binding so if after further calculation it is found more advantageous to file separate returns we will do so before June 15th.

Have duplicate originals Forms 1122 and 1122E, marked "tentative," for each subsidiary of Corpora-

Defendant's Exhibit No. 56—(Continued)

tion covering period to May 1st executed by proper officers; file one copy with Collector in San Francisco sending other copy here for filing. Have these forms also executed for each subsidiary of Western Pacific Company and Western Realty for period May 1st to end of year and file in San Francisco. Attach to all these forms photostatic copy of application for extension and letter granting such extension, which are being airmailed you today. Also attach completed schedules as required in letter granting extensions.

Prepare tentative declared-value returns for Company and each subsidiary and for Western Realty and Delta for entire year and have duplicate originals executed by proper officers mailing one executed form of each here and filing other in San Francisco before March 15th attaching photostatic copies of application and letter granting extensions.

Would like receive copies of all forms mentioned above for our files. Please acknowledge receipt and understanding this wire and confirm filing by wire.

M. J. CURRY

cc. Confirming (ail mail) with photostatic copies of extension and letter granting extension
Mr. James K. Polk

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 57

Via Air Mail—

July 14, 1942.

Mr. D. C. DeGraff, General Auditor,
The Western Pacific Railroad Company,
526 Mission Street,
San Francisco, Calif.

Dear Mr. DeGraff:

We are looking into the questions you raised in your letter of July 7th, File A-29-1, in connection with 1942 income tax accruals, but before answering we would appreciate reply from you on the following:

With reference to the losses sustained account abandonment of the Deep Creek Railroad Company, it has occurred to us that this loss might be considered by the Internal Revenue Bureau as a 1939 loss in view of the fact that the Interstate Commerce Commission issued its certificate permitting this abandonment July 1, 1939; operation of the line was abandoned as to interstate and intrastate traffic in August, 1939; highest bid for scrap was accepted in August, 1939; and copy of letter we have on our files, dated November 7, 1939, to Mr. Matthew from Mrs. Tyler, which reads as follows:

"Its investment in road and equipment of $504,-029.92 which realized only $25,698.50 will be written off to profit and loss in 1939. The company will

Defendants' Exhibit No. 57—(Continued)

then have no assets except the cash on hand and will not be engaged in any business."

* * *

"Mr. DeGraff and I have conferred on any possible undesirable result of 'forgiving' any unpaid balance of debt of our Reorganization Trustees against the Deep Creek. There could be no adverse tax effect if done in 1939 as in this year there has been a total writing off of the investment in road and equipment exceeding $500,000 except for the approximate sum of $25,000 received. This would greatly exceed any gift to capital that could be made by forgiving outstanding indebtedness."

"I have written thus fully concerning the status of Deep Creek Railroad Company because Mr. Elsey is desirous of winding up its affairs as soon as practical. As stated above the salvage job by the purchaser of the railroad as scrap will be completed shortly and the Auditor is winding up the small outstanding interline accounts. * * *"

As we cannot find in our records any information as to why this investment, for income tax purposes, was charged off in 1940 instead of 1939, as we feel it should have been in view of the facts recited above, please advise.

Yours very truly,

/s/ M. J. CURRY,

Treasurer.

Defendants' Exhibit No. 57—(Continued)

August 25, 1942.

Via air mail—
Mr. D. C. DeGraff, General Auditor,
The Western Pacific Railroad Company,
526 Mission Street,
San Francisco, Calif.

Dear Mr. DeGraff:

With further references to 1942 income tax accruals:

At the time our 1940 and 1941 tax returns were prepared, question arose as to which of the two years (1939 or 1940) the Deep Creek loss could be utilized. It was decided this was immaterial for the same reasons as stated in your letter, namely, that the income deficits for 1939 and 1940 were so large it really made no difference in the return for either year and the 1941 carryover would remain the same. However, we made a memorandum of this with the idea of going into the matter more thoroughly before it became necessary to make up our 1942 returns. Now that the question has come up it will enable us before filing the 1942 returns to reach a definite decision in the matter.

As stated in my telegram of the 14th, we are still undecided on the Deep Creek loss. From the information contained in our records it appears this loss should be charged off in 1939, as it is our understanding the Revenue Bureau has ruled such losses should be written off the year the securities have been ascertained as worthless. However, due to

Defendants' Exhibit No. 57—(Continued)

the large amount involved, we would not want to take it out of 1940 unless we are certain that there is no possible reason for keeping it in that year. Therefore, we should like some more information from you to support this, such as, when did title for the scrap pass to purchaser? When was scrap entirely removed? When was payment for the scrap received? In other words, any additional reason you can supply as to why this loss should be written off in 1940, other than ICC instructions that adjusting entries be made in that year, which we understand is not sufficient evidence to satisfy the Internal Revenue Bureau.

After we have determined for income tax purposes the proper year in which this loss was sustained, there are other factors which must be considered, as you know, and which may effect the Revenue Bureau's decision as to its being allowed. I mention this for the reason you can no doubt give us additional information which will be helpful in determining the question.

First, it may be considered by the Bureau as an inter-company transaction on a consolidated return, which, in some cases has been disallowed.

Secondly, if we feel it will be allowed, the loss must be adjusted, as the Bureau has ruled that losses on advances to affiliated corporations are allowable only to the extent of the excess of the amount of the advances due over the amounts of the operating losses of the affiliate, which in prior years offset

Defendants' Exhibit No. 57—(Continued)

taxable income on consolidated returns. In other words, it should not be deducted twice.

Again, it might be considered in part as a contribution to capital.

So, as stated above, before arriving at a decision it would be appreciated if you can give us this additional information.

With reference to the questions raised in your letter of July 7th as to why items of 1941 income should affect carryover of previous years: Item 26 of the "Instructions for Form 1120" for 1941, Step III—"Conversion of Net Operating Loss Carryover into Net Operating Loss Deduction" fully answer this question. However, this will have no effect on the 1942 Carryover.

The $100 dividends mentioned in next to last paragraph of your letter should be adjusted as stated.

While on the subject of adjustments, if and when Internal Revenue Examiner inspects the Western Realty income tax return for 1941, we suggest his attention be called to the fact that net operating loss deduction was omitted from the 1941 return and a refund is therefore due.

Further, in connection with setting up of 1942 income tax accruals, we estimate the Western Pacific Railroad Corporation's income deficit for the year 1942 will be somewhere between $480,000 and $485,000.

Yours very truly,

/s/ M. J. CURRY.

[Endorsed]: Filed Feb. 18, 1949.

DEFENDANTS' EXHIBIT No. 58
(Identification only)

September 17, 1945

Wood, Walker & Co.,
63 Wall Street,
New York 5, N. Y.

Attn. Miss M. Abels,
Statistical Department

Gentlemen:

Your letter of September 13th, addressed to Mr. E. C. Bates, Treasurer of this Company, has been referred to this office for reply.

I notice that your communication was sent to Mr. Bates as Treasurer of The Western Pacific Railroad Corporation and I am therefore a bit uncertain as to just what you may be trying to determine.

With respect to the stock of The Western Pacific Railroad Company, I think that perhaps the best explanation is that contained in our 1944 annual report under the heading of "Taxes" which is quoted below:

> "When reference is made to the Company's income for 1944 and 1943, consideration must be given to the fact that no Federal income and excess profits tax charges were included for the first four months of 1944 nor for the year 1943.
>
> "Prior to the period of reorganization, which began August 2, 1935, and through 1943, the Company's tax returns had been made by the

then parent, The Western Pacific Railroad Corporation, a holding corporation which owned all of the Company's preferred and common stock, except directors' qualifying shares. The holding corporation filed a consolidated return for itself and its various subsidiaries, of which The Western Pacific Railroad Company was one.

"The plan of reorganization for The Western Pacific Railroad Company was confirmed on October 11, 1943, and found the preferred and common stock (owned by the holding corporation) to be "without equity or value." As a result of this loss, the consolidated return indicated no liability for 1943 Federal income or excess profits taxes. To provide against the contingency that liability of the Railroad Company for some taxes in respect of 1943 might be subsequently asserted by the Commissioner of Internal Revenue, the Reorganization Trustees obtained authority of the Court to set aside a reserve fund of $7,100,000 invested in Government securities.

"As a part of the proceedings for effectuating the plan of reorganization, the Company's preferred and common stocks owned by the holding corporation were transferred to the Reorganization Committee on May 1st, 1944. A consolidated tax return covering the first four months was filed by the holding corporation which reflected no liability for 1944 Federal income and excess profits taxes for that period.

"To provide against the contingency that liability of the Railroad Company for some taxes for the first four months of 1944 might be subsequently asserted by the Commissioner of Internal Revenue, your Directors on March 26th, 1945, established an additional reserve fund in the amount of $3,000,000 to be combined with the previously established reserve fund of $7,100,000. The additional reserve fund has also been invested in Government securities. This entire reserve will be held intact to protect the cash position of the Company in the event it should be later necessary to make any payment of taxes or interest resulting from an administrative or judicial ruling adverse to the Company's contention that it was not liable for any Federal income or excess profits taxes for the calendar year 1943 and the first four months of 1944."

You will note in the fourth paragraph of the above quotation that the corporation's holdings of the Company's stock were transferred to the Reorganization Committee on May 1, 1944, as part of the proceedings for effectuating the plan. If you are attempting to ascertain the value of the stock of the Corporation, I would suggest that you communicate directly with Mr. M. J. Curry, Room 5205, 40 Wall Street, New York 5, N. Y., who is the President of The Western Pacific Railroad Corporation.

As a matter of information, prior to its transfer to the Company's reorganization committee, all of

the stock of the Company was held by The Western Pacific Railroad Corporation and it was not dealt in on the various security exchanges. That situation, of course, no longer obtains since the Company's reorganization effected as of December 29, 1944.

Very truly yours,

/s/ CHARLES ELSEY.

bcc—Mr. M. J. Curry.

DEFENDANTS' EXHIBIT No. 59
(Identification only)

Schedule of All Purchases and Sales of Western Pacific Railroad Corporation Preferred Stock

		Purchases.		
Date	Broker for Vendor	No. of Shares	Price Per Share	Total Cost
1944				
2/23	Troster, Currie & Summers	500	3/8	$ 218.75
2/23	E. F. Hutton & Co.	1000	3/8	391.35
2/28	L. D. Sherman & Co.	200	3/8	100.00
2/29	Troster, Currie & Summers	200	3/8	100.00
3/1	Eisele & King, Libaire, Stout & Co.	200	1/2	102.50
3/2	Hill, Thompson & Co.	35	3/8	17.50
3/3	Moore, Leonard & Lynch	100	1/2	50.00
3/18	Hill, Thompson & Co.	500	.65	325.00
3/18	M. S. Wien & Co.	200	5/8	135.00
3/20	Newburger & Hano	600	1/2	375.00
6/26	Merrill, Lynch, P. F. & B.	100	3/8	37.50
8/21	Frank C. Moore Co.	250	1/2	140.62
9/5	L. D. Sherman & Co.	800	1/2	450.00
10/9	Williams & Imbrie	2000	5/8	1,375.00
10/9	Friedman & Co.	200	5/8	125.00
12/27	M. S. Wien & Co.	100	1/4	31.25
12/28	Franklin & Co.	3538	1/2	1,990.13
1946				
1/11	M. S. Wien & Co.	600	1/2	337.50
1/16	M. S. Wien & Co.	500	1/2	281.25
9/20	L. D. Sherman & Co.	1000	2 3/8	2,510.00
9/30	G. A. Saxton & Co.	200	3	600.00
9/30	M. S. Wien & Co.	200	3	600.00
	Totals	13023		$10,293.35

Mr. Van Kirk made no sales of said stock

Defendants' Exhibit No. 59—(Continued)

J. S. Farlee & Co.

Confirmations of All Purchases and Sales of Preferred Stock, to April 10, 1948

	Purchases			Sales			
Trade Date	Number of Shares	Price Per Share	Total Cost (incl. comm.)	Number of Shares	Price Per Share	Total Net Proceeds	Balance of Shares Held
1944							
1/10	200	1/8	$ 25.00				200
2/16	200	3/8	75.00				400
2/16	100	3/8	37.50				500
2/17	200	1/2	100.00				700
2/18	200	1/2	100.00				900
2/18	200	1/2	100.00				1,100
3/16	6	1/2	3.00				1,106
3/20	160	5/8	103.20				1,266
3/31	400	9/16	250.00				1,666
12/6	12	1/4	3.00				1,678
12/6	100	3/8	43.75				1,778
12/18	70	1/4	21.88				1,848
12/19	200	1/4	75.00				2,048
12/19	100	3/8	37.50				2,148
12/20	24	1/4	6.00				2,172
1945							
3/19	300	3/8	150.00				2,472
3/20	200	1/2	100.00				2,672
4/6	7	1/4	1.75				2,679
4/9	243	5/8	151.88				2,922

Defendants' Exhibit No. 59—(Continued)

J. S. Farlee & Co. (Cont.)

Confirmations of All Purchases and Sales of Preferred Stock, to April 10, 1948

	Purchases			Sales			
Trade Date	Number of Shares	Price Per Share	Total Cost (incl. comm.)	Number of Shares	Price Per Share	Total Net Proceeds	Balance of Shares Held
1945							
5/11	100	1¼	125.00				3,022
5/11	200	1⅛	225.00				3,222
5/11	200	1 3/16	237.50				3,422
5/11	100	1⅛	112.50				3,522
5/11	500	1¼	625.00				4,022
5/11	500	1¼	625.00				4,522
5/11	500	1¼	625.00				5,022
5/11	100	1¼	125.00				5,122
5/11	300	1¼	375.00				5,422
5/12	500	1⅛	562.50	500	1¼	$ 585.00	5,422
6/5	100	⅞	100.00				5,522
6/5	200	1	200.00				5,722
10/9	100	⅝	62.50				5,822
10/16	400	½	250.00				6,222
10/18	75	½	46.88				6,297
10/18	25	⅝	15.63				6,322
10/19	100	⅝	62.50				6,422
10/20	100	⅝	62.50				6,522
10/23	700	½	393.75				7,222
10/31	500	½	281.25				7,722

Defendants' Exhibit No. 59—(Continued)

11/1	425	½	239.06				8,147
11/16	100	½	56.25				8,247
11/21	500	1	500.00	700	1⅛	745.50	8,047
11/23	500	⅞	437.50				8,547
1946							
1/16	500	½	$ 281.25				9,047
2/4	500	⅝	312.50				9,547
6/3	100	3	300.00				9,647
7/29	200	3½	700.00				9,847
7/30	300	3¼	975.00				10,147
8/2	200	4	800.00	200	4⅛	$ 825.00	10,147
8/5	5	3½	17.50				10,152
9/16	20	3	60.00				10,172
9/30	27	3	81.00				10,199
10/10	500	3½	1,797.50	500	3¾	1,840.00	10,199
11/7				100	4	393.00	10,099
11/12				100	4⅛	405.50	9,999
11/20				200	4	393.00	9,799
11/29				500	4	1,970.00	9,299
12/16	30	3¼	105.00				9,329
1947							
1/2	100	3¼	325.00				9,429
1/2	50	3⅜	168.75	40	4	152.60	9,439
1/7	100	3¼	325.00				9,539
1/29				100	4¼	369.00	9,439
2/18	100	3½	350.00				9,539

Defendants' Exhibit No. 59—(Continued)

J. S. Farlee & Co. (Cont.)

Confirmations of All Purchases and Sales of Preferred Stock, to April 10, 1948

	Purchases			Sales			
Trade Date	Number of Shares	Price Per Share	Total Cost (incl. comm.)	Number of Shares	Price Per Share	Total Net Proceeds	Balance of Shares Held
1947							
3/18	200	3 7/16	687.50				9,739
3/27				200	3⅞	763.00	9,539
4/23	100	3⅛	312.50				9,639
5/27	16	2⅝	42.00				9,655
6/2	300	2¾	825.00	300	2⅞	862.50	9,655
6/17	50	3¼	162.50	100	3¼	325.00	9,605
6/19	75	3⅛	234.38				9,680
7/14				300	3⅜	1,012.50	9,380
7/15	24	3⅛	75.00				9,404
7/18				100	3½	350.00	9,304
7/23	100	3¼	325.00				9,404
7/24	20	3⅛	62.50				9,424
8/29	15	3⅜	50.63				9,439
9/9				100	4⅛	406.50	9,339
10/1	100	3⅝	362.50				9,439
10/3	200	3¼	700.00				9,639
1948							
1/7	100	3	300.00				9,739

Defendants' Exhibit No. 59—(Continued)

1/14	100	3 1/6	306.25				9,839
2/3	100	2¾	275.00				9,939
2/4	175	2¾	481.25				10,114
2/5	100	2⅜	237.50				10,214
2/5	200	2¼	450.00				10,414
2/7				200	2½	500.00	10,214
2/11				100	2⅝	262.50	10,114
2/16				275	3	825.00	9,839
2/19	100	2⅞	287.50				9,939
2/19	100	3	300.00				10,039
2/24				100	3⅛	312.50	9,939
3/2	300	3	900.00				10,239
3/5	200	3	600.00				10,439
3/11	100	3	300.00				10,539
Totals	15,254		$22,605.29	4,715		$13,298.10	10,539

Defendants' Exhibit No. 59—(Continued)

Western Pacific Railroad Corp. Preferred Stock Given by Russell M. Van Kirk to Mrs. Russell M. Van Kirk and Owned and Held by Her

No. of Shares	Ctf. No.	Name	Date of Ctf.
100	D22125	William A. Plecity	Apr. 6, 1943
2	D028817	De Copper & Doremus	July 22, 1931
5	D028936	De Coppet & Doremus	Oct. 7, 1931
8	D04525	Norman Williams	July 15, 1925
5	D029126	De Coppet & Doremus	Dec. 3, 1931
10	D042694	De Coppet & Doremus	Apr. 13, 1943
10	D042687	De Coppet & Doremus	Apr. 8, 1943
100	D21735	Morgan Davis & Co.	Mar. 22, 1943
100	D19713	John S. Calvert	Mar. 24, 1941
100	D19711	John S. Calvert	Mar. 24, 1941
100	D19710	John S. Calvert	Mar. 24, 1941
8	D028661	Bertram E. Alanson	May 27, 1931
100	D8680	Bertram E. Alanson	May 11, 1931
100	D8679	Bertram E. Alanson	May 11, 1931
100	D8678	Bertram E. Alanson	May 11, 1931
100	D8677	Bertram E. Alanson	May 11, 1931
100	D8676	Bertram E. Alanson	May 11, 1931
100	D8675	Bertram E. Alanson	May 11, 1931
100	D8674	Bertram E. Alanson	May 11, 1931
100	D8673	Bertram E. Alanson	May 11, 1931
100	D21788	Ross B. Cameron	Mar. 24, 1943
1	D012495	Harrison Smith	Oct. 28, 1925
1	D03944	Harrison Smith	July 15, 1925
100	D15902	Silas Auerbach	Oct. 26, 1937
100	D18511	Samuel H. Popkin	Aug. 28, 1939
100	D18386	Samuel H. Popkin	June 8, 1939
100	D18387	Samuel H. Popkin	June 8, 1939
100	D18368	Samuel H. Popkin	May 23, 1939
100	D18371	Samuel H. Popkin	May 26, 1939
25	D037682	Harry Stowsky	May 12, 1936
7	D031369	Miss Priscilla F. Alden	Aug. 15, 1933
100	D18304	Peter A. Nygren	May 8, 1939
21	D042945	Rachel Booth Powers	Mar. 13, 1945
24	D042902	Halle & Stieglitz	Jan. 4, 1945
100	D21992	Gus Carras	Mar. 29, 1943
100	D21993	Gus Carras	Mar. 29, 1943
100	D21994	Gus Carras	Mar. 29, 1943
100	D21314	Louis Elkies	Feb. 10, 1943
100	D21315	Louis Elkies	Feb. 10, 1943
100	D21316	Louis Elkies	Feb. 10, 1943
100	D21317	Louis Elkies	Feb. 10, 1943
100	D21318	Louis Elkies	Feb. 10, 1943
25	D043255	O. Stuart White, Jr.	Sept. 24, 1946
24	D043492	Farlee & Co.	July 29, 1947
1	D043476	Farlee & Co.	June 26, 1947
5	D043513	Farlee & Co.	Sept. 12, 1947
41	D042792	Farlee & Co.	Mar. 22, 1944
3,123			

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2109

THE WESTERN PACIFIC RAILROAD COMPANY

LIST OF DIRECTORS AND TERMS THEREOF, JANUARY 1, 1935 TO FEBRUARY 12, 1948

	Year 1935	Year 1936	Year 1937	Year 1938	Year 1939	Year 1940	Year 1941	Year 1942	Year 1943	Year 1944
Director	Charles Elsey	Same	Same	Same	Same	Same	Same	Same	Same	Same
Director	T.M.Schumacher	Same	Same	Same	Same	Same	Same	Same	Same	T.M.Schu to 12/ E. E. Co from 12/
Director	A. C. Jones	Same	Same	Same	Same	Vacant to 3/27/40 W.S.Curtiss from 3/27/40	W.S.Curtiss	Same	Same	W. S. Cu to 12/2 Wakefield from 12/
Director	J. F. Regan	Same	Same	J. F. Regan to 8/29/38 Vacant from 8/29/38	—	Vacant to 3/27/40 H.H.Poultorer from 3/27/40	H.H.Poultorer	Same	Same	H.H.Poul to 12/2 E. E. Ba from 12/
Director	E. W. Mason	Same	Same	Same	Same	Same	Same	Same	Same	Same
Director	D. C. DeGraff	DCD to 2/18/36 CPR from 2/18/36 to 3/30/36 DCD from 3/30/36	D.C.DeGraff	Same	Same	Same	Same	Same	Same	D. C. De to 12/2 J.R.Clark from 12/
Director	W. G. Bruce	Same	W. G. Bruce to 8/9/37 C. L. Dredt from 8/9/37	C. L. Dredt	Same	Same	Same	Same	Same	C. L. Dre to 12/2 J. A. Fol from 12/
Director	E. C. Bates	Same	Same	Same	Same	Same	Same	Same	Same	E. C. Ba to 12/2 J.W.Mailli from 12/
Director	Ralph Budd	Same	Same	Ralph Budd to 3/10/38 Vacant from 3/10/38	—	Vacant to 3/27/40 E.W.Englebright from 3/27/40	E.W.Englebright	Same	Same	E.W.Engle to 12/2 E. C. Ma from 12/
Director	S. F. Ennis	Same	S. F. Ennis to 11/10/37 Vacant from 11/10/37	Vacant to 3/30/38 Reed Smoot from 3/30/38	Reed Smoot	Same	Reed Smoot to 2/3/41 T.L.Phillips from 3/26/41	T.L.Phillips	Same	T.L.Phill to 12/2 E.G.Buckl from 12/
Director	Wm. Fries	Same	Same	Same	Same	Same	Same	Same	Same	Wm. Fries to 11/2 Vacant fr 11/20/
Director	J. E. Gorman	Same	Same	Same	Same	Same	Same	J.E. Gorman to 3/25/42 Vacant from 3/25/42	—	—
Director	W. L. Hughson	Same	Same	Same	Same	Same	Same	Same	Same	W.L.Hughs to 11/20/ "11/20/5
Director	J. G. Kooper to 8/15/35 Vacant from 8/15/35	C. W. Dooling from 2/18/36	C.W.Dooling	Same	Same	Same	Same	Same	Same	C.W.Dooli to 12/2 F.C.Wright from 12/2
Director	A. W. Lousby	A. W. Lousby to 11/23/36 W. H. Kingsley from 12/7/36	W.H.Kingsley	Same	Same	Same	Same	W.H.Kingsley to 3/7/42 H.B.Campbell from 11/2/42	H.B.Campbell to 3/1/43 Vacant from 3/1/43	—
Director	J. L. Eagle	Same	Same	Same	Same	Vacant, 1/1/40 to 3/27/40 C. F. Post from 3/27/40	C. F. Post	Same	Same	—
Director	F.J.Shepard	Same	Same	Same	Same	Same	Same	F.J.Shepard to 8/22/42 A.P.Osborn from 11/2/42	A.P.Osborn	A.P.Osborn to 11/20/ Vacant fr 11/20/44
Director	W. T. Smith	W. T. Smith to 8/25/36 Vacant from 8/25/36	Vacant to 3/31/37 C.P.Russell from 3/31/37	C. P. Russell	Same	C.P.Russell to 5/6/40 H.J.Carey from 5/6/40	H. J. Carey	Same	Same	H. J. Carey to 11/20/ Vacant fr 11/20/44
Director	J.W.Williams	Same	Same	Same	Same	Same	J.W.Williams to 2/4/41 Vacant from 2/4/41	—	—	—

Office of Secretary,
San Francisco, Calif.,
February 12, 1948.

THE WESTERN PACIFIC RAILROAD COMPANY

1, 1935 TO FEBRUARY 12, 1948

Year 1942	Year 1943	Year 1944	Year 1945	Year 1946	Year 1947	Year 1948
Same	Same	Same	Same	Same	Same	Same
Same	Same	T.M.Schumacher to 12/28/44 E. E. Coulson from 12/28/44	E. E. Coulson	Same	Same	Same
Same	Same	W. S. Curtiss to 12/28/44 Wakefield Baker from 12/28/44	Wakefield Baker	Same	Same	Same
Same	Same	H.H.Poultorer to 12/28/44 E. E. Ball from 12/28/44	E. E. Ball	Same	Same	Same
Same	Same	Same	Same	Same	E. A. Mitchell	Same
Same	Same	D. C. DeGraff to 12/28/44 J.R.Clark, Jr. from 12/28/44	J. R. Clark, Jr	Same	Same	Same
Same	Same	C. L. Dredt to 12/28/44 J. A. Folger from 12/28/44	J. A. Folger	Same	Same	Same
Same	Same	E. C. Bates to 12/28/44 J.W.Mailliard, Jr. from 12/28/44	J.W.Mailliard, Jr	Same	Same	Same
Same	Same	E.W.Englebright to 12/28/44 E. C. Magerty from 12/28/44	E. C. Magerty	Same	E. C. Magerty to 8/5/47 Vacant from 8/5/47	—
.Phillips	Same	T.L.Phillips to 12/28/44 E.G.Buckland from 12/28/44	E. G. Buckland to 12/1/45 Vacant to 5/1/46	Vacant to 5/1/46 Stuart Jenkins from 5/1/46	Stuart Jenkins	Same
Same	Same	Wm. Fries to 11/20/44 Vacant from 11/20/44				
. Gorman 3/25/42 ant from 3/25/42	—	—				
Same	Same	W.L.Hughson to 11/20/44 "11/20/5				
Same	Same	C.W.Dooling to 12/28/44 F.C.Wright from 12/28/44	F.C.Wright to 3/26/45 C.B.Henderson from 3/26/45	C.B.Henderson	Same	Same
.Kingsley 3/7/42 Campbell m 11/2/42	H.B.Campbell to 3/1/43 Vacant from 3/1/43	—				
Same	Same	—				
J.Shepard 8/22/42 P.Osborn m 11/2/42	A.P.Osborn	A.P.Osborn to 11/20/44 Vacant from 11/20/44				
Same	Same	H. J. Carey to 11/20/44 Vacant from 11/20/44				
—	—	—				

Note

In accordance with Plan of Reorganization, amended By-Laws were adopted on November 20, 1944, reducing the membership of the Board of Directors to 11 Directors.

91

Int. Ex 92

2110

THE WESTERN PACIFIC RAILROAD COMPANY

LIST OF MEMBERS OF EXECUTIVE COMMITTEE AND TERMS THEREOF, JANUARY 1, 1935 TO

ROAD COMPANY

INC. JANUARY 1, 1935 TO FEBRUARY 12, 1948

	Year 1935	Year 1936	Year 1937	Year 1938	Year 1939	Year 1940	Year 1941	Year 1942	Year 1943	Year 1944	Year 1945	Year 1946 (see Note)	Year 1945	Year 1946	Year 1947	Year 1948
Member of Executive Committee (*)	T.M.Schumacher	Same	Same	Same	Same	Same	Same	Same	Same	Same	Same	T.M.Schumacher to 12/31/46	—	—	—	—
Member of Executive Committee (β)	Charles Kleay	Same	Same	Same	Same	Same	Same	Same	Same	Same	Same	Charles Kleay to 12/31/46	—	—	—	—
Member of Executive Committee	A. W. Loasby	A. W. Loasby to 12/7/36 W.H. Kingsley from 12/7/36	W. H. Kingsley	Same	Same	Same	Same	W.H.Kingsley to 3/7/42 R.B.Campbell from 11/2/42	R.B. Campbell to 3/7/43 Vacant from 3/7/43	W.H.Kingsley to 3/7/42 R.B.Campbell from 11/2/42	R.B. Campbell to 3/7/43 Vacant from 3/7/43	Vacant	—	—	—	—
Member of Executive Committee	A. G. Jones	Same	Same	Same	Same	Vacant to 3/7/40 E.J.Carey from 3/7/40	E.J.Carey	Same	Same	Same	Same	E. J. Carey to 11/30/46	—	—	—	—
Member of Executive Committee	F. J. Sheppard	Same	Same	Same	Same	Same	Same	F.J.Sheppard to 8/28/42 A.P.Osborn from 11/2/42	A.P.Osborn	J.Sheppard to 8/28/42 A.P.Osborn from 11/2/42	A.P.Osborn	A. P. Osborn to 11/30/46	—	—	—	—

(*) Ex-Officio. Mr. Schumacher was also Chairman of the Executive Committee.

(β) Ex-Officio. Mr. Kleay was also President of the Company.

Note: Company was reorganized effective December 29, 1944, and Executive Committee provided for in By-Laws of reorganized Company has not been elected.

Office of Secretary,
San Francisco, Calif.,
February 12, 1948.

Cameraman's Note:

This is poor copy, but is the best obtainable.

INTERVENERS EXHIBIT No. 3

Mr. Polk:

Herewith extract from AAR weekly information letter, as per 'phone conversation of date.

M. J. CURRY

3/16/43.

Extract from Weekly Information Letter No. 504, dated March 13, 1943, from Association of American Railroads, Washington, D. C.

Internal Revenue Depreciation Account Ruling

Internal Revenue Commissioner Helvering this week refused the request of this Association that railroads desiring to change from retirement to depreciation accounting be permitted to place in the agreement an additional clause which would provide "that the reserve for accrued depreciation to the date of the change in the accounting method shall not be used in computing invested capital for excess profits tax purposes."

"Only true earned surplus or undivided profits," Mr. Helvering said, in a letter received by Mr. Fletcher, Vice President of this Association, "can be included in invested capital, and if, for any reason, the books of a railroad do not properly reflect the true surplus, such adjustments must be made as are necessary in order to arrive at the correct amount of surplus. If, for example, the depreciation actually sustained with respect to the existing property is not reflected on the books of a

corporation, earned surplus must be reduced to that extent.

"In the opinion of this office it is necessary to reduce the surplus of a corporation changing from the retirement method to the depreciation method of accounting to the extent of the amounts indicated by the reserve for depreciation required by the conditions imposed by the Commissioner before permission to change can be granted. Therefore, the Bureau cannot consent to the inclusion of the suggested clause in the agreement."

[Endorsed]: Filed Feb. 3, 1949.

INTERVENER'S EXHIBIT No. 4

The Western Pacific Railroad Company
Western Pacific Building, 526 Mission Street
San Francisco, California

March 17, 1943.
220.4

Mr. Robert E. Coulson,
Whitman, Ransom, Coulson & Goetz,
40 Wall Street,
New York.

Dear Mr. Coulson:

This will reply to your letter of March 1st relating to depreciation on Way and Structures and its relation to Income Tax.

Intervener's Exhibit No. 4—(Continued)

Enclosed you will find a memorandum dated March 13th, with copies of attachments referred to therein, relating to negotiations between the A.A.R. and the Internal Revenue Bureau. Since Mr. DeGraff's memorandum was written, A.A.R. Accounting Circular No. 51, dated March 9th, has been received and, with its enclosures, bears on the attitude of the Internal Revenue Department concerning depreciation accounting.

It is of interest to point out that determination of loss at the time of retirement is a matter of fact, whereas the amount of depreciation accrued must always be a theoretical premise.

We will continue to use the retirement basis for establishing tax losses rather than to select one of the other alternatives offered by the Tax Commissioner. When the reorganized company takes over, the method to be followed in subsequent years can be decided upon. Any taxes now paid will probably be subject to re-examination with respect to those due from the new company, and when this whole subject is under discussion the most advantageous method can be selected.

The "brief" referred to in the atfached papers, and particularly Commissioner Helvering's letter of October 24th, is one prepared by the A.A.R. dated April 20th, 1942, entitled

> "A Discussion of Conditions under which Railroads May Change from Retirement to De-

Intervener's Exhibit No. 4—(Continued)

preciation Accounting with Respect to Road Property.

Brief for Consideration of the Bureau of Internal Revenue."

We have but one copy here, but you can no doubt otbain one from Mr. Schumacher, or upon application to the Association.

Yours very truly,

/s/ CHARLES ELSEY.

enclosure

cc Mr. T. M. Schumacher . . . with encloures.—C. E.

Mr. Robert E. Coulson:

The attached Circular No. 51 and its enclosures were received after Mr. DeGraff wrote his memorandum on March 13th.

C. E.

San Francisco,
March 17, 1943.

Intervener's Exhibit No. 4—(Continued)

(Copy)

Association of American Railroads
Transportation Building
Washington, D. C.

Circular No. 51
March 9, 1943
File 223-2

E. H. Bunnell,
Vice President.

To Chief Accounting Officers:

Herewith is copy of three letters, dated October 24, 1942, December 9, 1942, and March 6, 1943, addressed to this Association by Mr. Guy T. Helvering, Commissioner of Internal Revenue, in the matter of conditions under which railroads may change from retirement to depreciation accounting.

These letters reflect the result of negotiations which the special tax committee conducted with the Bureau of Internal Revenue and are self-explanatory.

Out of an abundance of caution, attention is directed to the fact that a taxpayer desiring to change his method of accounting must make application to the Commissioner for permission so to do within 90 days after the beginning of the taxable year in which the change is to be made. For the year 1943, the 90-day period will expire March 31st.

Yours very truly,

/s/ E. H. BUNNELL.

43480.

Intervener's Exhibit No. 4—(Continued)

(Copy)

Treasury Department
Washington

March 6, 1943.

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue and refer to
GC:I:GEL A-370657

Association of American Railroads,
Transportation Building,
Washington, D. C.

Attention: Mr. R. V. Fletcher

Sirs:

Reference is made to your letter of January 15, 1943, relating to the terms and conditions of the irrevocable agreement required by the Bureau upon granting permission to a railroad to change from retirement to depreciation accounting.

You suggest that an additional clause should be incorporated in the agreement reading "that the reserve for accrued depreciation to the date of the change in the accounting method shall not be used in computing invested capital for excess profits tax purposes."

Only true earned surplus or undivided profits can be included in invested capital, and if, for any reason, the books of a railroad do not properly reflect

Intervener's Exhibit No. 4—(Continued)

the true surplus, such adjustments must be made as are necessary in order to arrive at the correct amount of surplus. If, for example, the depreciation actually sustained with respect to the existing property is not reflected on the books of a corporation, earned surplus must be reduced to that extent.

Whether the depreciable assets of a corporation are valued on its books at the beginning of the taxable year at an amount in excess of their actual value at that time is a question of fact. Cumberland Glass Manufacturing Co. v. Commissioner, 44 F. (2d) 455; Geuder, Paeschke and Frey Co. v. Commissioner, 41 F. (2d) 308; Haugh & Keenan Storage and Transfer Company v. Heiner, 20 F. (2d) 921; Northwestern States Portland Cement Company, 7 B.T.A. 935.

In the opinion of this office it is necessary to reduce the surplus of a corporation changing from the retirement method to the depreciation method of accounting to the extent of the amounts indicated by the reserve for depreciation required by the conditions imposed by the Commissioner before permission to change can be granted. Therefore, the Bureau cannot consent to the inclusion of the suggested clause in the agreement.

Respectfully,

/s/ GUY T. HELVERING,
Commissioner.

Intervener's Exhibit No. 4—(Continued)

(Copy)

41998-2

Treasury Department,
Washington

December 9, 1942.

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and refer to IT:EV:PU RCS

Association of American Railroads,
Law Department, Transportation Building,
Washington, D. C.

Attention: Mr. R. V. Fletcher
Vice-President

Sirs:

Receipt is acknowledged of your letter of November 20, 1942, inquiring with respect to the

Intervener's Exhibit No. 4—(Continued)

form of agreement required by the Bureau upon granting permission to a railroad to change from retirement to depreciation accounting.

Each railroad is required to irrevocably agree: (1) that a reserve for accrued depreciation in accordance with one of the options set forth in Bureau letter of October 24, 1942, shall be set up as of the date the change in accounting method is effective; (2) that the remaining sum to be recovered through depreciation allowances shall be limited to the cost or other basis, less the depreciation so accrued; (3) that neither the change of method nor the amount of depreciation so accrued shall have any effect on taxable net income for any year ending prior to the date of change in accounting method; (4) that the depreciation rates agreed to are subject to modification, if subsequent experience indicates that revision is necessary in order to spread the cost of the assets over their remaining useful lives; such revision, however, is not to be made retroactive; and (5) that complete depreciation accounting in accordance with all of the applicable sections of the Internal Revenue Code and Regulations shall be adopted for those accounts which are changed from retirement to depreciation accounting.

In connection with condition (1) above it is necessary to select the option and agree upon the specific reserve for each account to be depreciated before permission is granted.

In view of the fact that it will be impossible for

Intervener's Exhibit No. 4—(Continued)

the Bureau to make a detailed investigation of the depreciation basis the permission letter includes a mutual understanding that the basis may be corrected to conform to the allowable basis under the Internal Revenue Code should subsequent investigation disclose errors of cost or valuation. In the event of any such correction, the accrued depreciation would be appropriately adjusted, but no retroactive adjustment will be made to the depreciation which may hav been allowed subsequent to the date of the change in accounting method.

Respectfully,

/s/ GUY T. HELVERING,
Commissioner.

Intervener's Exhibit No. 4—(Continued)

(Copy)

4-345-1

Treasury Department
Washington

October 24, 1942.

Office of
Commissioner of Internal Revenue

Association of American Railroads,
Transportation Building,
Washington, D. C.

In re: Conditons under which Railroads may change from Retirement to Depreciation Accounting with respect to Road Property

Sirs:

Reference is made to conferences between your Association and the Bureau of Internal Revenue on February 18 and 19, 1942, and to your brief on the above question, dated April 20, 1942.

Your brief has been considered by the Chief Counsel of the Bureau of Internal Revenue, who has ruled in effect, that the conditions under which permission will be granted railroads to change from retirement to depreciation accounting with respect to road properties are within the discretion of the Commissioner of Internal Revenue, and that the reasonableness of these requirements are questions of fact, rather than of law.

Intervener's Exhibit No. 4—(Continued)

This office also has given careful consideration to the brief which you submitted, and has come to the conclusion that, as a condition requisite to granting permission to change from retirement to depreciation accounting, a reserve representing past accrued depreciation shall be set up at the date of the change in accounting method.

Each railroad may elect to determine its reserve by one of the following methods:

1. The accounts may be reconstructed from their beginning, or may start with the I. C. C. valuation, setting up as a reserve the difference between cost of reproduction new and cost of reproduction less accrued depreciation as determined at the valuation date. From either starting point, the capital accounts shall be carried forward, increased by additions and decreased by retirements, except that any increase in replacement costs, or additions or betterments expensed, which have been deducted for income tax purposes, may not be restored. Depreciation at rates to be agreed upon shall be computed for all years and accrued into a depreciation reserve. From this reserve shall be deducted the cost of normal retirements, but for retirements due to casualty or special obsolescence, which would have been allowable under depreciation accounting, only the accrued depreciation thereon shall be deducted.

Intervener's Exhibit No. 4—(Continued)

2. A reserve may be set up by multiplying the expired life of individual structures, or the weighted average ages of the accounts representing groups of assets, now in service, by the depreciation rates agreed upon for these assets.

3. A reserve of 30% of the total depreciable accounts at the date of change may be set up. It is to be understood that this is an overall reserve and the total amount so computed is to be allocated to the different depreciable accounts on a reasonable basis, such allocation to be a matter of agreement between each railroad and the Bureau.

Respectfully,

/s/ GUY T. HELVERING,
Commissioner.

Attendance at conferences held February 18 and 19, 1942, in the matter of substitution for income tax purposes of depreciation accounting for retirement accounting on certain classes of road property.

Treasury Department

Thos. Tarleau, Legislative Counsel (Feb. 18)

Bureau of Internal Revenue

Norman D. Cann, Asst. to Comm. (Feb. 18)

Leo Diamond, Spl. Asst. to Chief Counsel (Feb. 18-19)

Intervener's Exhibit No. 4—(Continued)

S. P. Hatchett, Head, Engineering and Valuation Division (Feb. 18-19)

E. L. Lindsey, Asst. Head, Engineering and Valuation Division (Feb. 18-19)

R. C. Staebner, Chief, Public Utilities Section (Feb. 18-19)

C. R. Dunn, Practice and Procedure Division (Feb. 18-19)

H. J. Donnelly, Practice and Procedure Division (Feb. 19)

Railroads

R. C. Beckett, Gen. Atty., Illinois Central (Feb. 18)

J. C. Kauffman, Gen. Atty., Chesapeake and Ohio (Feb. 18-19)

R. J. Lehman, Gen. Atty., Atch., Top. & Santa Fe (Feb. 18-19)

F. J. Fell, Jr., V.P. & Compt., Pennsylvania RR. (Feb. 18)

T. H. Seay, Compt., Southern (Feb. 18-19)

L. J. Tracy, Controller, Union Pacific (Feb. 18)

R. V. Fletcher, V. Pres., A.A.R. (Feb. 18)

E. H Bunnell, V Pres, A.A.R. (Feb. 18-19)

R. L. Ettenger, Jr., Asst. to V. Pres., A.A.R. (Feb 18-19)

37773-6

[Stamped]: Received Mar. 22, 1943, Western Pacific Railroad Corporation.

[Endorsed]: Filed Feb. 3, 1949.

INTERVENERS' EXHIBIT No. 5

February 21, 1945.

Messrs. Pierce & Greer
40 Wall Street
New York 5, N. Y.

Attention Mr. F. C. Nicodemus, Jr.

Dear Mr. Nicodemus:

This Corporation has received notice from the Deputy Attorney General of Delaware stating that unless it pays the 1942 franchise tax and penalty interest by April 1, 1945, the Corporation's charter will be forfeited. The notice shows the following payments due as of April 1, 1945:

1942 franchise tax	$2,525.00
12% penalty interest	505.00
1943 franchise tax	2,525.00
12% penalty interest	202.00
Total	$5,757.00

I feel that upon application to the State Tax Board of Delaware, they will agree to reduce the tax and interest penalty as they did for the years 1940 and 1941. If a reduction is allowed on the same basis, there would be due on April 1st the following:

1942 franchise tax	$1,262.50
4% penalty interest	88.40

1943 franchise tax	1,262.50
4% penalty interest	37.90
Total	$2,651.30

The question in my mind is whether we should pay these taxes or let them go by default. If we default and our charter is voided, the question arises what would be the effect on the consolidated income and excess-profits tax returns filed by the Corporation, as parent, for the years 1942, 1943 and 1944. As you know, a very large deduction was taken in 1943, which wiped out any tax liability for that year and will also have an effect upon the 1942 and 1944 consolidated returns. I understand the total tax saving to The Western Pacific Railroad Company will amount to about 15 million dollars. Therefore, I feel the payment or non-payment of these franchise taxes must be determined particularly from the Federal income tax angle.

I would suggest that before arriving at a decision in this matter you confer with the firm of Whitman, Ransom, Coulson & Goetz, our tax counsel, who are aware of this situation and are considering the consequences which the non-payment of these franchise taxes would have from an income tax viewpoint.

If it is decided these franchise taxes be paid, my personal feeling is we should pay the tax for 1943 at the same time the 1942 tax is paid, thereby avoiding further accrual of penalty interest thereon.

I would appreciate your opinion on this at your early convenience.

A copy of this letter is being sent to Mr. Polk of the firm of W.R.C.& G., for his information.

Yours very truly,

/s/ M. J. CURRY.

cc. Mr. James K. Polk
Whitman, Ransom, Coulson & Goetz.

[Endorsed]: Filed Feb. 3, 1949.

INTERVENERS' EXHIBIT No. 6

May 31, 1944.

Mr. F. C. Nicodemus, Jr.
40 Wall Street
New York 5, N. Y.

Dear Mr. Nicodemus:

As you know (see copies our letters dated March 21, 1944, to State of Delaware, Office of Attorney General, and March 31, 1944, to Corporation Trust Company, Wilmington, Delaware) the State Tax Board granted extension to July 1, 1944, for payment of the Corporation's 1941 franchise tax, which as of July 1, 1944, will amount to $1,262.50 principal, plus penalty interest of 4% from July 1, 1942, amounting to $101—a total of $1,363.50.

In view of conditions surrounding the Corporation at this time, I should like to have your opinion as to what should be done in the matter of payment

or non-payment of the tax. If not paid on or before July 1, 1944, its charter will be voided.

Yours very truly,

/s/ M. J. CURRY.

[Endorsed]: Filed Feb. 4, 1949.

INTERVENERS' EXHIBIT No. 7

Pierce & Greer
40 Wall Street
New York 5, N. Y.

June 14, 1944.

Mr. M. J. Curry
President
The Western Pacific Railroad Corporation
37 Wall Street
New York 5, N. Y.

Dear Mr. Curry:

As I mentioned to you yesterday, I talked with Colonel Coulson about the compromise proposal respecting the Delaware franchise tax involving the total payment as of July 1, 1944, of the sum of $1,363.50. In the course of this talk I explained to Colonel Coulson that it would be necessary to make this payment in order to continue the corporate existence of the Company through the current calendar year, and that I did not see how we could avoid making this payment out of current available cash.

I told him that I felt quite sure, and he agreed, that Mr. Buckland would recognize the necessity of this payment should he ultimately succeed in maintaining his claim of a lien on our cash derived from Standard Realty and Development Company, notwithstanding the fact that his own claim has been satisfied and he has been made whole under the Commission's Plan of Reorganization.

You may, therefore, arrange for the payment referred to in your letter to me of May 31, 1944.

Yours very truly,

/s/ F. C. NICODEMUS JR.

Check No. 33
Date Paid June 28/44
Approved for payment

/s/ M. J. CURRY,
Treasurer.

[Marginal Note]: Mem. to note & number checks in payment on June 28th.

/s/ MJC

[Endorsed]: Filed Feb. 4, 1949.

INTERVENERS' EXHIBIT No. 8

March 27, 1943.

State of Delaware
State Tax Department
843 King Street
Wilmington, Delaware

Gentlemen:

Referring to letter of February 4, 1943, from the Office of the Attorney General, in regard to this Corporation's franchise taxes for 1940 and 1941, which are unpaid. Subsequently we also received from the Corporation Trust Company of Wilmington, Delaware, statement of franchise tax due on February 4, 1943, covering both years.

We have delayed replying, pending submission of the question to our Board of Directors.

We understand that under the Delaware statutes if the tax and accrued interest for the year 1940 is not paid by April 1, 1943, the Corporation's charter will be voided. As we are desirous of preventing this, if possible, we offer the following information in the hope that you will give favorable consideration to our request for relief through a compromise payment of the amount due.

This Corporation is a holding company, owning the entire capital stock of The Western Pacific Railroad Company, a California corporation, and one half of the common capital stock of The Denver and Rio Grande Western Railroad Company, a Delaware corporation, and, in addition, other securities

of both companies, which companies have been in process of reorganization under Section 77 of the Federal Bankruptcy Act since late in 1935. Practically the entire assets of the Corporation are in these two companies, from which no income has been received since just prior to filing petitions in bankruptcy.

On March 15, 1943, the United States Supreme Court handed down its decision in the Western Pacific case, which affirmed the plan of reorganization promulgated by the Interstate Commerce Commission and approved by the Federal District Court in San Francisco, which plan declared the stock of the Railroad Company to be without value, thereby wiping out approximately 80% of this Corporation's assets. The Interstate Commerce Commission's modified plan of reorganization for the Denver and Rio Grande Western, which also declares the stock of that company to be without value, has not been certified to the Federal District Court in Denver, however, we feel that since the Supreme Court upheld the Commission in declaring the stock of the Western Pacific to be without value, the Commission will, no doubt, maintain its position that the preferred and common stock of the Denver and Rio Grande Western has no value.

Aside from the stocks of the Western Pacific Railroad, which the Court decision indicates to be without value, all of the assets of the Corporation, constituting securities of both companies, are pledged to secure loans which have been in default since 1934.

It therefore becomes necessary for the Corporation to liquidate and dissolve, which should be accomplished within a period of six months.

In view of the above facts, will you please advise if your Bureau is willing to accept a compromise payment of the 1940 franchise tax, that is, about half of the tax, and waive the interest which has accrued?

A prompt response will be very much appreciated.

Yours very truly,

/s/ M. J. CURRY.

cc. The Corporation Trust Company
100 West Tenth St.
Wilmington, Delaware
Att. Mr. L. H. Herman.

bcc. Mr. F. C. Nicodemus, Jr.

[Marginal note]: Mr. Nicodemus of course approved this——.

[Endorsed]: Filed Feb. 4, 1949.

INTERVENERS' EXHIBIT No. 9

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York

December 11, 1946.

Allan P. Matthew, Esquire
Balfour Building
San Francisco, California

Dear Mr. Matthew:

This acknowledges your letter of December 7th. Evidently my night letter of December 6th was not altogether clear.

My difficulty did not arise at all from the fact that Mr. Schumacher turned over his trustee files to Mr. Curry. That he seemed to me to have a clear right to do if he so desired to the extent that he was entitled as trustee to hold the files.

What did give me some concern was the definition of what constituted trustees files. Physically, the file cabinets contained all the correspondence which Mr. Schumacher or Mr. Curry had written in their capacities as officers of the operating company. In other words, the construction given your advice was that all documents which came into existence during the period of trusteeship belonged to the trustees in their fiduciary capacity. This I hoped you did not mean by your opinion. Obviously the books of account of the company were maintained in theory during the period of trusteeship by the agent of the trustees. It would be a quite impracticable theory that these books of ac-

count must remain in possession of the fiduciary trustees.

If you meant your advice to apply to all papers affecting the operation of the railroad company during the period of trusteeship then I think the situation should be clarified by a prompt application by the railroad company to the court for an order directing the trustees to turn over to the officers of the reorganized company all papers which they held as fiduciaries and which affected the operations of the railroad company, subject, of course, to a right of inspection on the part of the trustees if any occasion therefor should arise.

If there is in the books any authority entitling Section 77 trustees operating a railroad company under supervision of the court to retain the vital records of the railroad company after their fiduciary capacity has terminated, I would certainly be interested in seeing the authority.

Naturally, my interest in the question discussed in this letter is solely in protecting the operating company in connection with the Van Kirk litigation here in New York, of which you have partial counterparts in the actions brought by the holding company in California. In this connection we have received copies of your answers in the California tax action of the holding company and I have also talked with Mr. Polk about his discussions with your office.

With all good wishes of the Season, I am

Sincerely yours,

/s/ ROBERT E. COULSON.

[Marginal Note]: Discussed with Col. Coulson and with Mr. Elsey by phone 12/16/46. Col. Coulson says nothing further to be done by us presently—or until we hear further from him. BE.

[Endorsed]: Filed Feb. 4, 1949.

INTERVENERS' EXHIBIT No. 10

February 11, 1947.

073

Via Air Mail
James K. Polk, Esq.,
c/o Carlton Hotel,
Washington, D. C.

Dear Mr. Polk:

In order that you may have definite authorization from this Company to proceed in connection with the pending controversy as to Federal income taxes for the years 1942, 1943 and 1944, as to which you hold power of attorney, I have today conferred with all available directors. All of the directors I have been able to reach, constituting a majority of the directors, have concurred in the proposal that you submit in writing to the Commissioner of Internal Revenue a definite proposal that the three years 1942, 1943 and 1944 be settled on the basis of no refund and no additional tax.

We understand that the year 1944 is involved in this controversy, so far as this Company is con-

explained that under the Commission Plan you and your Board have an equal right with the A. C. James Co. in the designation of a representative. I have, however, agreed to put the problem up to you and have stated to my fellow trustees that I thought there was no conflict in interest between your organization and ours since we are both anxious to see the common stock given those marketable characteristics which will come from putting it on a dividend basis.

There is one further embarrassment in the situation which has led me to defer talking with you about the matter. My associate trustees, who feel strongly that we should have representation in the Reorganization Committee, are unanimous in feeling that no one of them should serve and that it is my duty to serve because of my close contact with the matter and my knowledge of the properties and personalities involved. This has raised a problem to which I have been giving some thought. Under the terms of Section 77 a reorganization committee serves without compensation. With this I have no quarrel. However, I have a very real interest in seeing the Federal taxes of the reorganized property placed upon a sound basis. We have quite an effective Federal tax department and my partner, James K. Polk, was retained some time ago by the trustees to take up this Federal tax matter in connection with the 1942 tax problems of the property. You no doubt realize how complicated this matter has become for a railroad which has gotten into the

excess profits areas, especially in connection with a reorganization of its capital structure. I would be extremely reluctant to have any participation, which I might have in the Reorganization Committee, disturb the relationship which Polk and our tax department have to this problem.

When Bob Swaine talked to me about this matter, I told him quite frankly about this aspect. He seemed, a little to my surprise, quite eager that the James group should have direct representation on the Committee. No doubt he feels that a preliminary commitment on their part is, under the Commission Plan, basically necessary in setting up any permanent organization because of the voting power which they can exercise under the requirement of cumulative balloting. He said he saw no objection to a dual relationship and further volunteered that if his firm were selected as counsel for the Reorganization Committee, he would feel that their responsibility to the Reorganization Committee were completely fulfilled if their tax men merely reviewed with Polk the solutions and practical determinations worked out by Polk and his associates.

I wish you would give this entire problem consideration and either write me as to your views or arrange that you and I should sit down at some convenient time when you are here in New York and discuss the entire matter.

Mr. Boyden told me early in the week on the telephone that he hoped to get out the ballots in the Western Pacific case late this week or early next

cerned, only during the period of affiliation, that is, through April 30, 1944, and that for the balance of the year 1944 the taxes of this Company will be determined on the basis of its separate return for that period outside the affiliation.

This authorization will be formally ratified at a meeting of the Board of Directors to be held early in March, 1947.

Very truly yours,

/s/ CHARLES ELSEY.

Copy by regular mail.

[Endorsed]: Filed Feb. 4, 1949.

INTERVENERS' EXHIBIT No. 11

Wood, Walker & Co.
Members New York Stock Exchange
63 Wall Street
New York 5, N. Y.

February 24, 1948.

Mr. A. Perry Osborn
20 Exchange Place
New York 5, New York

Dear Mr. Osborn:

On February 6, 1948, you asked us for the following information:

"A tabulation by months of Wood, Walker & Company's purchases and sales of Western-

Interveners' Exhibit No. 11—(Continued)

Pacific Railroad Company securities from Jan. 1, 1942, through 1945, and a separate monthly tabulation of such purchases and sales for the account of Mr. Wood, members of his family, any officer, director and counsel for the corporation, all during the same period."

We have examined our records, and to the best of our knowledge and belief, the following are the only transactions which would come within the above category.

A/C Anna M. Wood

1942	Sept. 30	—Sold 1M Western Pac. R.R. Co. 5s/46 @37
	Oct. 7	—Sold 10M Western Pac. R.R. Co. 5s/46 @37
1943	Mar. 17	—Sold 10M Western Pac. R.R. Co. 5s/46 @53¾
	Mar. 17	—Sold 10M Western Pac. R.R. Co. 5s/46 @53½
	July 26	—Sold 10M Western Pac. R.R. Co. 5s/46 @67½
1942	Dec. 30	—Bought 10M Western Pac. R.R. Co. 5s/46 @ 36¼

A/C Willis D. Wood

1944	Jan. 17	—Sold 25M Western Pac. R.R. Co. 5s/46 @81
	Feb. 3	—Sold 10M Western Pac. R.R. Co. 5s/46 @89
	Dec. 26	—Sold 25M Western Pac. R.R. Co. 5s/46 @110¼
	Dec. 26	—Sold 28M Western Pac. R.R. Co. 5s/46 @110¼
1944	Dec. 27	—Bought 53M Western Pac. R.R. Co. 5s/46 @110½
1943	Dec. 16	—Sold 90shs Western Pac. R.R. Co. (Old) Comm. $1.00 (for the lot)

Yours very truly,

WOOD, WALKER & CO.

By /s/ D. A. MURRAY.

dm/hk

Interveners' Exhibit No. 11—(Continued)

Wood, Walker & Co.
63 Wall Street
New York 5, N. Y.

March 10th, 1948.

Mr. Perry A. Osborn
20 Exchange Place
New York City, New York

Dear Mr. Osborn:

Am enclosing herewith for accounts of AM Wood and WD Wood the long position after purchases and sales, supplementing letter of February 24th.

Very truly yours,

/s/ MISS HELEN KOCIOLEK,
Secretary to W. D. Wood.

Supplementing Letter of Feb. 24th, 1948

Long position after purchases and sales
Western Pacific R. R. Co. Securities

Anna M. Wood Account

1942 Jan. 1	—Western Pac. R.R. Co. 5s/46	Long 31M
Sept. 30	—Western Pac. R.R. Co. 5s/46	Sold 1M Long 30M
Oct. 1	—Western Pac. R.R. Co. 5s/46	Sold 10M Long 20M
Dec. 30	—Western Pac. R.R. Co. 5s/46	Bought 10M Long 30M
1943 Mar. 17	—Western Pac. R.R. Co. 5s/46	Sold 10M Long 20M
Mar. 17	—Western Pac. R.R. Co. 5s/46	Sold 10M Long 10M
July 26	—Western Pac. R.R. Co. 5s/46	Sold 10M Closed

Interveners' Exhibit No. 11—(Continued)

Willis D. Wood Account

1942 Jan. 1—Western Pac. R.R. Co. 5s/46 Long 48M

No transactions in years 1942 and 1943

1944 Jan. 17—Western Pac. R.R. Co. 5s/46 Sold 25M Long 63M
Feb. 3—Western Pac. R.R. Co. 5s/46 Sold 10M Long 53M
Dec. 26—Western Pac. R.R. Co. 5s/46 Sold 25M Long 28M
Dec. 26—Western Pac. R.R. Co. 5s/46 Sold 28M Long 28M
Dec. 26—Western Pac. R.R. Co. 5s/46 Sold 28M Closed
Dec. 27—Western Pac. R.R. Co. 5s/46
Bought 53M Long 53M

1942 Jan. 1—Western Pac. R.R. Co. (Old Comm.) Long 100 shs

No transactions in year 1942

1943 Dec. 16—Western Pac. R.R. Co. (Old Comm.)
Sold 90 shs Long 10 shs

Willis D. Wood
Western Pacific Securities
On hand end of year

Year	Shares Common (W.P.R.R.Corp.)	Shares Preferred (W.P.R.R.Corp.)
1923	500	200
1924	0	0
1925	0	0
1926	0	0
1927	0	500
1928	0	700
1929	1,700	2,400
1930	2,000	2,950
1931	2,000	2,950
1932	2,000	2,950
1933	100	2,000
1934	100	2,000
1935	100	2,000
1936	100	2,000
1937	100	2,000
1938	100	500
1939	100	500
1940	100	Closed
1941	100	
1942	100	
1943	10	
1944	10	
1945	10	
1946	10	
1947	10	

Interveners' Exhibit No. 11—(Continued)

Willis D. Wood (Cont.)

Western Pacific R.R. Co. 1st 5s 1946

1935	$26,000
1936	50,000
1937	50,000
1938	68,000
1940	68,000
1941	88,000
1942	88,000
1943	88,000
1944	Closed

Western Pacific R.R. Co. 5s 1946

1944	$53,000

1/9/45—Exchanged for $21,200 4½s 2014; 318 Shs. Pfd.; 247.51 Shs. Com.; Cash $12,025.17

Year	Western Pacific R.R. Co. 4½s 2014	
1/ 9/45—Received in exchange	$21,200	
8/ 7/46—Purchased	800	
		$22,000
5/ 3/46—Redeemed	$ 7,000	
4/12-19/47—Sold	15,000	
		22,000
		Account Closed

Western Pacific R.R. Co. Preferred

1/ 9/45—Received in exchange	318 Shares
8/ 9/46—Purchased	32 Shares
1/ 9/48—Purchased	50 Shares
On hand 4/15/48	400 Shares

Western Pacific R.R. Co. Common

1/ 9/45—Received in exchange	247.51 Shares
8/12/46—Purchased	52.49 Shares
On hand 4/15/48	300 Shares

Interveners' Exhibit No. 11—(Continued)

Anna M. Wood

Western Pacific Securities

On hand end of year

Year	Shares Common (W.P.R.R.Corp.)	Shares Preferred (W.P.R.R.Corp.)
1924	0	200
1925	0	0
1926	0	0
1927	0	0
1928	0	0
1929	0	200
1930	1,200	700
1931	1,200	1,100
1932	1,200	1,100
1933	1,200	1,100
1934	1,200	1,000
1935	1,200	1,000
1936	500	900
1937	500	900
1938	Closed	Closed

Western Pacific R.R. Co. 1st 5s 1946

1937	$30,000
1939	31,000
1940	31,000
1941	31,000
1942	30,000
1943	Closed

[Endorsed]: Filed Feb. 9, 1949.

INTERVENERS' EXHIBIT No. 14

JKPBCC February 11, 1947

Mr. Charles Elsey, President
The Western Pacific Railroad Company
526 Mission Street
San Francisco, California

Dear Mr. Elsey:

Enclosed herewith is a copy of the letter this day filed, pursuant to your authorization, with the Commissioner of Internal Revenue, Washington, D. C.

Sincerely yours,

JAMES K. POLK.

Enc. (per BC)

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York 5, N. Y.

(Copy)

February 11, 1947

The Honorable Joseph D. Nunan, Jr.
Commissioner of Internal Revenue
Washington, D. C.

Attention: Mr. Frank Eddingfield

Re: The Western Pacific Railroad Corporation and Affiliated Corporations 1942, 1943 and 1944 Federal Income Taxes

Dear Sir:

The Western Pacific Railroad Corporation and its affiliated subsidiaries filed consolidated returns

for the calendar years 1942 and 1943 and the said Western Pacific Railroad Corporation filed a consolidated return for the calendar year 1944 including therein its said subsidiaries for the period from January 1, 1944, to April 30, 1944, during which period affiliation existed.

On the said return for 1942 a consolidated tax liability of $4,201,821.54 was reported and duly assessed and paid. On the said return for 1943 there was reported a net loss and no taxable income. On the said erturn for 1944, based on a carryover of the unused 1943 net loss, there was reported no taxable income and no tax liability. A claim for refund of the tax so paid for 1942, based on a carryback of the said 1943 net loss, was filed and is now pending in your office.

The taxpayer on behalf of itself and its aforesaid affiliated subsidiaries hereby offers to settle and determine the tax liabilities of the said corporations for the said taxable years 1942, 1943 and 1944 in the amounts shown on the returns filed as aforesaid. This proposal of settlement does not relate to or affect the tax liability of the said subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated. The within proposal is made without prejudice to any rights or claims of the parties, if the proposal is not accepted by you.

As part of this proposal The Western Pacific Railroad Corporation, on behalf of itself and its aforesaid affiliated subsidiaries agrees that, if this

proposal is accepted, it will consent to a rejection of the said claim for refund of the 1942 taxes, and further agrees not to sue upon said claim or file other or further claims in respect of 1942 taxes on any ground whatsoever. It is further agreed by the said The Western Pacific Railroad Corporation on behalf of itself and its aforesaid affiliated subsidiaries that if this proposal is accepted it will execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement.

Authority for the submission of the within proposal of settlement by the undersigned is contained in a Power of Attorney heretofore filed in your office.

Respectfully,

THE WESTERN PACIFIC RAILROAD CORPORATION,

JAMES K. POLK,
Attorney-in-Fact.

[Endorsed]: Filed Feb. 9, 1949.

INTERVENERS' EXHIBIT No. 15
(Identification Only)

June 5, 1943

E. T. Buckland, Esq.
New York, New Haven & Hartford Railroad
New Haven, Connecticut

Western Pacific

Dear Mr. Buckland:

Bob Swaine called me up the other day to urge that you and I agree promptly upon the third member of the Reorganization Committee so that that Committee can appoint counsel and get to work on documents even prior to the formal approval of the Commission Plan by security holders. I told Bob that you and I had not yet discussed the matter of the third member of the Board and that the fault is mine.

My fellow trustees in the James Foundation (which holds all the stock of A. C. James Co.) are all clearly of the opinion that it would be advisable, if practical, for our group to have representation on the Reorganization Committee. Their argument is that, owing to the substantial bond holdings of the Foundation, the Foundation will have something like 21½% of the voting stock of the reorganized company. This interest is, of course, substantially greater than that which will be held by The Railroad Credit Corporation. It is also likely to be, of necessity, a more permanent interest. I have

week. I still feel it is of the utmost importance to have the reorganization made effective on the last day of the present calendar year.

Sincerely yours,

ROBERT E. COULSON.

INTERVENERS' EXHIBIT No. 16

Whitman, Ransom, Coulson & Goetz
40 Wall Street, New York

June 26, 1943

Mr. M. J. Curry, President
The Western Pacific Railroad Corporation
37 Wall Street
New York, N. Y.

Dear Mr. Curry:

This acknowledges your letter of June 21st as to the present needs of The Western Pacific Railroad Corporation.

While I am sending copies of your letter and of my reply to each of the Trustees of the James Foundation, it will probably not be possible to take formal action on your proposal until after July 1st.

In any attempt to settle the affairs of the holding company in a manner which will wipe out the large deficiency claims held by the Curtiss Southwestern Company, Chase National Bank of New York and

Central Hanover Bank and Trust Company, it would probably be desirable to provide, as a part of the consideration for the cancellation of the deficiency claims, that The Western Pacific Railroad Corporation agree to cooperate, by voting its stock in the Western Pacific Railroad Company, which stock has been declared worthless by the decision of the Supreme Court, to facilitate any necessary changes in the corporate structure of the operating company to effectuate the reorganization.

In a recent telephone conversation with Mr. Arthur Grotz, of the Chase National Bank, I learned that the Chase National Bank claims a lien on the stock of the operating company owned by the holding company. This lien presumably has no validity, as it has not been approved, so far as I am informed, by the necessary vote of two-thirds of the stockholders present at a stockholders' meeting. However, this situation does create some embarrassment in working out any settlement agreement.

As to the possible cancellation of your Delaware charter by failure to pay the 1940 franchise tax on or before July 1, 1943, this probably is of more apparent than real importance. Under the Delaware law the corporation continues its existence for all necessary purposes for a period of three years.

Before the Foundation gives a final and definitive answer to your proposal, I would wish to discuss with Mr. Polk the tax aspects of the problem and make that information available to the Trustees of

the Foundation. You will hear from me further in this matter.

Sincerely yours,

/s/ ROBERT E. COULSON.

[Stamped]: Received June 28, 1943, The Western Pacific Railroad Corporation.

[Stamped]: M.J.C. June 28, 1943.

[Endorsed]: Filed Feb. 9, 1949.

INTERVENERS' EXHIBIT No. 17

At New York, N. Y.
June 8, 1945.
File:

Mr. H. E. Poulterer:

I have told Mr. McCready that in the event he should be served with any legal process in the future, he is to accept service and turn all papers over to Mr. H. Brua Campbell of the firm of Pierce and Greer, 40 Wall Street, New York.

I have also asked Mr. McCready to advise you, with a copy to me, of the service of any such process, together with a brief description thereof.

J. E. HENNESSY.

JEH/ss

cc: Mr. D. C. McCready

[Endorsed]: Filed Feb. 11, 1949.

INTERVENERS' EXHIBIT No. 18-A
(Identification Only)

Western Union
(Telegram Form)

San Francisco, January 28, 1944

Shelly Pierce, Financial Editor
Journal of Commerce
New York, New York

Following statement was issued here in connection our December figures Quote During the first eleven months of 1943 Western Pacific made accruals in anticipation of Federal Income and Excess Profits taxes for that year. A recent reexamination of certain provisions of the reorganization plan which calls for severe reductions in the capitalization of the company has resulted in the conclusion by the management that no Federal income and excess profits tax liability exists in respect of 1943. In view of this conclusion entries were necessarily made in December income accounts which resulted in elimination of all such tax accruals for 1943. These adjustments produced the unusual income results for the month of December and the year. Unquote.

CHARLES ELSEY.

EWE:SH

INTERVENERS' EXHIBIT 18-B
(Identification Only)

Western Union
(Telegram Form)

1944 Jan 28, PM 5 14

FU323 CAK—San Francisco, Calif, 28 154 P
T. M. Schumacher
Western Pacific RR Co. 37 Wall St., NYK—

Anticipating inquireis from newspapers and others concerning situation brought about in December figures from tax credit. Following statement was prepared and uniformly given to all inquirers without further embellishment:

"During the first eleven months of 1943 Western Pacific made accruals in anticipation of Federal income and excess profits taxes for that year. A recent re-examination of certain provisions of the Reorganization Plan which calls for severe reductions in the capitalization of the Company has resulted in the conclusion by the management that no Federal income and excess profits tax liability exists in respect of 1943. In view of this conclusion entries were necessarily made in December income accounts which resulted in elimination of all such tax accruals for 1943. These adjustments produced the unusual income results for the month of December and the year."

Discussed this with Mr. Coulson here today and

he believes we should stand on such information without additional details. Above for your general information.

CHARLES ELSEY.

[Stamped]: Received Jan. 28, 1944, W.P.RR. Co.

[Stamped]: T. M. S. Jan. 29, 1944.

INTERVENERS' EXHIBIT 18-C
(Identification Only)

San Francisco, January 25, 1944.

073

Mr. D. C. DeGraff,
Mr. E. C. Bates,
Mr. C. L. Droit,
Mr. T. D. Brown.

Distribution of our mimeographed income statement for December and year 1943 is certain to provoke inquiries as to the unusual results springing from the elimination of Federal Income and Excess Profits Taxes for the year.

In order that we may answer such questions with uniformity, please utilize the information given below:

"During the first eleven months of 1943, Western Pacific made accruals in anticipation of Federal Income and Excess Profits taxes for that year.

"A recent re-examination of certain provisions of the Reorganization Plan, which calls

for severe reductions in the capitalization of the company, has resulted in the conclusion by the management that no Federal Income and Excess Profits tax liability exists in respect of 1943.

"In view of this conclusion, entries were necessarily made in December income accounts which resulted in elimination of all such tax accruals for 1943. These adjustments produced the unusual income results for the month of December and the year."

If your inquirer presses for more details, I would suggest that you state that the whole matter is in the hands of our New York tax counsel.

CHARLES ELSEY.

bcc—Mr. E.W. Englebright,
Mr. P. L. Wyche,
Mr. Logan Paine.

[Marginal Notes]: This release was shown Mr. Coulson today and he thought it covered the situation sufficiently.

EW. E.,
1/28/44.

Ok'd by Mr. Elsey.
E.

INTERVENERS' EXHIBIT No. 19
(Identification Only)

McCutchen, Thomas, Matthew, Griffiths & Greene
Counselors at Law

San Francisco 4
February 8, 1944

Deliver
Mr. Charles Elsey, President,
The Western Pacific Railroad Company,
526 Mission Street,
San Francisco 5, California

The Western Pacific Railroad
Company Reorganization

Reserve Fund for Contingent Tax
Liability ~~and for Post-War
Modernization and Improvement~~

Dear Mr. Elsey:

Herewith I enclose in duplicate a proposed form of petition and a proposed form of order relating to the establishment of a reserve fund to be used for the payment of any possible Federal income and excess profits tax liability for the year 1943 and for post-war modernization and improvement of the railroad. You will notice that both the petition and the order are very brief and contain no statement of the reasons why it is believed that there is no Federal tax due for 1943. I think this subject can be fully developed at the hearing, following the outline suggested in Mr. Coulson's memorandum of

Interveners' Exhibit No. 19—(Continued)

February 4, 1944, which you sent me with your letter of the same date.

The title for the fund suggested by Mr. Coulson was "Reserve for Contingent Tax Liabilities." This title has been expanded in the enclosed forms to "Reserve Fund for Contingent Tax Liability and for Post-War Modernization and Improvement." It seems to me to be desirable to use the term "reserve fund" instead of the word "reserve" alone. Also, I believe that there may be some advantages in including "post-war modernization and improvement" as part of the title of the fund, so that in years to come the ultimate purpose of the fund will always be clearly disclosed on the books of account and balance sheets.

Please let me have your comments on the enclosed forms. You may wish to consult with Mr. DeGraff in order to make certain that the proposal is not in conflict with the accounting classifications or other rules or regulations of the Interstate Commerce Commission.

I shall defer submitting these forms to Mr. Coulson until I hear from you.

Very truly yours,

/s/ ALLAN P. MATTHEW.

[Marginal Notes]: Void—Mr. Matthew will provide revision.
(To be revised.)

[Stamped]: The Western Pacific Railroad Co. President. Feb. 8, 1944.

Interveners' Exhibit No. 19—(Continued)

Allan P. Matthew,
1500 Balfour Building,
San Francisco 4, California

VOID

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

PETITION FOR AUTHORITY TO ESTABLISH A RESERVE FUND FOR CONTINGENT TAX LIABILITY AND FOR POSTWAR MODERNIZATION AND IMPROVEMENT

T. M. Schumacher and Sidney M. Ehrman, the duly appointed, qualified and acting Trustees of the properties of the Debtor above named, hereinafter referred to as the Trustees, hereby represent to the Court and petition as follows:

I.

The Trustees are advised and believe that the Debtor and the Trustees have no Federal income or excess profits tax liability for the year 1943.

Interveners' Exhibit No. 19—(Continued)

However, the Commissioner of Internal Revenue has not yet passed upon the question, and the Trustees believe that it is in the best interests of the estate of the Debtor to provide a reserve fund out of which 1943 Federal income and excess profits taxes may be paid in the event that liability therefor should be established. The Trustees are advised and believe that the sum of $7,100,000 will be adequate to cover any possible liability for such taxes for the year 1943. The estate of the Debtor contains sufficient cash derived from the earnings of the railroad of the Debtor during the year 1943 to establish a reserve fund in the amount of $7,100,000 without using funds required for other purposes.

II

It is the judgment of the Trustees that such reserve fund should be invested in United States Treasury securities and that any portion of the fund not required in order to meet such possible tax liability should be held and used for the modernization and improvement of the railroad of the Debtor after the conclusion of the present war. The Trustees propose to designate the fund as the "Reserve Fund for Contingent Tax Liability and for Post-War Modernization and Improvement."

Wherefore, your petitioners pray that they be authorized to establish, out of the earnings of the railroad of the Debtor during the year 1943, a reserve fund in the amount of $7,100,000, to be desig-

Interveners' Exhibit No. 19—(Continued)

~~nated as the "Reserve Fund for Contingent Tax~~ Liability ~~and~~ for Post-War Modernization and Improvement," to be invested in United States Treasury securities, and to be used for the payment of any Federal income and excess profits taxes which may be found due for the year 1943, and, in so far as not required for that purpose, to be used for the modernization and improvement of the railroad of the Debtor after the conclusion of the present war.

....., ~~Counsel for Petitioners.~~

State of California,
City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says:

That for more than twelve years last past he has been the President of The Western Pacific Railroad Company and since the appointment of the Trustees of the properties of said Company he has been their Agent in immediate charge of the railroad and other property of that Company; that he had read the foregoing petition and knows the contents thereof and the same is true of his own knowledge.

.....

Interveners' Exhibit No. 19—(Continued)

Allan P. Matthew,
1500 Balfour Building,
San Francisco 4, California

Draft

VOID

In the District Court of the United States, for the Northern District of California, Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER AUTHORIZING ESTABLISHMENT OF A RESERVE FUND FOR CONTINGENT TAX LIABILITY AND FOR POST-WAR MODERNIZATION AND IMPROVEMENT

The petition filed February . . . . ., 1944, by T. M. Schumacher and Sidney M. Ehrman, the Trustees of the properties of the Debtor above named, for authority to establish a reserve fund of $7,100,000 for contingent tax liability and for post-war modernization and improvement, came on duly to be heard and was heard this day and thereupon submitted. Good cause appearing therefor, the Court, being fully advised, finds that notice of the hearing

Interveners' Exhibit No. 19—(Continued)

~~upon said petition has been given as prescribed by~~ the order of this Court, that all of the averments of said petition are true, and that it is for the best interests of the estate of the Debtor that this order be made.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the Trustees are hereby authorized to establish, with funds in their hands belonging to the estate of the Debtor and derived from the earnings of the railroad of the Debtor during the year 1943, a reserve fund in the amount of $7,100,000, to be designated as the "Reserve Fund for Contingent Tax Liability and for Post-War Modernization and Improvement," to be invested in United States Treasury securities, and to be used for the payment of any Federal income and excess profits taxes which may be found due for the year 1943, and, in so far as not required for that purpose, to be used for the modernization and improvement of the railroad of the Debtor after the conclusion of the present war.

Dated: ....., 1944.

A. F. ST. SURE,

~~Judge.~~

VOID

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein as designated by the parties, to wit:

Bill of Complaiant for Equitable Relief.

Answer and Counterclaim of Defendants The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

Answer of the Defendant The Western Realty Company.

Reply to Counterclaim of Defendants The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co., Ltd., and Standard Realty and Development Company.

Notice of Motion for Leave to Intervene as Plaintiffs.

Order Granting Leave to Intervene.

Complaint in Intervention.

Answer of the Western Pacific Railroad Corporation to Complaint in Intervention.

Answer of Defendant The Western Realty Company to Complaint in Intervention.

Affidavit of Julius Levy Applying for Temporary Restraining Order and Preliminary Injunction on Behalf of Interveners.

Order Denying Application for Temporary Restraining Order on Condition, and Pre-trial Order and Exhibit A—Stipulation and Agreement, etc.

Stipulation and Agreement between Plaintiff and Defendants Relating to Agreement with the Bureau of Internal Revenue. and Exhibit A.

Answer of the Western Pacific Railroad Company et al. to Complaint in Intervention.

Supplemental Bill of Complaint.

Answer of Defendant The Western Realty Company.

Answer of Defendants The Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, Delta Finance Co. Ltd., and Standard Realty and Development Company to Plaintiff's Supplemental Bill of Complaint.

Stipulation for Substitution of Meredith H. Metzger, formerly Meredith H. Van Kirk, as a Plaintiff in Intervention.

Stipulation Correcting Trial Record and Making Certain Exhibits as Part Thereof.

Opinion.

Findings and Conclusions Proposed by Plaintiff.

Notice of Motion for Reargument and to Amend Findings of Fact and Conclusions of Law Appearing in the Court's Opinion Filed September 6, 1949.

Notice of Motion of Plaintiff and of Alexis I.

du P. Bayard, Receiver, to Join Receiver as Party Plaintiff under Rule 25(c) R.C.P. and Exhibits.

Order under Rule 25(c) Directing the Joinder of Party Plaintiff.

Defendants' Objections to Findings and Conclusions Proposed by Plaintiff.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Motion to Amend Findings and Judgment.

Order Granting Motion to Amend Judgment.

Amended Judgment.

Notice of Appeal by Plaintiffs.

Notice of Appeal by Plaintiffs in Intervention.

Designation by Appellants of Contents of Record on Appeal.

Designation by Appellees of Additional Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal.

Docket Entries.

Plaintiff's Exhibits Nos. 1, 3a, 3b, 4a, 4b, 5a, 5b, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20a, 20b, 20c, 20d, 20e, 20f, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32a, 32b, 33, 34a, 34b, 34c, 35, 36, 37, 38a, 38b, 39a, 39b, 39c, 39d, 39e, 39f, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77a, 77b, 78a, 78b, 79a, 79b, 80, 81a, 81b, 82 and 83.

Defendants' Exhibits Nos. 1, 2, 3, 4a, 4b, 4c, 5a, 5b, 5c, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24a, 24b, 25, 26, 27, 28, 29, 30, 31, 32,

33, 34, 35a, 35b, 36, 37a, 37b, 37c, 38a, 38b, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52a, 52b, 53, 54, 55, 56, 57, 58, 59 and 60.

Interveners' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18a, 18b, 18c, 19, 20 and 21.

Reporter's Transcripts:

For Monday, April 7, 1947.

Vol. 1 for Monday, August 25, 1947, 4:00 o'clock p.m.—Proceedings on Application for Temporary Restraining Order.

Vol. 2 for Tuesday, August 26, 1947, 9:00 o'clock a.m.—Proceedings on Application for Temporary Restraining Order.

For Monday, October 6, 1947—Proceedings on Hearing on Motions to Strike Portions of the Complaint in Intervention.

For Monday, November 28, 1949—Argument on Motions.

For Tuesday, January 11, 1949—Pre-Trial Conference.

Vol. 1 for Tuesday, February 1, 1949.

Vol. 2 for Wednesday, February 2, 1949.

Vol. 3 for Thursday, February 3, 1949.

Vol. 4 for Friday, February 4, 1949.

Vol. 5 for Tuesday, February 8, 1949.

Vol. 6 or Wednesday, February 9, 1949.

Vol. 7 for Thursday, February 10, 1949.

Vol. 8 for Friday, February 11, 1949.

Vol. 9 for Tuesday, February 15, 1949.

Vol. 10 for Wednesday, February 16, 1949.

Vol. 11 for Thursday, February 17, 1949.
Vol. 12 for Friday, February 18, 1949.
Vol. 13 for Wednesday, February 23, 1949.

In Witness Whereof, I have hereunto set my hand and seal of said District Court, at San Francisco, California, this 18th day of March, A. D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VANBUREN,
Deputy Clerk.

[Endorsed]: No. 12506. United States Court of Appeals for the Ninth Circuit. Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, Appellants, vs. Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company and Delta Finance Co., Ltd., Appellees. Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., Appellants, vs. Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, the Western Realty Company, The Standard Realty and Development Company and Delta Finance Co., Ltd., Appellees. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed March 20, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12506

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Plaintiffs and Appellants,

and

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., a Corporation,

Interveners and Appellants,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,

Defendants and Appellees.

STATEMENT BY APPELLANTS THE WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. duP. BAYARD, RECEIVER, OF POINTS ON WHICH THEY INTEND TO RELY ON APPEAL

Appellants The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, designate the following points upon which they intend to rely on the appeal in the above-entitled cause:

1. The District Court erred in entering judgment for defendants and against plaintiffs.

2. The District Court erred in failing to hold that plaintiffs are entitled to an accounting from defendant The Western Pacific Railroad Company and to a decree directing payment to plaintiffs of the entire amount of federal tax savings for the years 1942, 1943 and the first four months of 1944, amounting to $17,201,739, resulting from the filing of consolidated federal income and excess profits tax returns in the name of the plaintiff corporation.

3. The District Court erred in failing to hold that plaintiffs are entitled to an accounting from defendant The Western Pacific Railroad Company and to a decree directing payment to the plaintiffs of some part of the above-mentioned $17,201,739.

4. The District Court erred in holding that the defendant The Western Pacific Railroad Company was not bound to account to the plaintiffs for the benefits which said defendant obtained as the result of satisfying its federal tax liabilities by using tax credits and deductions of the plaintiff corporation at a time when the plaintiff corporation had lost its stock equity in said defendant and arising principally out of that very loss.

5. The District Court erred in failing to hold that, where the economic unity between a parent and a subsidiary corporation has been severed and the parent's stockholdings in the subsidiary have become worthless and the subsidiary utilizes or appropriates the parent's tax credit, arising from the loss of the parent's investment in the subsidiary,

by means of a consolidated return in which it satisfies its own tax liability by offsetting the parent's loss against the subsidiary's income and obtains other tax advantages from the use of the consolidated return with the parent, the former subsidiary must account to its former parent for the enrichment thus obtained.

6. The District Court erred in failing to hold that plaintiffs are entitled to an accounting from the defendants other than The Western Pacific Railroad Company and to a decree directing them to pay to the plaintiffs either all or part of their tax savings for the years 1942, 1943 and the first four months of 1944 resulting from the filing of consolidated federal income and excess profits tax returns in the name of the plaintiff corporation.

7. The District Court erred in holding that the use in consolidated returns with defendants of plaintiff corporation's loss to offset income of defendants and thus to produce tax savings was, as respects the United States, improper.

8. The District Court erred in holding that because of the alleged impropriety of the defendants' use in consolidated returns of the plaintiff corporation's loss to offset income of defendants, the plaintiffs were not entitled to an accounting of the tax savings thus resulting, and that the court should leave the parties where they are.

9. The District Court erred in failing to hold that by virtue of the stipulation filed in the District

Court on September 5, 1947, and its order of August 29, 1947, the sum of $3,385,290 must be deemed to have been refunded to the plaintiff corporation by the Treasury Department in the ordinary course and manner prescribed by law and by that plaintiff paid into said District Court, that the said sum is now held by defendant The Western Pacific Railroad Company as agent of the District Court, that the said defendant should be directed to return said sum of $3,385,290 to the Clerk of the District Court, and that the Clerk should be directed to deliver said sum forthwith to the plaintiffs in accordance with the District Court's opinion that the funds or tax savings resulting from the settlement with the government should be left where they are.

10. The District Court erred in holding that what plaintiff seeks is not all or a share of the tax savings but rather something in the nature of equity or value for its former ownership of stock of the defendant The Western Pacific Railroad Company, or something denied to it in the prior Reorganization Plan of The Western Pacific Railroad Company, and that recognition of said plaintiff's claim would be recognition of a right to share in the earnings of The Western Pacific Railroad Company.

11. The District Court erred in holding that Section 77 of the Bankruptcy Act or the philosophy underlying Section 77 stands as a barrier against the equitable validity of the plaintiff's claim in this cause, and that an award to the plaintiff would

in some way modify the administrative or judicial judgments in the said reorganization proceedings of the defendant The Western Pacific Railroad Company or would nullify either directly or indirectly the purpose of said Section 77.

12. The District Court erred in holding that "duality of control" is not relevant in resolving the issues in the case.

13. The District Court erred in holding that the plaintiff corporation could not have lawfully acquired any part of the tax savings here involved by voluntary agreement between the directorates of the plaintiff corporation and the defendant The Western Pacific Railroad Company.

14. The District Court erred in holding that the plaintiff corporation's right to a recovery depends on whether it could have lawfully acquired the tax savings by voluntary agreement between the directorates of the plaintiff corporation and the defendant The Western Pacific Railroad Company.

Dated: March 21, 1950.

/s/ HERMAN PHLEGER,

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER & HARRISON.

/s/ FRANK C. NICODEMUS, JR.

/s/ A. PERRY OSBORN,

/s/ MAHLON DICKERSON,

/s/ NORRIS DARRELL,

/s/ LeROY R. GOODRICH,

Attorneys for Appellants The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver.

Receipt of copies admitted.

[Endorsed]: Filed Mar. 21, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT BY APPELLANTS MEREDITH H. METZGER, HENRY OFFERMAN AND J. S. FARLEE & CO., INC., OF THE POINTS ON WHICH THEY INTEND TO RELY

Appellants Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., state the following points on which they intend to rely on appeal in the above-entitled case:

1. Appellants are entitled to judgment on the ground that the moneys in issue were obtained in breach of fiduciary duties to plaintiff and constitute an unjust enrichment to defendants.

2. The Court below erred in finding that the fund in issue was created in such a fashion as to

require equity to leave the parties where it found them.

3. Assuming, arguendo, that the Court below correctly determined that the parties should be left where it found them, then, pursuant to that Court's own pre-trial order, the judgment should find and leave appellants with $3,385,290.00

4. The reorganization proceeding involving the defendant The Western Pacific Railroad Company not only fails to preclude appellants from obtaining a favorable judgment herein, but indeed permits the assertion of the instant claims against that defendant under an assumption order and agreement duly made in said proceedings.

5. Defendants' technical defenses are without merit.

Dated: March 20, 1950.

/s/ WEBSTER V. CLARK,
ROGERS and CLARK,

/s/ DAVID FREIDENRICH,

/s/ JULIUS LEVY,

Attorneys for Plaintiffs in Intervention and Appellants Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., a corporation.

Receipt of copies admitted.

[Endorsed]: Filed Mar. 21, 1950.

[Title of Court of Appeals and Cause.]

ORDER DISPENSING WITH THE PRINTING IN THE RECORD OF CERTAIN EXHIBITS

Upon the verified application of appellants The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, and good cause appearing therefor,

It Is Hereby Ordered that no part of plaintiffs' Exhibits 1, 2, 3A, 3B, 4A, 4B, 5A, 5B, 20A, 20B, 20C, 20D, 20E, 20F, 77A, 77B, 78A, 78B, 79A, 79B, 81A, 81B, 82 and 83 need be printed in the record herein, and that this Court will consider said exhibits in their original form without reproduction in the record.

Dated: March 24, 1950.

/s/ WILLIAM HEALY,
Circuit Judge.

/s/ HOMER BONE,

/s/ WALTER L. POPE,
Judges U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed March 27, 1950.

[Title of Court of Appeals and Cause.]

ORDER DISPENSING WITH THE PRINTING IN THE RECORD OF CERTAIN EXHIBITS

Upon reading the verified application of appellees herein for an order dispensing with the printing of certain exhibits, and good cause appearing therefor,

It Is Hereby Ordered that no part of Plaintiffs' Exhibits 3A, 3B, 4A, 4B, 5A, 5B, 16 20A-F, 77A, 77B, 78A, 78B, 79A, 79B, 81A, 81B, 82 and 83, and no part of Defendants' Exhibits 27, 40, 42, 48, 52A, 52B and 60 need be included in the printed record herein, and this Court will consider said exhibits in their original form without reproduction in the printed record.

The Court will consider such other exhibits, which have not been designated for printing by any of the parties hereto, without reproduction in the printed record if at any time any such party shall designate such exhibits as material to the consideration of the appeal, provided that the party so designating such exhibits at its own expense shall provide the Court with printed copies thereof.

/s/ WILLIAM DENMAN,

/s/ CLIFTON MATHEWS,

/s/ WM. E. ORR,

Judges of the above-entitled court.

[Endorsed]: Filed April 11, 1950.

LIBRARY
SUPREME COURT, U.S.

Vol. VI

TRANSCRIPT OF RECORD

(Pages 2179 to 2319)

Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DuP. BAYARD, RECEIVER, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN AND J. S. FARLEE & CO., INC., PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 150—PETITION FOR CERTIORARI FILED JUNE 23, 1952
No. 160—PETITION FOR CERTIORARI FILED JUNE 26, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

SUPPLEMENTAL
Transcript of Record

Appeals from the United States District Court,
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

EXHIBIT No. 23-A

In the District Court of the United States for the Northern District of California Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

PETITION OF REORGANIZATION COMMITTEE FOR AN ORDER APPROVING AND AUTHORIZING: INDENTURES RELATING TO FIRST MORTGAGE BONDS AND GENERAL MORTGAGE INCOME BONDS, INCLUDING FORMS OF BONDS, FORM OF INTEREST COUPON AND FORMS OF TRUSTEE'S CERTIFICATES OF AUTHENTICATION; ADJUSTMENT PAYMENTS TO PERSONS TO WHOM NEW SECURTIES ARE ISSUABLE IN RESPECT OF THE PERIOD JANUARY 1, 1939, TO DECEMBER 31, 1943, INCLUSIVE; THE AGGREGATE PRINCIPAL AMOUNT OF GENERAL MORTGAGE INCOME BONDS TO CONSTITUTE SERIES A, THE AGGREGATE PAR VALUE OF THE SHARES OF PREFERRED STOCK TO CONSTITUTE SERIES A, AND ADJUSTMENTS IN THE AGGREGATE AMOUNT OF SAID BONDS AND THE

AGGREGATE PAR VALUE OF SAID STOCK TO BE ISSUED UNDER THE PLAN; THE DENOMINATION OR PAR VALUE, RESPECTIVELY, OF GENERAL MORTGAGE INCOME BOND SCRIP OF SERIES A AND PREFERRED STOCK SCRIP OF SERIES A; AND ADJUSTMENTS IN THE AMOUNT OF GENERAL MORTGAGE INCOME BONDS OF SERIES A AND PREFERRED STOCK OF SERIES A TO BE ISSUED TO THE RAILROAD CREDIT CORPORATION AND A. C. JAMES CO.

Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, being all the members of the Reorganization Committee designated to put into effect and carry out the plan of reorganization of the debtor above named, hereby represent to the Court and petition as follows:

1. The plan of reorganization of the debtor (hereinafter called "the plan") confirmed by order of this Court on October 11, 1943, provides in subdivision R. as follows:

> "The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan.

"The method of carrying out the plan shall be determined by the reorganization committee in its discretion, and the reorganization committee shall also determine, subject to the approval of the court, the form, and, except as herein otherwise expressly provided, the provisions, of all mortgages, bonds, coupons, charters, by-laws, stock certificates, voting trust certificates, acceptances, assents, and all other instruments in the judgment of the reorganization committee necessary or desirable in connection with carrying out the plan.

2. Pursuant to the foregoing provisions of the plan, your petitioners have determined, acting on advice of counsel, that the debtor company should be used in carrying out and making effective the plan of reorganization and should execute the new mortgages and issue the new securities contemplated by the plan. A separate petition is being filed by your petitioners for the approval by this Court of the use of the debtor company.

3. For the purpose of putting into effect and carrying out said plan your petitioners have approved as to substance and general form, and submit herewith for the approval of the Court, the following:

(a) Indenture relating to the First Mortgage Bonds contemplated by the plan, a printer's proof of which is filed herewith as "Exhibit A";

(b) Indenture relating to the General Mortgage

Income Bonds contemplated by the plan, printer's proof of which is filed herewith as "Exhibit B";

4. The indenture relating to the new First Mortgage Bonds (Exhibit A) contemplates the issuance of bonds of Series A in both coupon and registered form. Said indenture sets forth the form of Series A Coupon Bond, which is in the denomination of $1,000, the form of interest coupon for Series A Coupon Bonds, the form of Series A Registered Bond, without coupons, and the form of Trustee's Certificate of Authentication, applicable to both forms of bonds. The substance and general form of the foregoing are intended to be included in the submission for approval of the Court hereunder.

5. The indenture relating to the General Mortgage Income Bonds (Exhibit B) contemplates the issuance of bonds of Series A in registered form only. It is contemplated that the bonds of Series A will be issued in denominations of $100, $500, $1,000, $5,000 and $10,000, and such other denominations, if any, as may be authorized by the Company, said denominations to be interchangeable except that an exchange may not be made for bonds of a lesser denomination when any such lesser denomination would be less than $1,000. Said Exhibit B sets forth the form of bond of Series A and the form of Trustee's Certificate of Authentication. The substance and general form of the foregoing are intended to be included in the submission for approval of the Court hereunder.

6. The plan of reorganization of the debtor requires, and the forms of new First Mortgage Bonds, Series A, and of new General Mortgage 4½% Income Bonds, Series A, contemplate that the new bonds distributed under the plan of reorganization shall be dated as of January 1, 1939. Petitioners have determined, subject to the approval of the Court, that the new Preferred Stock, Series A, and the new common stock to be issued upon consummation of the Plan should be dated as of January 1, 1944.

7. The form of indenture for the General Mortgage Income bonds (Exhibit B) submitted to the Court herewith necessarily includes (Sec. 5.03) the determinations made by your petitioners, subject to the approval of the Court, of the "available net income" of the properties of the debtor during the period from January 1, 1939 to December 31, 1943, as required by Subdivision L of the plan of reorganization and the allocation of this income in accordance with the equitable rights under the plan of the participating creditors who will receive the new securities. The plan clearly contemplates that, as between the classes of interested creditors, the available net income of the debtor for any period after January 1, 1939, until the reorganized company comes into ownership and possession of the properties of the debtor shall be treated as if the reorganized company had come into such ownership and possession of the properties on January 1, 1939, and had issued as of that date the new securities is-

suable under the plan, other than the $10,000,000 First Mortgage Bonds, Series A, and contemplates that for the period after January 1, 1939, until the reorganized company comes into ownership and possession of the debtor's properties, the persons to whom the new securities are issuable shall be entitled to receive appropriate payments in lieu of the interest and dividends to which they would presumably have been entitled under the provisions of the plan, if the plan had been consummated on January 1, 1939.

8. All the securities to be issued in this reorganization will be issued to first mortgage bondholders and secured creditors of the debtor. No provision is made under the plan for unsecured creditors or for owners of preferred or common stock of the debtor company. During the period from January 1, 1939, through the calendar year 1943, the properties of the debtor, which have been under the management of the Trustees appointed by this Court, have shown substantial earnings which would have been available for interest and dividends. The Reorganization Committee, under its duty to carry out the plan pursuant to its terms and intent, and subject to the approval of this Court, has determined that there should be made to said first mortgage bondholders and secured creditors at the time they surrender the obligations of the debtor which they now hold, and receive in satisfaction thereof the new securities authorized under the plan, certain adjustment payments in cash representing the

amounts which said first mortgage bondholders and secured creditors might presumably have received on the new securities which they are to receive under the plan, if such securities had actually been in existence since January 1, 1939, and payments of interest and dividends made thereunder.

9. In determining the amounts of adjustment payments which it is proposed to make, at the time of the consummation of the plan, to carry out the intent of the plan as to recognition as between the various classes of creditors of their equitable right to participate in earnings on the same basis as if the new securities had actually been issued on January 1, 1939, your petitioners have reviewed the earnings records of the properties of the debtor for the period from January 1, 1939, through the calendar year 1943.

10. As reported by the accounting department maintained by the Trustees appointed by this Court, the earnings of the estate of the debtor and its wholly owned railway subsidiaries in the year 1939, after capital fund requirements and before interest (other than equipment trust and trustees' certificate interest), were $567,407.30, and were therefore such that income in that amount, viz. $567,407.30 would have been available, under the provisions of the plan, for the payment of interest on the General Mortgage Income Bonds to be issued upon consummation of the plan. The corresponding earnings in the year 1940, amounting to $1,707,964.93, were such that income in the amount of $954,855 would have

been available, under the provisions of the plan, for the payment of full interest on the General Mortgage Income Bonds for the year 1940, income of $387,447.70 for the balance of unpaid interest on such bonds for the year 1939, income of $106,090 for sinking fund requirements with respect to such bonds for the year 1940, and income in the amount of $259,572.23 would have been available for the payment of dividends on the preferred stock to be issued upon consummation of the plan or for other corporate purposes. The corresponding earnings in the year 1941, amounting to $3,650,651.56, were such that sufficient income would have been available, under the provisions of the plan, for the payment of full interest on the General Mortgage Income Bonds, the sinking fund requirement and a dividend of 5% on the preferred stock and after such payments a balance of $997,196.56 of income available for dividends on the common stock and for other corporate purposes would have remained. The corresponding earnings in the year 1942, amounting to $9,126,016.98, were such that sufficient income would have been available, under the provisions of the plan, for the payment of full interest on the General Mortgage Income Bonds, the sinking fund requirement and a dividend of 5% on the preferred stock, and after such payments a balance of $6,472,561.98, of income available for dividends on the common stock and for other corporate purposes would have remained. The corresponding earnings in the year 1943, amounting to $18,683,299.07, were such that sufficient income would have been available, under

the provisions of the plan, for the payment of full interest on the General Mortgage Income Bonds, the sinking fund requirement and a dividend of 5% on the preferred stock, and after such payments a balance of $16,029,844.07 of income available for dividends on the common stock and for other corporate purposes would have remained. Attached hereto, as Exhibit "C," is a summary of Available Net Income and Other Data for the period January 1, 1939 to December 31, 1943, inclusive.

11. The above data (paragraph 10) as to earnings after capital fund requirements and before interest (other than equipment trust and trustees' certificate interest) for the period from January 1, 1939 through the calendar year 1943, are subject to the following comments:

(a) The amounts of such earnings for each calendar year are shown after deducting the capital fund requirements, as provided in the plan, without application of the over-all limitation of $1,000,000, which, as provided in the indenture (Section 5.05) relating to the General Mortgage Income Bonds (Exhibit B) submitted herewith for approval, has been left for adjustment, in respect of the cost of capital investments during the period between January 1, 1939 and December 31, 1943, in the discretion of the directors after the reorganization.

(b) The amounts of such earnings for the calendar years 1942 and 1943 are after deducting deferred maintenance reserves charged to operating ex-

penses, namely, the respective amounts of $999,082 and $1,172,542, and amounts for amortization of road defense projects charged to operating expenses, namely, the respective amounts of $63,840.84 and $134,412.46.

(c) The amount of such earnings for the calendar year 1943, is before deduction of a special funded tax reserve which has been set up in the amount of $7,100,000. However, after deduction of such reserve there would still remain the amount of $11,583,299.07, which would have been available, under the provisions of the plan, for the payment of full interest on the General Mortgage Income Bonds, the sinking fund requirements and a dividend of 5% on the preferred stock, and after such payment a balance of $8,929,844.07 available for dividends on the common stock and for other corporate purposes would have remained.

(d) The amount of interest upon the General Mortgage Income Bonds and the amount of the preferred stock dividends have been computed upon the aggregate principal or par amounts of such securities contemplated under the plan to be issued in the reorganization, reduced by the minor amounts in respect of the proposed cash payments referred to under paragraph 18 hereinbelow.

(e) The aggregate amount of earnings for the entire period from January 1, 1939, through the calendar year 1943, which would have been available to pay interest to the old first mortgage bondholders and secured creditors was $35,434,735.76. This

amount is to be compared with the aggregate interest for the period ($14,437,203.55) which such creditors entitled to participate under the plan would legally be entitled to receive under the obligations of the debtor which they hold but for the provision of the plan as to equitable adjustment on the basis of the new securities to be issued on the consummation of the plan.

(f) The properties of the debtor earned for the years specified below, after all interest and preferred dividends, and available for dividends on the common stock and other proper corporate purposes, the following approximate amounts per share of common stock to be issued under the plan:

Year	Earnings per share
1941	$ 3.12
1942	$20.28
1943	$50.24

In respect of the year 1943, if the special tax reserve, referred to above in subparagraph (c) of this paragraph 11, were to be deducted, the approximate earnings per share would be $27.99.

(g) The foregoing amounts per share and the aggregate amount set forth in paragraph 13 hereinbelow, have been computed upon the basis of the full number of common shares to be issued in the reorganization, as determined by the decision of this Court construing the plan, dated June 21, 1944, namely, 319,032,767 shares. This number is sub-

ject to reduction in respect of the number of shares to be issued to The Railroad Credit Corporation depending upon the amount of payments to that Corporation under the marshalling and distributing plan of 1931 which amount cannot be finally determined until the time of the consummation of the reorganization.

12. In the reports of October 10, 1938, and June 21, 1939, filed by the Interstate Commeree Commission in connection with this reorganization, the Commission has clearly expressed its desire and purpose that the new financial structure should include only such an amount of common stock as might permit reasonable dividends (sometimes specified as $3.00 per share) to be earned and paid thereon under normal conditions. The properties of the debtor earned, during the five-year period from January 1, 1939 to December 31, 1943, after interest, capital fund, sinking fund and preferred stock dividends under the new capital structure, an aggregate amount equal to approximately $73.66 per share on the proposed new common stock. However, these earnings available for common stock dividends and other corporate purposes occurred entirely in the years 1941, 1942 and 1943. The plan provides that not more than $3.00 per share with respect to any one year shall be paid to the common stockholders of the reorganized company without additional participation by the preferred stockholders.

13. After full consideration of the purpose and intent of the plan, your petitioners have determined

and recommend to the Court for approval that an aggregate amount of $12,684,271.54 be paid to the present first mortgage and secured creditors, at the time of the consummation of the plan, representing their equitable right as provided in the plan to participate in earnings of the properties during the period from January 1, 1939 through December 31, 1943, to be paid at the time they surrender the obligations of the debtor now held by them for the new securities authorized under the plan.

14. The cash held by the debtor's Trustees is such that, without endangering the cash resources of the reorganized company, such adjustment payments may be made to such bondholders and secured creditors.

15. Petitioners recommend that upon the distribution of the new General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, and common stock, under the provisions of the plan of reorganization, the debtor's Trustees make or cause to be made, through the exchange-depositary to be approved by the Court by one or more checks as may be convenient, adjustment payments in cash as follows:

(a) with each General Mortgage 4½% Income Bond, Series A, issued and distributed under the plan, a cash payment of 22½% of the principal amount thereof;

(b) with each share of Preferred stock, Series A, issued and distributed under the plan, a cash payment of $15.82; and

(c) with each share of common stock, issued and distributed under the plan, a cash payment of $9.00.

16. Your petitioners do not recommend that cash payments be made with the scrip certificates for the General Mortgage 4½% Income Bonds or with the scrip certificates for preferred and common stock, but recommend that provision be made for a deposit of sufficient funds with an agent to be approved by the Court for payments corresponding in amounts and percentages to those stated in paragraph 15 hereof, when such scrip is exchanged for General Mortgage 4½% Income Bonds, Preferred Stock and Common Stock, respectively.

17. The plan of reorganization of the debtor provides in subdivision P. for the issuance of a specific amount or number of bonds and shares of stock to the various creditors entitled to participate under the plan. In order to satisfy the requirements, it will be necessary, in the instance of the General Mortgage 4½% Income Bonds, Series A, the Preferred Stock, Series A, and the common stock to be issued under the plan, to provide bond and stock scrip. The form and substance of such scrip will be submitted later for the approval of this Court. At this time, however, your petitioners have determined, subject to the approval of the Court, that the scrip for said bonds and the scrip for said Preferred Stock should be limited in each case to one denomination or par amount; namely, $20, and that the scrip for said common stock should be for

a number of fractions of a share which would not be fixed but would be filled in when issued with appropriate fractions of not less than thousandths of a share.

18. In the event the denomination and par amount of the foregoing bond and preferred stock scrip are limited to $20, the requirements of The Railroad Credit Corporation and the A. C. James Co. under subdivision P. of the plan cannot be satisfied exactly by the issuance of such scrip. Furthermore, the aggregate principal amount of Series A bonds to be issued under the plan, namely $21,219,075, does not enable a complete issuance of bonds in denominations the lowest of which is $100.00. Similarly the aggregate par value of the Series A Preferred Stock to be issued under the plan, namely, $31,850,297, does not enable a complete issuance of full shares where as in this instance the par value is $100. Accordingly your petitioners propose, subject to the approval of the Court, to provide for the issuance of an aggregate principal amount of General Mortgage 4½% Income Bonds, Series A, of $21,219,000 and for the issuance of Preferred Stock, Series A in the aggregate par value of $31,850,200. Your petitioners have determined in this connection, subject to the approval of the Court, that the aggregate principal amount of Series A of said bonds should be fixed at the amount of $21,219,000, the amount shown in the indenture relating to said bonds (Exhibit B) and that the total number of shares in Series A of said preferred stock should be

fixed at 318,502 shares. Your petitioners propose, further, subject to the approval of the Court, to make the necessary adjustments, so that the total amount of said Series A Bonds and the total par value of said Series A Preferred Stock issued to all claimants under the plan (including bonds and stock issued to cover scrip) will equal the foregoing aggregate principal and par amounts, by reducing the amount of Series A Bonds and Series A Preferred Stock to be issued to The Railroad Credit Corporation and the A. C. James Co., with payments of the difference in cash as follows:

	Income Bonds		Preferred Stock		Total
	Per Plan	Proposed	Per Plan	Proposed	Cash
The Railroad Credit Corporation	$154,111	$154,080 in bonds 31 in cash	$241,681	$241,640 in stock 41 in cash	$ 72
A. C. James Co.	$163,724	$163,680 in bonds 44 in cash	$256,756	$256,700 in stock 56 in cash	100
					$172

Wherefore, your petitioners pray for the order of this Court:

(a) Approving, in substance and general form, the Indenture relating to the First Mortgage Bonds contemplated by the plan of reorganization of the debtor, a printer's proof of which is filed herewith as "Exhibit A," subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

(b) Approving, in substance and general form,

the Indenture relating to the General Mortgage Income Bonds contemplated by the plan of reorganization of the debtor, a printer's proof of which is filed herewith as "Exhibit B," subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

(c) Approving in substance and general form, the bonds, interest coupon and trustee's certificates of authentication, the forms of which are set forth in said Exhibits "A" and "B," subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

(d) Approving the recommendation of your petitioners that First Mortgage Bonds, Series A, and General Mortgage 4½% Income Bonds, Series A, to be issued pursuant to the plan, be dated as of January 1, 1939, and that Preferred Stock, Series A, and common stock, to be issued pursuant to the plan, be dated as of January 1, 1944;

(e) Approving the recommendation of your petitioners, and directing the Trustees of the debtor's estate, at the time of the consummation of the plan, to make the adjustment payments in cash, set forth in paragraphs 15 and 16 hereof, in the aggregate amount of $12,684,271.54;

(f) Approval of the fixing of the aggregate principal amount of Series A of the General Mortgage Income Bonds at the amount of $21,219,000 and the total number of shares in Series A of the Preferred Stock at 318,502 shares, and the issuance of only

said aggregate principal amount of said bonds and said total number of shares of said stock in fulfillment of the requirements of the plan of reorganization of the debtor.

(g) Approving the issuance of scrip in respect of General Mortgage 4½% Income Bonds, Series A and scrip in respect of Preferred Stock, Series A, only in denomination and par value, respectively, of $20, and the issuance of scrip with respect to common stock in the form of open or blank denomination to be filled in when issued with appropriate fractions of not less than thousandths of a share.

(h) Approval of the adjustments in the amount of General Mortgage Income Bonds and Preferred Stock to be issued to The Railroad Credit Corporation and A. C. James Co. and the cash payments to said creditors as proposed in paragraph 18 hereof.

(i) Granting such other and further relief as may be proper in the premises.

Respectfully submitted,

WHITMAN, RANSOM,
COULSON & GOETZ,

/s/ WHITMAN, RANSOM,
COULSON & GOETZ,

/s/ PILLSBURY, MADISON,
SUTRO,
Counsel for Petitioners.

State of New York,
County of New York—ss.

Robert E. Coulson, being duly sworn, deposes and says:

That he is a member of the Reorganization Committee of The Western Pacific Railroad Company; that he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

/s/ ROBERT E. COULSON.

Sworn to before me this 18th day of August, 1944.

[Seal): /s/ BEATRICE C. CUNNINGHAM, Notary Public, New York County, N. Y. Co. Clk's No. 212 Reg. No. 426C6, Kings Co. Clk's No. 173 Reg. No. 319C6, Bronx Co. Clk's No. 38 Reg. No. 140C6, Queens Co. Clk's No. 757 Reg. No. 20906, Certificate filed in Richmond County.

Commission Expires March 30, 1946.

Original Filed U.S.D.C. August 23, 1944.

EXHIBIT No. 23-B

In the District Court of the United States for the Northern District of California Southern Division

No. 26591-S

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER APPROVING AND AUTHORIZING MORTGAGE INDENTURES, FORMS OF BONDS, INTEREST COUPONS, ETC.; ADJUSTMENT PAYMENTS TO PERSONS TO WHOM NEW SECURITIES ARE ISSUABLE UNDER THE PLAN AND OTHER MATTERS

The petition filed August 23, 1944, by Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, the Reorganization Committee designated to put into effect and carry out the plan of reorgnization of the debtor above named, for an order approving and authorizing: indentures relating to First Mortgage Bonds and General Mortgage Income Bonds, including forms of Bonds, form of Interest Coupon and forms of Trustees' Certificates of Authentication; adjustment payments to persons to whom new securities are issuable in respect of the period January 1, 1939 to December 31, 1943, inclusive; the

aggregate principal amount of General Mortgage Income Bonds to constitute Series A, the aggregate par value and number of shares of Preferred Stock to constitute Series A, and adjustments in the aggregate amount of said bonds and the aggregate par value of said stock to be issued under the plan; the denominations, respectively, of General Mortgage Income Bond Scrip of Series A, Preferred Stock Scrip of Series A, and Common Stock Scrip; and adjustments in the amount of General Mortgage Income Bonds of Series A and Preferred Stock of Series A to be issued to The Railroad Credit Corporation and A. C. James Co., duly came on to be heard and was heard September 25, 1944, and has been submitted.

The Court being fully advised in the premises finds that notice of the hearing upon said petition has been given as prescribed by the order of this Court dated and filed August 23, 1944, and that all of the allegations and representations contained in the petition are true except for certain minor corrections made and noted at the hearing on September 25, 1944. The Court further finds and concludes:

(a) The proposed indenture relating to the First Mortgage Bonds contemplated by the plan (Exhibit "A" filed with the petition), with the corrections and changes submitted by petitioners at the hearing on September 25, 1944, and the denomination and form of Series A Coupon Bond, the form of Interest Coupon for Series A Coupon Bonds, the form of Series A Registered Bond without coupons, and

the form of Trustee's Certificate of Authentication applicable to both forms of bonds, all as set forth in said Exhibit "A," are consistent with the plan of reorganization and appropriate for carrying out and making effective the plan and should be approved;

(b) The proposed indenture relating to the General Mortgage Income Bonds contemplated by the plan (Exhibit "B" filed with the petition), with the corrections and changes submitted by petitioners at the hearing on September 25, 1944, and the denominations and form of Series A Registered Bond and the form of Trustee's Certificate of Authentication set forth in said Exhibit "B," are consistent with the plan of reorganization and appropriate for carrying out and making effective the plan and should be approved;

(c) The mortgage indentures should be dated as of January 1, 1939, as provided in the plan of reorganization; the First Mortgage Bonds, Series A, should be dated as of January 1, 1939; the General Mortgage 4½% Income Bonds, Series A, should be dated as of January 1, 1939; and the new Preferred Stock, Series A, and the new common stock to be issued upon consummation of the plan should be dated as of January 1, 1944;

(d) The available net income of the debtor and its subsidiaries for the years 1939 to 1943, inclusive, determined under the provisions of Subdivision L of the plan, is as follows:

1939	$ 1,017,478.91
1940	2,156,001.35
1941	4,093,588.31
1942	9,484,368.12
1943	18,703,511.00
Total	$35,454,947.69

Upon the consummation of the plain an amount equivalent to such available net income should be applied as directed in ordering paragraphs 5 and 6 hereinbelow;

(e) The cash held by the debtor's Trustees is such that, without endangering the cash resources of the reorganized company, the adjustment payments recommended by the Reorganization Committee may be made to the existing first mortgage bondholders and secured creditors of the debtor;

(f) The determination and recommendation of the Reorganization Committee that adjustment payments in cash in the aggregate amount of approximately $12,681,086.52 be made to the present first mortgage bondholders and secured creditors of the debtor at the time of the consummation of the plan, are in accordance with the plan of reorganization and appropriate and should be approved; and payments corresponding in amounts and percentages to those recommended in paragraph 15 of the petition should also be made at the time of the consummation of the plan with the scrip certificates issued for General Mortgage 4½% Income Bonds, Series

A, Preferred Stock, Series A, and Common Stock, to the nearest cent in the case of each such bondholder and secured creditor;

(g) The determination and recommendation of the Reorganization Committee that the scrip certificates for General Mortgage 4½% Income Bonds, Series A, and the scrip certificates for Preferred Stock, Series A, be issued only in denominations of $20 and one-fifth of a share, respectively, and that the scrip certificates for common stock should be for a fraction of a share which would not be fixed but would be filled in when issued with appropriate fractions of not less than thousandths of a share, are consistent with the plan of reorganization and appropriate and should be approved;

(h) The determination and recommendation of the Reorganization Committee that the aggregate principal amount of General Mortgage 4½% Income Bonds, Series A, to be issued in the reorganization be fixed at $21,219,000, that the aggregate par value of Preferred Stock, Series A, to be issued in the reorganization be fixed at $31,850,200, under the provisions of the plan, and that a cash payment of $72 be made to The Railroad Credit Corporation and a cash payment of $100 be made to A. C. James Co., with corresponding reductions in the aggregate amounts of said bonds and stocks to avoid the issuance of such bonds in denominations of less than $100 and of fractional shares of such preferred stock, are consistent with the plan and appropriate and should be approved.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed

1. That the indenture relating to the First Mortgage Bonds contemplated by the plan of reorganization (Exhibit "A" filed with the petition), with the corrections and changes submitted by the petitioners at the hearing on September 25, 1944, and the form and denomination of Series A Coupon Bond, the form of Interest Coupon for Series A Coupon Bonds, the form of Series A Registered Bond without coupons, and the form of Trustee's Certificate of Authentication, all as set forth in said Exhibit "A," be and hereby are approved as to substance and general form subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

2. That the indenture relating to the General Mortgage Income Bonds contemplated by the plan of reorganization (Exhibit "B" filed with the petition) with the corrections and changes submitted by petitioners at the hearing on September 25, 1944, and the form and denomination of Series A Registered Bond and the form of Trustee's Certificate of Authentication set forth in said Exhibit "B," be and hereby are approved as to substance and general form subject to such minor changes as the Reorganization Committee, upon advice of counsel, may deem advisable;

3. That the determination and recommendation of the Reorganization Committee that First Mortgage Bonds, Series A, be dated as of January 1,

1939, that General Mortgage 4½% Income Bonds be dated as of January 1, 1939, and that Preferred Stock, Series A, and the common stock to be issued pursuant to the plan be dated as of January 1, 1944, be and hereby are approved;

4. That the issuance of scrip certificates in respect of General Mortgage 4½% Income Bonds, Series A, and scrip certificates in respect of Preferred Stock, Series A; only in denominations, respectively, of $20 and one-fifth of a share, and the issuance of scrip certificates with respect to common stock in the form of open or blank denomination to be filled in when issued with appropriate fractions of not less than thousandths of a share, be and hereby are approved;

5. That the Trustees of the debtor's estate be and hereby are directed to make or cause to be made at the time of the consummation of the plan, through the exchange depositary to be approved by the Court, in such manner as may be convenient, adjustment payments in cash, in the aggregate amount of $12,681,086.52, or such lesser or greater amount as may be required to make payments to individual creditors to the nearest cent, and in such individual amount or amounts as shall equal the total of or each of the following, as the Reorganization Committee may determine:

(a) with each General Mortgage 4½% Income Bond, Series A, issued and distributed under the plan, a cash payment of 22½% of the principal amount thereof;

(b) with each share of Preferred Stock, Series A, issued and distributed under the plan, a cash payment of $15.81;

(c) with each share of common stock, issued and distributed under the plan, a cash payment of $9.00; and

(d) with scrip certificates for General Mortgage 4½% Income Bonds, Series A, Preferred Stock, Series A, and common stock, issued and distributed under the plan, payments corresponding in amounts and percentages to those directed in this paragraph to be made with such Bonds, Preferred Stock and common stock, respectively;

6. That the balance of the available net income of the debtor and its subsidiaries for the years 1939 to 1943, inclusive, remaining after the payments directed in paragraph 5 hereof, be applied as follows:

(a) $1,699,395.92 to be credited by the reorganized company to the capital fund account within thirty days after the consummation of the plan, provided, however, that such account shall be reduced prior to or at the end of such thirty-day period to $1,000,000 either by proper charges to such account, under the provisions of the plan, or by reducing said account by the amount of the excess over $1,000,000;

(b) $424,360 to be applied to the making of the sinking fund payments required by subdivision L of the plan in respect of the General Mortgage 4½% Income Bonds, Series A; and

(c) $20,659,938.92, or the remaining balance of said available net income, to be applied to any proper corporate purpose of the reorganized company;

7. That the aggregate principal amount of Series A of General Mortgage Income Bonds be fixed at $21,219,000, and that the total number of shares in Series A of the Preferred Stock be fixed at 318,502 shares of the par value of $100 each, and that $21,219,000 principal amount of said bonds and 318,502 shares of said Preferred Stock be issued in fulfillment of the requirements of the plan of reorganization:

8. That The Railroad Credit Corporation receive, in fulfillment of the requirements of paragraph 4 of Subdivision P of the plan of reorganization, $154,080 General Mortgage 4½% Income Bonds, Series A, $241,640 Preferred Stock, Series A, not more than 35,425 shares of common stock and cash in the amount of $72.00; and

9. That A. C. James Co. receive, in fullfillment of the requirements of paragraph 5 of Subdivision P of the plan of reorganization, $163,680 General Mortgage 4½% Income Bonds, Series A, $256,700 Preferred Stock, Series A, 37,635 shares of common stock and cash in the amount of $100.00.

Dated Sept. 25, 1944.

/s/ A. F. ST. SURE,
District Judge.

[Endorsed]: Filed April 6, 1949.

[Endorsed]: No. 12506. United States Court of Appeals for the Ninth Circuit. Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, Appellants, vs. Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, the Western Realty Company, the Standard Realty and Development Company and Delta Finance Co., Ltd., Appellees. Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., Appellants, vs. Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, the Western Realty Company, the Standard Realty and Development Company and Delta Finance Co., Ltd., Appellees. Supplemental Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed March 20, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12506

United States
Court of Appeals
For the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Appeals from the United States District Court, Northern District of California, Southern Division.

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, February 28, 1951.

Before: Healy, Circuit Judge,
Fee and Byrne, District Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeals herein presented by Mr. Herman Phleger, counsel for appellants Western Pacific Railroad Corporation, et al., and by Messrs. Julius Levy and Webster V. Clark, counsel for appellants, Metzger, et al., and by Mr. Allan P. Matthew, counsel for appellees, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, October 29, 1951.

Before: Healy, Circuit Judge,
Fee and Byrne, District Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT

Order that the typewritten opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

United States Court of Appeals
for the Ninth Circuit.

No. 12,506

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDADRD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Oct. 29, 1951

Upon Appeal From the United States District Court for the Northern District of California, Southern Division.

Before: Healy, Circuit Judge, and Fee and Byrne, District Judges.

William M. Byrne, District Judge:

OPINION

These are appeals from a judgment denying relief to plaintiffs below, who are seeking to recover approximately $17,000,000 from the reorganized The Western Pacific Railroad Company, defendant and appellee.[1] Appellants are The Western Pacific Railroad Corporation (hereinafter sometimes referred to as "Corporation"), its receiver, and three of its preferred stockholders, who intervened to assert Corporation's claims.

Appellant Corporation, from 1916 until the events which gave rise to this litigation, owned all of the capital stock of The Western Pacific Railroad Company, an operating railroad company. The operating company became financially distressed during

[1]There are seven appellees who are an affiliated group. The only one from whom appellants seek a money judgment is The Western Pacific Railroad Company, hereinafter sometimes referred to as the "subsidiary." The term, "subsidiaries," used in the plural number, refers to The Western Pacific Railroad Company and all other members of the affiliated group of which appellant "Corporation" was the parent.

the "depression of the early thirties" and in 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 U.S.C. 205). The court, in that year, placed its affairs in the hands of trustees. In 1939 the Interstate Commerce Commission approved (233 I.C.C. 409) a proposed plan of reorganization, which was thereafter submitted to and approved by the district court in 1940. In the plan it was determined, inter alia, that the capital stock of the subsidiary, owned by Corporation, was without equity or value and therefore was not entitled to participate in the plan. Appeals followed and, after a contrary holding by this court, the Supreme Court considered and rejected the contention of Corporation that it should have the right to participate in the plan because of increased earnings of the debtor while in reorganization, and affirmed the district court on March 15, 1945.[2] Thereafter the plan of reorganization was submitted to the creditors in accordance with the statutory requirement (11 U.S.C. 205 (e)), and, following their approval, was confirmed on October 11, 1943, by the district court. On April 30, 1944, with the approval of the court, Corporation transferred all of its stock in the subsidiary to the reorganization committee and this stock was later cancelled. On December 31, 1944, the trustees turned the railroad properties over to the reorganized company, The Western Pacific Railroad Company, appellee here.

This litigation involves a dispute about taxes and

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[2]Ecker vs. Western Pacific Railroad Corp., 318 U. S. 448.

tax savings for the years 1942, 1943 and the first four months of 1944, a period during which the railroad properties were controlled and operated by the trustees of the bankruptcy court.

During the years in which Corporation was the owner of all the outstanding stock of the pre-reorganization, The Western Pacific Railroad Company, including the years the trustees of the bankruptcy court had possession and control of the railroad properties, Corporation followed the practice of filing consolidated income tax returns in which it reported the earnings of the operating company as well as other affiliated companies.

During the year 1942 the operating company, under the control of the court's trustees, had substantial net earnings. On May 15, 1943, a consolidated return for the calendar year 1942, showing tax liability of $4,201,821.54, was filed by Corporation in behalf of all members of the affiliated group. Corporation, not having had any net earnings during 1942, did not pay any part of the tax.

On July 15, 1944, consolidated income and excess profits tax returns for the calendar year 1943, showing no taxable income, were filed by Corporation in behalf of all members of the affiliated group. The operating company, under the management of the trustees, again made substantial net earnings in 1943, but the loss sustained by Corporation by reason of the declaration of worthlessness of its stock[3] in the operating company (which had cost

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[3]Section 123 of the Revenue Act of 1942. (26 U.S.C. 23 (g) (4)). By this subsection, losses re-

Corporation $75,000,000) was utilized as an offset in the consolidated returns and thus resulted in a net loss and no tax obligation for any of the affiliated group. In addition, part of the loss was "carried back" to 1942[4] and a claim for refund of the taxes paid under the consolidated return for 1942 was filed with the Commissioner by Corporation on March 9, 1945. A consolidated return in behalf of the affiliated group was filed on June 15, 1945, by Corporation for the first four months of 1944. No tax liability was shown by this return by reason of the "carry forward"[5] of an unused portion of the loss arising from the declaration of the worthlessness of the stock of the subsidiary company owned by Corporation.

The validity of the stock loss offsets was questioned by the Commissioner of Internal Revenue, and after negotiations a tax settlement was made with the Commissioner on August 13, 1947, whereby, in consideration of the withdrawal of the claim for refund of 1942 taxes, the Commissioner accepted and approved the returns for the calendar year 1943 and first four months of 1944. Except for the offset of the capital stock loss of Corporation, the

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sulting from worthlessness of stock of an affiliate became operating losses instead of capital losses as theretofore.

[4]Section 122 (b) (1) of the Internal Revenue Code. (26 U.S. Code.)

[5]Section 122 (b) (2) of the Internal Revenue Code. (26 U.S. Code.)

net earnings of the subsidiaries for 1943 and the first four months of 1944 would have required the payment of some $17,000,000 in income and excess profits taxes.

This suit in equity was instituted October 10, 1946, by Corporation, alleging "consolidated income tax returns were filed by the plaintiff for itself and its affiliates which reported a deductible loss by the plaintiff in an amount sufficient to eliminate all taxable income for the group as a whole" for the periods in question and praying that the rights and interests of the plaintiff and the defendants be fixed and determined. A complaint in intervention was filed by three stockholders of Corporation on April 7, 1947. The principal difference between the original complaint and the complaint in intervention is the allegations in the latter pertaining to "duality" or interlocking management and "domination" of the parent by the subsidiary. It is alleged that various directors, officers and counsel of Corporation acted as directors, officers and counsel of the subsidiary with the result that the subsidiary dominated and controlled Corporation; that said officers caused Corporation to file consolidated tax returns when Corporation had "no duty or obligation whatsoever so to do." Corporation filed an answer to the complaint in intervention in which it denied "on its own behalf and on behalf of its officers and directors all allegations * * * of domination and control of the plaintiff, its officers and directors" by the subsidiaries and affiliates, but six months later Corporation filed a supplemental bill of com-

plaint alleging a "duality of control" and, though falling short of intervenors' allegation of "domination," it alleges "at the special instance and request of the defendants and the trustees in the reorganization proceedings acting for the defendants the plaintiff, however, consented to the filing on its behalf of consolidated * * * tax returns with defendants" for the tax periods in question. It is further alleged that plaintiff "does not aver that in so conducting themselves" the officers acting for both corporations "were aware of wrong-doing or consciously disregarded the interests of plaintiff." There is no assertion of actual fraud or specific acts of deceit nor would the record support any such assertion. Corporation's claim appears to rest on constructive fraud presumed from the intercorporate relationship which it asserts deprived it of its independence and caused it to suffer a loss.

The appellants emphasize that Corporation maintained its offices jointly with those of its subsidiaries and the trustees in New York; that Corporation's officers, who handled the tax transactions, were also employees of the subsidiaries and trustees, and their salaries and the expenses of the office were jointly paid; that because of its impoverished financial condition, Corporation was incapable, as of June 1, 1943, of paying salaries or office expenses and thereafter the subsidiaries paid all of the salaries and office expenses. Appellants refer to this as "duality of management" which they contend created a fiduciary relationship and the subsidiaries' duty to deal fairly with Corporation.

Many of the cases cited by appellants deal with the duties of trustees, agents and partners and with the granting of restitution for violation of their duties. Clarity of reasoning has suffered because of the failure to distinguish between the several varieties of fiduciaries, and the duties imposed on each. Although all trustees are fiduciaries, all fiduciaries are not necessarily trustees.

"A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation. Fiduciary relations include among others the relation of trustee and benficiary, guardian and ward, agent and principal, attorney and client * * *. The directors and officers of a corporation are also fiduciaries, as are receivers, and executors and administrators. The scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations * * *." (Restatement of Restitution, Section 190, comment "a.") (Emphasis added.)

As stated by Professor Scott in 49 Harvard Law Review at page 521:

"In some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust * * *." (Emphasis added.)

Appellants place a great measure of reliance on the case of Commercial National Bank in Shreveport vs. Parsons, 144 F. 2d 231. That case is distinguishable from the case before us in that the fiduciary relationship arose out of a contract which imposed the duties of a trustee upon the "new

bank." The court decided the case on the established rule that a trustee owes the duty of absolute fidelity to the trust estate and may not profit by dealing with it. We know of no better way to point up the distinction than to use the words of the court cited and emphasized by appellant's brief:

"The credit thus obtained by the new bank was a profit derived from the trust property as effectively as if it had been paid that much in cash." (Emphasis added.)

Cases which deal with trustees, agents and partners are not controlling here as there is no contention that the subsidiary was a trustee, agent or partner. It is appellants' contention that the subsidiary dominated Corporation through the dual officers. If this be true, then a fiduciary relationship existed, but the duties imposed were not those of a trustee. While a trustee may not deal with the trust estate and thereby make a profit, affiliated corporations are usually associated for the very purpose of dealing with each other for profit, e.g., manufacturing and sales companies; railroads and their subsidiary short line companies. Even the corporation which dominates its subsidiary, with the resultant fiduciary relationship, properly deals with its affiliate for profit as long as there is no overreaching or unfairness.

Whether or not a fiduciary relationship exists, and the extent of the duties imposed, depends upon the particular field of substantive law involved. We must look to the law of corporations to determine whether the subsidiary stood in a fiduciary relation

to Corporation. The mere fact of officers and directors in common does not create such a fiduciary relationship. There is nothing insidious about duality of management and control as such. It is very common in the realm of business, particularly in the situation of parent and subsidiary, as here. At times business convenience requires such relationship. The officers and directors who occupy this dual position are fiduciaries to both companies and owe a duty of loyalty to each. Thus they cannot favor the interests of one corporation while sacrificing or betraying those of the other. If they do so, they must respond in damages for their tortious conduct or account for any benefits derived through their breach of duty.

But rules relating to the individual officers do not reach the point involved in this case. Here we must determine whether the subsidiary corporation stood in a fiduciary relation to the parent corporation. There are several orthodox ways in which one corporation may become a fiduciary in relation to another corporation, e.g., it may hold property in trust for the other, or it may become an agent for the other. Fiduciary duties also arise where one corporation dominates the other. Consolidated Rock Co. vs. Du Bois, 312 U.S. 510. Although the presence of common officers and directors does not in itself create a domination or a fiduciary relationship between the corporations, it does subject dealings between them to judicial scrutiny as to their fairness and reasonableness to ascertain if domination exists, and if so, whether it has resulted in

overreaching which will raise a presumption of constructive fraud.

There obviously existed an interlocking management between Corporation and the subsidiaries. But this situation was not of the subsidiary's making. On the contrary, it was created by Corporation, whose stockholders elected its Board of Directors, who appointed its officers. Since plaintiff Corporation owned 100% of the stock of the subsidiary, it elected all of the directors of the subsidiary, which, in turn, appointed its officers. After the subsidiary was reorganized it was no longer controlled by Corporation but by the trustees appointed by the bankruptcy court.[6] Corporation continued in office the same directors who, in turn, continued to employ the same officers. This was not unnatural since Corporation continued to own all the capital stock of the subsidiary long after it had been divested of control of the subsidiary by reason of the reorganization.

If it be assumed that the advent of the trustees into the affiliation and the increased prosperity of the subsidiary resulted in control of the affairs of Corporation so as to raise fiduciary obligations, the scope and extent of the subsidiary's obligations would be to deal fairly with Corporation. A corporation can only act through its officers and agents. It follows that if there was domination and

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[6]The name of one of the trustees was submitted to the court by Corporation and the other was selected by the court and approved by all interested parties in the bankruptcy proceeding.

unfairness it was exercised through the dual officers who forsook their obligations to Corporation, by which they were appointed, and served the purposes of the subsidiary. Although the arguments of appellants are exceedingly general, it is apparent that they assign three particulars wherein the dual officers failed in their obligations to Corporation, resulting in unfairness: (1) They filed consolidated returns; (2) they failed to exact an agreement from the subsidiary requiring payment of money to Corporation as a condition to their consent to file consolidated returns; (3) they should have resigned and allowed the appointment of successors who would have exacted such an agreement from the subsidiary. We shall discuss these three particulars seriatim.

The consolidated returns were filed by Corporation as the parent, for itself and its subsidiaries. Appellants contend that the subsidiaries caused[7] Corporation to file consolidated returns when it had "no duty or obligation whatsoever so to do." The filing of these returns was in exact conformity with the practice followed since 1916. Beginning in 1927 Michael J. Curry, first as treasurer and after February 1, 1942, as president of Corporation, supervised preparation of consolidated returns,

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[7]Appellant Intervenors attribute the "causation" to "domination and control" of Corporation by the subsidiaries and trustees, whereas Corporation, which denies "domination and control" merely attributes it to its consent to the filing "at the special instance and request of the defendants and the trustees * * *" (pleadings).

signed and filed them. In each year the consolidated tax liability was distributed pro rata to those members of the group who had taxable incomes without allocating any tax to a company showing a loss or paying such company tribute for the tax "saved" by the use of its loss in the returns. Mr. Curry supervised preparation of tentative tax returns for 1942, and on March 15, 1943, signed and filed them and arranged for an extension of time until May 15, 1943, to file the final returns. On March 23, 1943, F. C. Nicodemus, Jr., who was counsel for Corporation at the time and appears on the pleadings and briefs in this case as present counsel for appellants, suggested by letter[8] to Mr. Schumacher, one of the trustees of the operating company, that he be authorized to employ Messrs. Whitman, Ransom, Coulson & Goetz, tax experts, to advise him on tax matter. This was done. Mr. Polk of this firm continued to advise with the officers of the group through the periods here in question. Mr. Polk reviewed the tax situation with Mr. Curry and Mr. Nicodemus and on May 20, 1943, prepared a detailed written report[9] addressed to Mr. Curry and circulated to Mr. Schumacher and Mr. Nicodemus. The report reviewed the tax advantages of consolidated returns and suggested the possibility that, under the recently enacted amendment to Section 23 (g) of the Internal Revenue Code, the loss of Corporation, upon a determina-

[8]Pl. Ex. 39B (read ino record, page 544).

[9]Pl. Ex. 50.

tion that its stock in the subsidiary was worthless, might constitute under a consolidated return, an offset to income of other group members. A consolidated return reporting the loss of Corporation as an offset to group income was prepared in the joint New York office, signed by Mr. Curry, and filed by him on July 15, 1944. The returns reported no tax owing. Substantially the same procedure was followed for the "carry back" claim for refund March 9, 1945, as well as the consolidated tax returns for the first four months of 1944, which were filed July 15, 1945.

It hardly seems conceivable that Corporation could complain because consolidated returns were filed. Not only was it in accordance with past practice of the group and under the supervision of Corporation's president, as in former years, but it was done under the guidance of the independent tax experts employed upon the suggestion of the General Counsel for Corporation, who represents appellants in the present proceeding. As the trial court stated[10]: "* * * when everybody was, as they were in this case, acting completely in the open in the matter, nobody was concealing anything from anyone else, the element of fraud or deception, of the kind that you refer to, is absent * * *. Everybody knew that consolidated returns were being filed. * * * Everybody knew that these attorneys were being employed to file this consolidated return. It was all done right out in the open." At the time

[10]Page 970, Transcript.

of trial plaintiff intervenors appeared to agree with these observations of the trial court,[11] but on this appeal they infer that there was something sinister about the filing of the consolidated returns.

It is interesting to note the reactions of appellants to observations in the opinion of the trial court[12] to the effect that the Commissioner erred in allowing the tax deduction in question. They vehemently argue that the filing of the consolidated returns and the use of plaintiff's loss to offset defendant's income was proper under the tax law and regulations. It is also interesting to note that the compromise of the tax claim between the Bureau of Internal Revenue and Corporation acting through its attorney-in-fact, James K. Polk,

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[11]Page 971, Transcript: "The Court: Well, all I have to say to you there, Mr. Levy, is that I don't think it is necessary to carry that argument forward now. Everybody knew, didn't they, that the consolidated return was being filed? So that the defendant railroad company wouldn't have to pay any income tax? That was why it was filed, wasn't it?

"Mr. Levy: Yes, your Honor."

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[12]In the opinion filed by the trial court (85 F. Supp. 868), appears the expressed view that the Bureau of Internal Revenue should not have compromised the tax claim of the taxpayers and should have insisted that the claimed deductions be disallowed in their entirety. The court said, "If I had the power, I would not hesitate to set aside the tax settlement. Indeed, if I could, I would order these taxes paid to the United States. That would effectively dispose of the cause." While we agree with the principal holding of the trial court, we do not

occurred after this action was commenced on October 10, 1946, and after the filing of the complaint in intervention on April 7, 1947; that no effort was made to invoke the power of the court to enjoin the officers of Corporation from continuing in their efforts to have the Bureau accept the consolidated returns as filed; that nothing was done to revoke Polk's power-of-attorney to represent Corporation in the proceedings before the Bureau; that Polk, as attorney-in-fact for Corporation, made an offer of settlement of tax liability for 1942, 1943 and the first four months of 1944 by letter of May 19, 1947, to the Internal Revenue Bureau; that a stipulation (hereafter discussed) was entered into between counsel in this case approving the settlement of the returns with the Government; that Corporation's Board of Directors adopted a resolution approving

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share this view. A taxpayer may avail himself of every means of tax deduction proper under the applicable statutes. Here the Commissioner questioned the taxpayer's right to the deduction and, after months of negotiation, compromised the disagreement with the taxpayer in lieu of litigating it in the Tax Court. The tax laws authorize the Commissioner to enter into compromises and they are binding on the court in the absence of fraud. This is particularly true in a collateral proceeding. The settlement of the tax claims is an undisputed fact in this case and whether or not it was advantageous to the government is not in issue. The trial court recognized the expression of this view as dictum when it stated: "Obviously the Court cannot pass judgment upon the validity of the tax compromise and settlement. It is now closed. It is final and cannot be reopened except for fraud." (Emphasis added.)

and ratifying the offer of settlement August 13, 1947.

The conclusion is inescapable that Corporation's officers, when they filed consolidated returns, did not violate any obligation but, on the contrary, were conforming with the policy and directions of Corporation.

Appellants suggest that Corporation was under no obligation to file consolidated returns; that it could have demanded that the subsidiaries enter into an agreement to pay it a sum of money as a prerequisite to its consent to filing such returns; that inasmuch as its officers did not exact such an agreement, they failed in their obligation to Corporation and are chargeable with an "unfair" omission to be imputed to the subsidiary by reason of the supposed domination.

Section 141 (a) of the Internal Revenue Code grants the privilege of filing consolidated returns upon the condition that all members of the affiliated group consent to the regulations prescribed by the Commissioner under the authority of subsection (b) of the same section. Regulation 104, Section 23.12, provides that the consolidated return shall be made by the parent corporation. Under the Regulations, the parent corporation is the agent for the entire group, and (except in unusual circumstances) all dealings with the Commissioner are handled by the parent.

Appellants argue that consolidated returns were designed solely for the benefit of the parent corporation. The argument is not sound. The Code

and Regulations recognize that the benefit of consolidated returns is for all corporations in the group. Any subsidiary in the group, as well as the parent, may prevent the filing of consolidated returns if the filing is detrimental or contrary to the interests of such corporation. Appellants assert that in the usual case the tax saving which a subsidiary effects will insure to the parent by way of increasing the value of its stock or by way of dividends. This is quite true in the usual case. But it does not mean that this result must follow, nor does it follow that, because the value of a parent's equity in a subsidiary corporation is increased by reason of benefits flowing to the subsidiary's preferred stockholders and creditors, it may receive the benefits direct, regardless of the rights of the subsidiary's preferred stockholders, creditors and minority common stockholders.

The appellants and intervenors contend that the tax laws require "economic unity" for the filing of consolidated returns. This is incorrect. The Regulations suggest procedure in cases where a subsidiary has left the affiliated group. Regulation 104, Section 23.12 (e). Thus, the regulations specifically envison situations where economic unity shall cease and yet permit the filing of consolidated returns. If, by the time the returns are filed the affiliation has ceased to exist, any benefits to the subsidiary obviously cannot insure to the parent. That is precisely the situation in the case at bar. In the tax periods involved there was an affiliated group. When the returns and the claim for refund were

filed, affiliation no longer existed. Therefore, the benefit of the consolidated return could not accrue to the parent corporation. If the assertion of appellants that consolidated returns "are not permitted for the benefit of the subsidiaries" were literally true, then there would be no lawsuit here because consolidated returns could not have been filed in the first instance.

Appellants cite three decisions of the Securities and Exchange Commission in support of their view that the rationale of the tax laws requires that any benefits resulting from the tax laws should go to the parent.[13] These decisions do not support this contention of appellants. These companies were seeking the approval of the Commission to alteration of inter-company agreements respecting income taxes. All three decisions show a decided viewpoint that the tax savings from consolidated returns shall not be paid over to the parent if this would in any way endanger the position of the creditors of the subsidiary. They also make clear that a company whose loss was utilized for the benefit of the group does not have a right to compensation from those who benefited. In the Cities Service case, supra, the Commission said:

"* * * we think it should be observed that in

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[13]In the Matter of Consolidated Electric & Gas Co., 15 S.E.C. 161; In the Matter of Consolidated Electric and Gas Co. and The Islands Gas and Electric Co., 13 S.E.C. 649; In the Matter of Cities Service Company and Cities Service Refining Corporation, Holding Co. Act of 1935, Release #5535, File 70-988.

the ordinary case the fact that one subsidiary contributes a particular income deduction to a consolidated return does not in itself entitle that subsidiary to the benefits of the reduced taxes resulting from the deduction. Where the reductions are possible from filing a consolidated return, they ordinarily are due to a number of factors contributed by the various members of the consolidated group, including, among others, earnings, and excess profits tax credits, as well as income deductions." (Emphasis added.)

There is nothing in the Code or Regulations that compels the conclusion that a tax saving must or should insure to the benefit of the parent company or of the company which has sustained the loss that makes possible the tax saving.

Assuming, as we have, that the subsidiary dominated Corporation through control of the dual officers, it did not abuse its supposed dominant position because the officers and directors common to both corporations did not sacrifice Corporation's interests to those of the subsidiary. When the Supreme Court decided that Corporation could not participate in the increased earnings of the operating company while in reorganization, Corporation suffered a severe loss. Since it had no income, there was no possible way for it to achieve any tax advantage to offset the loss. But its affiliate did have use for the loss and the group was entitled, under the tax law, to make use of that means of tax savings. The dual officers owed fiduciary duties to both corporations to promote the interests of both and

to obtain for each what it was entitled to under the tax laws. Under this state of facts these officers had a positive duty to make use of the loss as they did, that is, to offset the income of members of the affiliated group with deductible losses of other members. If the positions of the corporations were reversed and the subsidiary had a loss and the parent had income, the officers would have been obliged to file consolidated returns to enable Corporation to make use of the loss. Indeed, this very thing had occurred in previous years of the affiliation and Corporation had effected substantial tax savings (Def. Ex. 46) by reason of filing consolidated returns. The record is clear that on none of these occasions was tribute paid to a subsidiary which had suffered a loss. The officers would have been derelict in their duty to the subsidiary had they failed to file consolidated returns. Their duty to Corporation required only that they not sacrifice its interests and did not require them to exact tribute for following the practice of the past twenty-five years. After the transaction Corporation was in exactly the same position that it was in before the subsidiary had effected the tax saving allowed by the tax laws.

However, it is contended that the subsidiary should have notified the Corporation's stockholders and directors of the filing of consolidated returns so that independent directors and officers could have been put in charge of Corporation's interests to make a bargain with the subsidiaries and obtain compensation as a prerequisite to filing consoli-

dated returns. There are several things wrong with this argument. The most obvious is that the entire transaction was open and above board. Many persons having an interest in Corporation, including stockholders and counsel, were fully aware of the situation. They chose not to act. They apparently preferred to permit the transaction to stand, intending thereafter to bargain for a share in the tax savings. They made no effort to inject themselves into the tax settlement with the government. But all this assumes that it would have been proper for Corporation to have made such a bargain. The Corporation was the sole owner of the subsidiary's capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities. Consolidated Rock Co. v. DuBois, 312 U.S. 510, 522. It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. A parent company is not acting in the best interests of its subsidiary when it seeks to appropriate to itself an advantage which the tax laws give the subsidiary.

Plaintiff argues that it was a "complete stranger" to defendant when the consolidated return was filed July 15, 1944, because the affiliation terminated on April 30, 1944, when its stockholdings were transferred to the reorganization committee. A tax return is an historical document relating to the past. This return related to a period when the affiliation existed. All fiduciary duties with respect to matters arising during the relationship continue during the

winding up period, and are "as sacred and inviolable after as before the expiration of its term."[14] It would be ridiculous to say that a fiduciary who performs an act winding up matters which relate to the affiliation period may exact payment merely because the relationship has technically terminated. If Corporation had required tribute as a condition of its cooperation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors. Equity will not permit a recovery as a substitute for a bargain which would have been unfair.

The record is barren of evidence to support the contention that Corporation was dominated by the subsidiary, or that there was a breach of any duty owed to Corporation. As the trial court stated, "The so-called 'duality of control' much discussed and emphasized, is not important."

Appellants contend that they have a special claim to the 1942 tax saving. They rely upon a pre-trial stipulation and order. The proposed settlement of tax liability with the government provided that the returns for 1942, 1943 and first four months of 1944 were to be approved as filed, and that the claim for refund of 1942 taxes was to be rejected. Intervenors applied to the court below for an order restraining the consummation of the settlement on

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[14]Trice v. Comstock, 121 Fed. 620, 625 (C.C.A. 8, 1903); Uniform Partnership Act. 7 U.L.A. Sec. 30; Cal. Corp. Code Sec. 15030; 3 Scott on Trusts (1939) Sec. 344; 16 Fletcher, Corporation (Perm. Ed.) Sec. 8174.

the theory that the rejection of the 1942 refund claim might be prejudicial to the position of Corporation in this litigation. The parties entered into a stipulation providing that for purposes of litigation the 1942 refund claim, diminished in proportion to the diminution of the entire tax saving, should be deemed to have been allowed and "paid to the plaintiff as the agent for the affiliated group * * *." (Emphasis added.) The pre-trial order confirmed the stipulation.

The trial court did not make formal findings of fact and conclusions of law, but relied upon Section 52 (a) F.R.C.P., which provides in part: "* * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein * * *." Findings of fact and conclusions of law are intended to aid appellate courts by affording them a clear understanding of the basis of the decision below. Findings are not a jurisdictional requirement of appeal which this court may not waive. Even in cases where there are no findings, if the record is so clear that the court does not need them, it may waive the defect, on the ground that the error is not substantial in the particular case.[15]

In the instant case the trial court's opinion discloses adequately the issues of fact which were before the court and the court's findings thereon.

The trial court, in a note appended to its opinion,

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[15]Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310; Hurwitz v. Hurwitz, 136 F. 2d 796; Goodacre v. Panagopoulos, 110 F. 2d 716.

stated that "inasmuch as there is little factual dispute" the opinion would serve as findings of fact and conclusions of law, but "counsel if they wish, may submit findings * * *." All parties elected not to submit additional or more detailed findings except that the appellants proposed findings with respect to the above stipulation and pre-trial order, and also a conclusion of law to the effect that the defendant should pay to the plaintiff the sum of $3,385,290. These proposed findings and conclusions, which were inconsistent with those embodied in the opinion, were rejected by the trial court.

Appellants argue that the court below concluded that it should leave the parties where it found them and that Corporation is therefore entitled to the assumed avails of the reduced refund claim.

The stipulation and pre-trial order were entered into and made for the purpose of protecting the position of Corporation in relation to the refund claims only if it should be found entitled to the refund. The court found it was not entitled to it. Appellants' position is no stronger with respect to the refund for 1942 taxes paid by the subsidiaries than it is with respect to the 1943 and 1944 savings of the subsidiaries. It is true that the government requires consolidated returns be filed in the name of the parent and that refunds are paid to the parent, but where such refunds are paid, the parent holds the refund as agent or trustee for the benefit of the affiliate which has overpaid.[16]

[16]Bankers Trust Co. vs. Florida East Coast, etc., 92 F. 2d 450.

In their brief appellant-intervenors allude to the losses they sustained as stockholders and imply that they have an equitable right to compensation apart from that of Corporation. To believe this would be to misapprehend their position. A corporation is a legal entity separate and distinct from its stockholders and benefits to the latter flow from the rights of the corporation. If this were not true these intervenors could not hope to gain by this proceeding as they sustained no loss by reason of Corporation being barred from participation in the reorganization plan. Their pleadings, as well as a stipulation filed in this suit, show that they acquired their stock after Corporation's stock in the subsidiary had been declared worthless. Defendants offered to prove at the trial that intervenors purchased their stock for less than one cent on the dollar. The offered evidence was properly excluded as irrelevant by the trial court. The fact, if it be a fact, that any or all of the present stockholders of Corporation acquired their stock as a speculation while the corporation was in the process of liquidation and its "stock was of trifling value" (page 11, intervenors' opening brief), is irrelevant to the issues here. Corporation is an entity and the issue is whether or not it is entitled to recover $17,000,000 from the successor of its former subsidiary. If it prevails its stockholders are entitled to reap the benefit, regardless of when they became such, or how "trifling" a sum they paid for their stock. The intervenors recognized this when they

filed their complaint in intervention to assert Corporation's claims.

We have examined the other authorities cited by appellants and find nothing contrary to our holding here. Appellants cite Southern Pacific Company v. Bogert, 250 U.S. 483, 492. That case was not concerned with the question of fiduciary relationship between parent and subsidiary. Rather, it was concerned with the fiduciary duty owed by the holders of the majority of the stock of a corporation to the minority stockholders. The case holds that a parent company has a fiduciary duty to any minority stockholders of the subsidiary.

Also cited is North American Co. v. S.E.C., 327 U.S. 686, 693. That case is not in point either. The court was not concerned with any question of fiduciary relationships. Rather it was concerned with the validity of the so-called "utility holding company death sentence" provision of the Public Utilities Holding Company Act.

The judgment is affirmed.

James Alger Fee, District Judge, dissenting:

There are no findings of fact which support the judgment of the Trial Court or the affirmance thereof by a majority of this Court.[1] The cause should be remanded for this reason alone.[2] The Trial Court gives two reasons for decision against plaintiff: first, that the "tax escape" was a fraud on the government, and, second, that a recovery

would violate the reorganization decree. Neither has any validity.

The major portion of the opinion of the Trial Court is devoted to the proposition that the "tax escape" was a fraud upon the government,[3] and therefore the proceeds were given to the defendant, an active wrongdoer.[4] This position that there was a fraud is given no support by the tax agents of the government who made the settlement.[5] It was expressly repudiated in open court by every party in this case. The majority of this Court, as the opinion shows, does not rely upon it.

A second subsidiary theory was also advanced below with little emphasis. The Trial Court said it would be inequitable to allow recovery to plaintiff because the stock of the then subsidiary owned by plaintiff was denied participation in either the assets or earnings in the reorganization proceeding. This reason is as unstable as the first.[6] The claim of plaintiff was not one against the original company, which was placed in reorganization. Everyone admits the genesis of the loss of plaintiff occurred later. Therefore, the claim would not in any event be barred by the decree of reorganization.[7] The liability to the government for taxes was not barred by that decree either. Liability for the use of plaintiff's loss long after the closure of the reorganization proceeding to obtain a benefit for defendant by compromise of the still existing tax claim could not be discharged, nor affected by the decree in reorganization. The right furnished consideration for contractual liability between

plaintiff and defendant as independent corporations. Plaintiff had a property right as owner of these shares of stock.[8] The reorganization court had power to deny plaintiff participation in the assets of its subsidiary, and, as a result, all but nominal values in the shares in the subsidiary were lost. But plaintiff was not in reorganization itself.[9] The company in reorganization did not own the stock and could not legally exercise the appurtenant property right to file a consolidated return. The reorganization court had no jurisdiction of plaintiff or of these property rights.

Decree of that court attempting to destroy rights of property in the stock owned by plaintiff would be void. The reorganization decree does not deal with the property rights in the stock and is therefore res judicata neither as to plaintiff nor as to its rights of property in the shares of stock or appurtenances.

Thus the two grounds advanced to sustain the judgment fail. The cause should be reversed for failure to state adequate findings to support the judgment. Findings must be made in the Trial Court. Appellate courts have no such right or function. The majority opinion attempts to accomplish justification of the result below by drawing inferences, deductions and conclusions from evidence which they claim to find in the record. It would be possible for other judges to set up a diametrically opposite set of facts from which a judgment in favor of plaintiff might be based. The very reason that Rule 52 requires findings of fact

is illustrated by the majority opinion. For the technical difficulties of finding a basis of fact for this judgment are many. Indeed, such difficulties are insurmountable.

If recovery is to be denied, the findings of fact, upon which determination adverse to plaintiff is based, must deal with the admitted facts and the allegations of the complaints of intervenors and plaintiff. Thereby, these material claims must be negatived.

In order to indicate what findings must be made to negative plaintiff's claim, a review of various phases thereof will be made. First, plaintiff had a property right to file or refuse to file consolidated returns, which could neither be given away without consideration nor cut off judicially without due process. Second, a trust fund was apparently created to pay these taxes by the reorganization court, and no order thereof has been shown vesting this fund in defendant. Third, by stipulation with defendant, plaintiff, as trustee, deposited a trust fund in court, which has not been distributed. Fourth, as an independent corporation, plaintiff, at request of defendant, filed consolidated returns and made a settlement with the United States, from which defendant derived benefit. Therefore, plaintiff is entitled to recovery for at least as much as it was worth. Fifth, a recovery much in excess of bare compensation for doing the acts is foreshadowed. Plaintiff has not been found to be in a fiduciary capacity toward defendant, and therefore the actual cash benefit obtained by defendant by use of losses

of plaintiff might well be compensated by award of an equitable portion of the tax remission which the United States allowed on account thereof. The findings made do not negative these contentions.

First then, plaintiff was found by the Trial Court to have been the owner of all the stock in the operating company when the petition for reorganization was filed. The Interstate Commerce Commission held that the assets of the operating company, at the initiation of the proceeding, were so shrunken that this stock was valueless for the purpose of participation in either the assets or earnings of the reorganization. The Supreme Court affirmed the denial of the petition of plaintiff for this relief. Plaintiff thereby is found to have sustained a loss of $75,000,000.00. There is no finding that the property right in the shares of stock was taken away from plaintiff either by this order or by the decree of reorganization.[10] Because of this ownership of these shares, plaintiff claims, under the recent enactment of Congress, a property right appurtenant thereto to use this loss in consolidated return and to offset it against earnings made by the properties in reorganization. Since, under the law, all corporations concerned must consent to the filing of consolidated returns, it is clear, contrary to the statement in the majority opinion, that plaintiff had no duty requiring it to file these returns. Plaintiff had a legal right to refuse to file. There is neither finding of fact that this property right did not accrue to plaintiff nor a finding that the

right vested in the subsidiary, the trustees in reorganization or in defendant.

It is found that plaintiff, by contract, transferred the stock in the former subsidiary to the reorganization trustees, after the right to file consolidated returns and have the benefit of offsetting losses against operating gains by the trustees, for income tax purposes, had accrued. These shares are thus recognized as property rights. There is no finding that the right to file or refrain from filing consolidated returns was sold and transferred with the shares of stock to the reorganization trustees.

And here it might be well to deal with one specious argument. It seems to be assumed that the officers of plaintiff could give away the property right to file or refuse to file consolidated returns either voluntarily or acting under the control of defendant or the reorganization trustees. This is strange doctrine. At the time of the transfer of stock, rights of creditors of plaintiff as well as those of stockholders were involved. By the enactment of Elizabeth, an insolvent corporation cannot hinder, delay or defraud its creditors by a transfer of property in their despite.[11] The equitable considerations are stressed by the Trial Court. The Chancellors have universally held that a transfer of all the assets of corporation, at the time not insolvent, cannot be made even by a majority of the stock.[12] Neither officers nor directors, without a vote of the majority, have such power.[13] In this case, it is of stellar importance that this right of plaintiff was its sole asset and that, upon appropriation thereof,

it became insolvent.[14] Specifically in any event, the transfer must be for adequate consideration and not in fraud of creditors or it will be invalid as against stockholders.[15] There are thus equitable considerations which the findings did not exclude.[16]

In a suit where stockholders of plaintiff intervene, there must be findings that there was adequate consideration for the shares of stock and the appurtenant right of filing a return. Otherwise, the District Court would be obliged to set aside the reorganization decree in order to grant relief by recapturing the assets of plaintiff improvidently given away.[17]

But a jury argument is made based upon a bare offer, which the Trial Court properly held incompetent, that the present stockholders of plaintiff did not pay adequate value for the stock. Suffice it to say that the James interests, which are present stockholders of defendant and which will share in this windfall, apparently acquired that stock to some extent by compromise of the interests of plaintiff in the stock which it formerly held.

Second, plaintiff claims there was a trust fund created by the reorganization court in the amount of $7,100,000.00 for the payment of taxes, and that defendant added $3,000,000.00 to the fund for the same purpose. Plaintiff claims, since these funds were saved by its action in filing the consolidated returns and making a contract of settlement with the government, that it is entitled to receive some compensation for conserving the trust funds. This claim is not valid as to the fund initiated by de-

fendant itself. A corporation has a right to set up reserves from its funds to meet contingencies. But the money impounded by the Bankruptcy Court to pay taxes was made up of funds in the hands of the reorganization trustees. There must be a finding that the Court decreed that this money should become the property of the defendant if not used to pay taxes. Otherwise it constitutes a trust fund of undistributed assets of the reorganziation.[18]

Third, plaintiff claims defendant stipulated that the $3,385,290.00 should be treated as if it had been paid to plaintiff "as agent" and the latter had placed this trust fund in court for distribution.[19] By the stipulation, plaintiff "as agent" was trustee of an express trust and, as such, had a right to deposit the fund and ask for a determination of the rights of all parties thereto, as in the nature of interpleader. Plaintiff affirmatively demanded findings upon this feature, and the Trial Judge refused to make them. A stipulation of parties to litigation that a fund is deposited in court is sufficient. The Court must give affirmative directions that the fund be paid to the proper party.[20] Before such a judgment be entered, findings of fact are required. It is assigned as error that the Trial Judge refused to make findings on this point. The rule requires findings of fact. This is error requiring reversal. The judgment here against plaintiff did not end the case. According to the very record before us, there is still a fund in the Trial Court which has not been distributed.

Fourth, we need not go so far afield. If we dis-

regard control of the officers[21] of plaintiff by defendant, the ownership of the stock and the appurtenant right to file returns and the presence of a trust fund, still a cause of action was proven prima facie[22] by facts which the Trial Court did find. We need only to be sophomorical enough to remind ourselves that, where one, at the special instance and request of another, does an act and benefit accrues to the one who made the request, the legal result is so standardized that for centuries it has been stated in one of the common counts.[23] Here there were two independent corporations at the time of the settlement of tax liability. They were capable of contracting with each other. Neither was longer connected with the other. Plaintiff, at the request of defendant long after the reorganization had been closed, entered into a settlement with the United States whereby its losses were used to obtain a benefit of $17,000,000 for defendant. Plaintiff was not bound to refuse consent to the filing of consolidated returns. It would seem, therefore, that sufficient facts are shown so that, in an action on the claim, plaintiff should recover (quantum meruit)[24] as much as the service was worth. Findings as to any affirmative defense should be specific.

If defendant had emerged sufficiently from reorganization to pay its own attorneys $300,000.00 for the same service, it is difficult to see how the reorganization decree prevents defendants from compensating plaintiff, at least for what the services were worth, which were rendered at its request and which resulted in benefit to it.

Fifth, it seems clear that definitive findings must

be made on other phases in order to deny plaintiff a much broader recovery. An argument is made that plaintiff is a fiduciary as respects defendant. The tax statute provides that plaintiff could use its loss of $75,000,000.00 to offset the earnings of the reorganization trustees and thereby obtain a remission of taxes for the reorganized company. Without the loss to plaintiff, the statute would not have applied. Without consent of plaintiff, neither could consolidated returns have been filed nor settlement made. The tax statute does not go farther and lay down any rule for allocation of the benefits obtained from a remission of taxes. The principles of equity should control division.[25] It is said, although there are no findings that the history of prior consolidated returns is controlling.[26] Of course, it cannot probably be shown how plaintiff heretofore dealt with a consolidated return after there has been a divorce from a subsidiary. If we look at it realistically, but little question arises. If plaintiff were still the owner of the stock of defendant, then the allocation of the $17,000,000.00 to defendant would be reflected in the increased value of its stock. The transfer of the stock left the right untouched. Since increase in value of stock in defendant no longer is of avail to plaintiff, there should be another method of applying the remission to the loss.

Finally, it may be, as the Trial Court said, that there is an overwhelming public policy which dictates that the reorganized company should be left alone as owner of the "amazing and undeserved tax" remission. But, before we, as Judges, take this

sole, remaining asset without compensation from stockholders of the plaintiff, who bore the losses, and give it as a surplus to distribute to the stockholders of the reorganized company, we should set out in clear and specific findings of fact the exact steps by which we accomplish such a result.

The cause should be reversed in order to permit adequate findings to be made.

[Endorsed]: Opinion and Dissenting Opinion. Filed Oct. 29, 1951. Paul P. O'Brien, Clerk.

Footnotes

[1]The patent insufficiency of the findings of the lower court to support the weight of the super structure now imposed is apparent. The order adopted the opinion as findings: "Findings of Fact. Plaintiff having proposed findings of fact in addition to the findings contained in the Court's opinion filed herein on September 6, 1949, and the defendant having objected thereto, and the Court being now satisfied that all facts necessary for decision are found in the opinion of September 6, 1949, now adopts by reference all such findings as its formal findings of fact in this cause, for all purposes as if the same were fully set forth herein. Conclusions of law. The Court concludes that the plaintiff shall take nothing herein and that the defendants shall have judgment in their favor for their costs of suit." Rule 52, Federal Rules of Civil Procedure; 28 U.S.C.A., §2106; Interstate Circuit vs. United States, 304 U.S. 55, 56; Kelley vs. Everglades District, 319 U.S. 415, 420, 421.

[2]The opinion of September 6, 1949, thus referred to, appears in 85 F. Supp. 868. Insufficiency of findings appears in important particulars indicated below.

There are no findings as to the mechanics of use of the right of plaintiff. It is not shown whether any resolutions were passed by the Board of Directors or stockholders of plaintiff authorizing the use for benefit of defendant. There is no finding whether a gift of the right was intended or whether there was an attempted payment of consideration.

There is no finding that plaintiff was ever party to the reorganization proceeding. There is no finding that plaintiff had any connection with the proceeding except to prosecute a claim for value of stock, which was disallowed.

There is no finding that the compromise settlement with the government, in which plaintiff participated and from which benefit to defendant arose, was connected with or contemporaneous with the reorganization proceeding.

The court should have found that defendant honestly believed that it was rightfully entitled to use the loss of plaintiff without consulting those beneficially interested in plaintiff or it used the loss fraudulently in deliberate disregard of the rights of those beneficially interested in plaintiff. The court should have found whether defendant was guilty either of mistake or of fraud. The belief of defendant's officers as to its rights at the time of filing the consolidated returns is one of the key facts in the case and should have been the subject of findings.

[3]The rationale of the opinion is set forth in colorful language. 85 F. Supp. 868, 875: "An array of able counsel on both sides have put forth prodigious and ingenious efforts, one side to retain the benefits of the tax 'escape,' and the other to obtain them. And all the time the taxes escaped in reality belong to the United States! The Court cannot cause these taxes to be paid, where they should be paid, to the United States."

[4]Even if the transaction were illegal, the result reached by the Trial Court could not stand. Cf. Barney vs. Saunders, 57 U.S. 534, 543: "They can not be allowed to aver that the profits made on the

trust funds should be put in their own pockets, because they were unlawful gains, for fear that the conscience of the cestui que trust should be defiled by participation in them. To indulge trustees in such an obliquity of conscience, would be holding out immunity for misconduct and an inducement to speculate with the trust funds, and put them in peril."

[5]The fact that the agents of the government, who effected the settlement, did not agree that there was a fraud on the United States is shown by United States ex rel. S. Roberts vs. The Western Pacific Railroad, 9 Cir., No. 12,723, June 15, 1951.

[6]The error of the lower court was in assuming that plaintiff is seeking an interest in the defendant corporation instead of compensation for property taken by defendant which belonged to plaintiff. The Trial Court made no finding as to the nature of the right to file consolidated returns, which only plaintiff could exercise. (Reg. 104, §23-16(a)) but which it could refuse to exercise (Reg. 104, §23.11(a)). Until such findings are made, there is no basis for a judgment denying participation in benefit.

[7]The effect of the decree is provided by 11 U.S.C.A., §205(f), Tilt vs. Kelsey, 207 U.S. 43, 52. Since the tax settlement between the government and the corporation occurred after the decree in reorganization, there could be no res judicata. Commissioner vs. Sunnen, 333 U.S. 591, 597, et seq.; Diaz vs. United States, 223 U.S. 442, 449.

[8]An incontrovertible proof of the proposition that plaintiff had no duty to apply the loss for the benefit of defendant may be cited. If plaintiff had sold a gold mine for a profit of over $75,000,000.00, its loss on the stock of the subsidiary could have been applied to offset any taxes against plaintiff. In that event, the trustees in reorganization would have been required to pay taxes against the operating company. Once used, the power of applying the loss would be functus officio, and plaintiff would have received the entire benefit.

[9]Callaway vs. Benton, 336 U.S. 132. The error in this proceeding, therefore, was the failure to reorganize plaintiff also. An illustrative case, where the parent was in reorganization, is reported in a series of opinions as In re Portland Electric Power Co., 97 F. Supp. 857-921. There a consolidated return was filed during the proceedings and the benefits appropriately distributed.

[10]It is inconceivable that a decree of reorganization prevents the company, when released from tutelage, from entering engagements and incurring liabilities. Otherwise, the reorganization would be perpetual. See In re Portland Electric Power Co., 97 F. Supp. 857, 873.

[11]Act of 1571, 13 Eliz. c. 5; Glenn, Fraudulent Conveyances and Preferences, (Rev. Ed., 1940), §§61 d, e, Vol. I, 95-99.

[12]Des Moines Life & Annuity Co. vs. Midland Insurance Co., 6 F. 2d 228. The statutes carry out the principle with various limitations. As plaintiff is a Delaware corporation, see Del. Rev. Code (1935) §65.

[13]Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed.) §1107.

[14]The trust fund theory probably applies. See Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed.) §7371.

[15]Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed.) §2946, notes 99 and 1.

[16]An interesting case in this Court, where the subsidiary was held liable for the unauthorized transfer of property of the parent by an officer of the subsidiary, is Clark & Wilson Lumber Company vs. McAllister, 101 F. 2d 709.

[17]Since plaintiff is a Delaware corporation, the decisions of that state are cited as illustrative of the general principle. Robinson vs. Pittsburgh Oil Refining Corporation, 14 Del. Ch. 193, 199; Hutton vs.

West Cork Railway Company, 23 L.R. Chancery Div. (1883) 654, 671, 677; Revised Code of Delaware (1935), Ch. 65, §65, Ch. 174. Cf. Laws of Delaware (1941), Ch. 132, §1.

[18]The Court below, the United States District Court for the Northern District of California, Southern Division, was the reorganization court. 34 F. Supp. 493. It therefore had the power to set aside the decree in reorganization, 11 U.S.C.A., §§ 11(8), 205(1), and administer this unadministered asset. Incidentally, the defendant cannot escape under any theory since it is under bond to pay all claims against the trustees.

[19]The stipulation of the parties was that a fund was paid into Court by plaintiff and therefore it must be returned to plaintiff's possession, unless some affirmative proof showed defendant was entitled thereto. The Trial Court held: "But, as between the parties no persuasion of conscience or equity impels me to do otherwise than to leave the parties where they are, the defendant with its amazing and undeserved tax success; the plaintiff as the reorganization left it, without interest in the debtor." Instead of restoring the parties to status quo ante, the Trial Court affirmatively awarded this to defendant. But no findings to sustain affirmative award are present.

[20]Rule 67, Federal Rules of Civil Procedure; 28 U.S.C.A., §§2041, 2042; Georgia vs. Madrazo, 26 U.S. 110, 121; United States vs. Morgan, 307 U.S. 183, 193; Osborn vs. United States, 91 U. S. 474, 479.

[21]As to the nature of the confidential relationship involved, where corporations have officers in common, see cases collected in annotation in 114 A.L.R. 299.

"It [a constructive trust] arises where one person acquires title to property from another by an abuse of a fiduciary or confidential relation between them * * *" Restatement of Restitution, §166 Comment

d. 3 Scott on Trusts, §648, p. 2336. Johnson vs. Umsted, 8 Cir. (1933) 64 F. 2d 316; Johnson vs. Clark, 7 California 2d 529, 61 P 2d. 767 (1936); Duncan vs. Dozey, 318 Illinois 500, 149 N.E. 495 (1925); Theis vs. Vonderheyden, 94 N. J. Eq. 317, 807, 119 Atl. 502, 121 Atl. 927 (1922).

[22]Other grounds for constructive trust, which it is possible for the trier of the fact to find upon the basis of evidence in the record, are fraud (Restatement of Restitution, § 166, Comment b; Templeton vs. Hollinshed, 119 Oregon 620, 250 P. 747), mistake (Restatement of Restitution, §§ 49, 170; 3 Scott on Trusts, § 468), and conversion or misappropriation (Burke Grain Co. vs. St. Paul Mercury Indemnity Co., 8 Cir., 94 F 2d 458; Pioneer Mining Co. vs. Tyberg, 9 Cir., 215 F. 501). As noted in the text following, a trust need not be worked out in all probability since simpler theories may serve for recovery.

[23]Matarese vs. Moore McCormack Lines, 2 Cir., 158 F. 2d 631, 170 A.L.R. 440 and note; Corbin on Contracts, § 1112; 1 Williston on Contracts, § 41, p. 115; Costigan, Implied in Fact Contracts and Mutual Assent, 33 Harv. L.R. 376; Burton vs. Burton Stock Car Co. (1898), 171 Massachusetts 437, 50 N.E., 1029; Ft. Wayne C. & L. R. Co. vs. Haberkorn (1896), 15 Indiana App. 479, 44 N.E. 322.

[24]Assumpsit would lie even though the Trial Court made findings of misappropriation, embezzlement and conversion. Reynolds vs. New York Trust Co., 188 F. 611; Terry vs. Munger (1890), 121 New York 161, 24 N.E. 272, 8 L.R.A. 216, 18 Am. St. Rep. 803; Conaway vs. Pepper (1919), 7 Boyce 511, 108 Atl. 676; Roberts vs. Evans (1872), 43 California 380; consult annotation 97 A.L.R. 250 and text treatment 1 C.J.S. Actions § 50(b).

[25]Restatement, Restitution, §§ 1, 81; Phillips-Jones Corporation vs. Parmley, 302 U.S. 233.

[26]See Note 8, supra.

United States Court of Appeals
for the Ninth Circuit
No. 12506

WESTERN PACIFIC RAILROAD CORP., et al.,
Appellants,
vs.
WESTERN PACIFIC RAILROAD CO., et al.,
Appellees.

MEREDITH H. METZGER, et al.,
Appellants,
vs.
WESTERN PACIFIC RAILROAD CO., et al.,
Appellees.

JUDGMENT

Appeals from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellants.

It is further ordered and adjudged by this court that the appellees recover against the appellants for their costs herein expended and have execution therefor.

Filed and entered October 29, 1951.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

APPLICATION OF INTERVENERS AND APPELLANTS, MEREDITH H. METZGER, HENRY OFFERMAN AND J. S. FARLEE & CO., INC., FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR REHEARING AND FOR STAY OF ISSUANCE OF MANDATE

To the Honorable the United States Court of Appeals for the Ninth Circuit:

Appellants Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc., respectfully represent to the Court that they intend to file a petition herein for rehearing of the decision rendered October 29, 1951. For the reasons stated in the attached affidavit of Webster V. Clark, Esq., one of counsel for the intervener-appellants, said appellants respectfully apply for an order extending for a period of twenty (20) days to, and including, December 18, 1951, the time within which to file their said petition for rehearing. Appellants further apply for an order staying issuance under Rule 28 of this Court, of the mandate until December 19, 1951, and then if said petition for rehearing has been filed by that day, until five (5) days after the determination of such petition.

Dated November 20, 1951.

WEBSTER V. CLARK,
ROGERS and CLARK,
WILLIAM E. HAUDEK,
JULIUS LEVY,
POMERANTZ, LEVY,
SCHREIBER & HAUDEK,
DAVID FRIEDENRICH,
By /s/ WEBSTER V. CLARK,
Attorneys for Interveners and Appellants.

It is so ordered this 20th day of November, 1951.

/s/ WILLIAM HEALY,
Circuit Judge.

(Affidavit attached.)

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

APPLICATION OF APPELLANTS, THE WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. duP. BAYARD, RECEIVER, FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR REHEARING AND FOR STAY OF ISSUANCE OF MANDATE IN THE MEANWHILE

To the Honorable the United States Court of Appeals for the Ninth Circuit:

Appellants, the Western Pacific Railroad Cor-

poration and Alexis I. duP. Bayard, receiver, respectfully represent to the court that they intend to file herein a petition for rehearing of the decision rendered October 29, 1951. For the reasons stated in the attached Affidavit of Herman Phleger, one of appellants' counsel, these appellants respectfully apply for an order extending for a period of 20 days, to and including, December 18, 1951, the time within which to file their petition for rehearing. Appellants further apply for an order staying issuance, under Rule 28, of the mandate until December 19, 1951, and then, if said petition for rehearing has been filed by that day, until 5 days after the determination of such petition.

Dated November 16, 1951.

HERMAN PHLEGER,

MOSES LASKY,

BROBECK, PHLEGER & HARRISON,

FRANK C. NICODEMUS, JR.,

MAHLON DICKERSON,

NORRIS DARRELL,

LEROY R. GOODRICH,

By /s/ HERMAN PHLEGER,

Attorneys for Appellant, The Western Pacific Railroad Corporation.

HERMAN PHLEGER,

MOSES LASKY,

BROBECK, PHLEGER & HARRISON,

By /s/ HERMAN PHLEGER,

Attorneys for Appellant, Alexis I. duP. Bayard, Receiver.

It Is So Ordered this 16th day of November, 1951.

/s/ WILLIAM HEALY,
Circuit Judge.

(Affidavit attached.)

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, January 30, 1952.

Before: Healy, Circuit Judge,
Fee and Byrne, District Judges.

[Title of Cause.]

ORDER DENYING PETITIONS FOR REHEARING, ETC.

Upon consideration thereof, and by direction of Healy, Circuit Judge, and Byrne, District Judge, It Is Ordered that the petitions of appellants, filed

December 17, 1951, and within time allowed therefor by rule of court and valid extensions thereof, for a rehearing of above cause be, and hereby are denied.

Insofar as the petitions seek a rehearing en banc, they are stricken as being without authority in law or in the rules of practice of this court.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Jan. 30, 1952

ON APPELLANTS' PETITIONS
FOR REHEARING

Before: Healy, Circuit Judge,
Fee and Byrne, District Judges.

PER CURIAM

The petitions of the appellants and intervenors for a rehearing are denied. Insofar as the petitions seek a rehearing en banc, they are stricken as being without authority in law or in the rules or practice of the court. See Kronberg v. Hale, 9 Cir., 181 F. 2d 767.

[Endorsed]: Order. Filed January 30, 1952. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Feb. 18, 1952

ON APPELLANTS' PETITION
FOR REHEARING

Before: Healy, Circuit Judge, and
Fee and Byrne, District Judges.

James Alger Fee, District Judge, (dissenting and suggesting a rehearing en banc of all Circuit Judges):

This cause involves the disposition of over $21,000,000.00. The solution requires application of novel statutory language affecting the fields of bankruptcy and taxes. I have expressed myself heretofore and still feel that the findings of the lower court do not support the determination made by two judges on the panel here.

I am unable to agree with either the denial of rehearing or the striking of the petitions which ask for a rehearing by the full complement of Circuit Judges of this Court en banc. Two District Judges and one Circuit Judge constituted the panel which heard the case. As has been pointed out in this serious and important litigation, three District Judges have, respectively, expressed three widely divergent views, while no member of the Court of Appeals has written a line on the merits.

I therefore suggest to the Court of Appeals a rehearing en banc of all the Circuit Judges. For this there is precedent in this Circuit.[1] The practice as I understand it, substantially accords with that of the Third Circuit,[2] which is admirable. Inasmuch as this might be the court of last resort in this case, it seems fairer to have the issues disposed of by Circuit Judges.

The Supreme Court of the United States at least once has given permission to an appellant to apply to this court for a hearing en banc. 316 U.S. 649.[3] In taking that action, reference was made to Textile Mills Securities Corporation vs. Commissioner of Internal Revenue, 314 U.S. 326.

[Endorsed]: Filed February 18, 1952. Paul P. O'Brien, Clerk.

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[1]Judges Denman, Mathews and Stephens sat in Hopper vs. United States, 9 Cir., 142 F. 2d 167, and Judges Wilbur, Denman and Healy sat in Crutchfield vs. United States, 9 Cir., 142 F. 2d 170. At page 177 of 142 F. 2d appears Circuit Judge William Denman's motion for a rehearing en banc of the Hopper case, supra, wherein it is stated that the cause is "now pending for rehearing in this Court." Accordingly, the rehearing of that case was held en banc before Judges Wilbur, Garrecht, Denman, Mathews, Stephens and Healy, being all of the Circuit Judges of this Court. Hopper vs. United States, 9 Cir., 142 F. 2d 181.

[2]United States vs. Gallagher, 3 Cir., 183 F. 2d 342, was heard by a panel of two Circuit Judges and one District Judge, and, upon suggestion of one of the Judges, was heard en banc by all Circuit Judges.

[3]See Robinson vs. Johnston, 9 Cir., 130 F. 2d 202.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,506

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, RECEIVER,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY AND DELTA FINANCE CO., LTD.,

Appellees.

PETITION FOR LEAVE TO FILE A MOTION TO VACATE ORDER STRIKING APPELLANT'S PETITION FOR REHEARING EN BANC AND REINSTATING SUCH PETITION

HERMAN PHLEGER,
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BROBECK, PHLEGER & HARRISON,
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Index of Authorities

Table of Cases

Pages

Commercial National Bank in Shreveport v. Parson, 144 F. 2d 231 2276

Commercial National Bank in Shreveport v. Connolly, 176 F. 2d 1004 2276

Commercial National Bank in Shreveport v. Connolly, 177 F. 2d 514 2273

Commissioner v. Textile Mills Corporation, 117 F. 2d 62 2274

Connolly v. Commercial National Bank in Shreveport, 189 F. 2d 608 2276

Freuhauf Trailer Co. v. Myers, 181 F. 2d 1008 2272

George A. Fuller Co. v. Commissioner, 92 F. 2d 72 2276

Independence Lead Mines Co. v. Kingsbury, 175 F. 2d 983 2270

Kronberg v. Hale, 181 F. 2d 767 ..... 2271, 2272

Lang's Estate v. Commissioner, 97 F. 2d 867 .. 2274

Northwestern Mutual Life Ins. Co. of Milwaukee v. Gilbert, 182 F. 2d 256 2272

Textile Mills v. Commissioner, 314 U.S. 326 .. 2274

United States ex rel. Robinson v. Johnston, 316 U. S. 649 ..... 2269, 2270

United States v. Sentinel Fire Ins. Co., 178 F. 2d 217 2273

Statutes and Rules

Page

Judicial Code, Sec. 4(c) 2268, 2270, 2274

Rules of Civil Procedure, Section 7(b)(1) ... 2274

S. 1053, 77th Congress, 1st Sess., a bill to amend Section 212 of old Title 28 U.S.C. 2274, 2275

United States Code:

Title 28, Section 46(c) 2273, 2274, 2277

Title 28, Section 212 2274

Texts and Miscellaneous

Final Report of the Committee on Codification and Revision of the Judicial Code 2275

Harvard Law Review, Vol. 63, p. 1449 2271

Subject Index

Summary 2268

Authorities 2268

Argument 2270

Procedure of Striking Petitions 2271

Legislative History of Title 28 U.S.C., Sec. 46(c) 2274

Hearing En Banc Particularly Appropriate in This Case 2276

Conclusion 2277

Appendices:

Appendix 1 (order striking petition for rehearing en banc) 2278

Appendix 2 (Judge Fee's opinion suggesting a rehearing en banc of all Circuit Judges) 2278, 2279, 2280

Appendix 3 (proposed motion) 2280, 2281, 2282

United States Court of Appeals
for the Ninth Circuit

No. 12,506

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. du P. BAYARD, RECEIVER,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

PETITION FOR LEAVE TO FILE A MOTION TO VACATE ORDER STRIKING APPELLANT'S PETITION FOR REHEARING EN BANC AND REINSTATING SUCH PETITION

To the Honorable William Denman, Chief Judge, and to the Judges of the United States Court of Appeals for the Ninth Circuit:

The petition of appellants, Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, respectfully shows:

On January 30, 1952, this Court (Healy, Circuit Judge; Fee and Byrne, District Judges) entered an order striking the appellants' petition for rehearing en banc as being without authority in law or in the rules of practice of the court. A copy is attached as Appendix I.

On February 18, 1952, Judge Fee filed a dissenting opinion and suggested a rehearing en banc of all the Circuit Judges. A copy is attached as Appendix II.

This petition asks leave to file a motion to vacate the above order and to reinstate the petition for consideration and action by the court. A copy of the motion is attached hereto as Appendix III.

Summary

In striking appellant's petition for rehearing en banc, two judges foreclosed consideration thereof by the members of the court.

This is a direct holding that no litigant is entitled to petition for a rehearing en banc, and that such a petition is to receive no consideration whatever.

It is submitted that this action is without support in law, and that a litigant is entitled under the law to (1) file such a petition, and (2) have it considered and acted upon by the court.

Authorities

Section 46(c) of the Judicial Code, enacted in 1948, provides:

Note: Emphasis is supplied unless otherwise noted.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court en banc shall consist of all active circuit judges of the circuit."

According to the reviser's note, this section "preserves the interpretation established by the Textile Mills case," i.e., Textile Mills v. Commissioner, 314 U.S. 326.

In United States ex rel. Robinson v. Johnston, 316 U.S. 649 (1941), the Supreme Court granted certiorari to this Court, and at the same time vacated this Court's judgment and remanded this case

"for further proceedings, including leave to petitioner to apply for a hearing before the court en banc."

citing the Textile Mills case.

This is a direct recognition of the right of a litigant to apply for a rehearing en banc.

We have been unable to find any authority for the proposition that a litigant may not apply for a hearing en banc, or that a court may strike a petition therefor, save Kronberg v. Hale, 181 F. 2d 767, decided by this Court and cited here as authority for the action taken. Although certiorari was applied for and denied in that case, an examination of the moving papers discloses that this point was not raised.

Argument

This Court consists of all of the judges thereof (Textile Mills v. Commissioner, 314 U.S. 326), and it may sit en banc. Section 46(c) of the Judicial Code provides in terms that it may rehear cases en banc if "ordered by a majority of the circuit judges who are in active service."

If hearings en banc can only be had when ordered by a majority of the circuit judges who are in active service, it follows that a litigant is entitled to have the matter presented to such judges for consideration and action, and that a petition therefor cannot be stricken nor can it be denied by a panel consisting of one circuit judge and two district judges.

In Independence Lead Mines Co. v. Kingsbury, 175 F. 2d 983 (1949), where a petition for rehearing en banc was denied by this Court, Chief Judge Denman, dissenting, stated (p. 992):

> "The attempt of two judges in a panel of three judges to deny a petition for rehearing en banc violates the law as established in United States ex rel. Robinson v. Johnston, 316 U.S. 649, 650, S. Ct. 1301, 86 L. Ed. 1732, and Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 333 et seq., 62 S. Ct. 272, 86 L. Ed. 249.
>
> * * *
>
> "In view of the Supreme Court decisions cited above, it is too obvious to need argument that two judges cannot thus assume to an act on a petition addressed to seven judges."

The Independence case was followed by a note on the subject in 63 Harvard Law Review 1449. Speaking of that case, it is there said (1451):

> "Indeed, since the three judges here could not under §46 have ordered a rehearing, their action in considering the petition seems singular."

In the same note, the following appears (1450):

> "Although it is perhaps impossible to have fixed and detailed criteria for the selection of the cases to be heard en banc, fuller development of the rules governing the procedure by which the hearings are granted or denied seems both necessary and practicable. * * * perhaps formal petition of counsel, as in the instant case, is the most suitable method for initiating a hearing en banc in a particular case. See Hearings before Subcommittee on Judiciary on S. 1053, 77th Cong., 1st Sess. 16, 40 (1941). * * * Section 46(c) merely provides that the court may sit en banc if a majority vote to do so * * * (only four out of nine justices enough, generally, to grant certiorari) * * * The petition should, it seems, be entitled to such consideration that denial of the petition results only when a majority of the individual judges are unwilling to grant it."

Procedure of Striking Petitions

The procedure of two judges denying a petition addressed to the whole court seems not to have been repeated in this Court after the Independence Lead Mines case. Instead, in Kronberg v. Hale, 181 F.

2d 767 (Feb., 1950), this Court (per curiam, before Judges Healy, Orr and McAllister) inaugurated the procedure of striking a petition for rehearing en banc "as being without authority in law or in the rules or practice of the court."

Twice in May of the same year an identical order was made on the authority of the Kronberg case by a panel consisting of Circuit Judge Bone and District Judges Goodman and Mathes. Freuhauf Trailer Co. v. Myers, 181 F. 2d 1008, and Northwestern Mutual Life Insurance Co. of Milwaukee v. Gilbert, 182 F. 2d 256.

The order in the instant cause, striking the petition for rehearing en banc, cites Kronberg v. Hale as authority. The order was that of but two judges, one circuit judge and one district judge.

We respectfully submit that the practice inaugurated in Kronberg v. Hale and followed in this case, i.e., striking the petition for rehearing en banc by the order of a majority of the court which heard the case, is not supported in law, or the rules of this Court and that it is not justified under the statute authorizing and recognizing rehearings en bac.

The statement that a petition for rehearing en banc is "without authority in law" is contrary to what the Supreme Court said and did in the Robinson case, supra. In remanding a cause to this Court so that a petition for rehearing might be filed and entertained, the Supreme Court necessarily construed the statutes as giving a litigant "authority in law" to file a petition for rehearing.

The statute (Title 28 U.S.C. Sec. 46(c)) provides for a rehearing en banc. Surely there must be a procedure whereby a litigant may request a court to take the action the law authorizes the court to take. Otherwise, two judges may prevent the other five from even being cognizant of the request for relief which the statute empowers the five to grant. And where two district judges are on the panel, two district judges could thereby prevent 7 circuit judges from granting a rehearing en banc, although only the circuit judges are qualified to pass on the question under Title 28 U.S.C., Section 46(c). Commercial National Bank in Shreveport v. Connolly, 177 F. 2d 514 (1949), and United States v. Sentinel Fire Ins. Co., 178 F. 2d 217, 239 (1949).[1]

If it is error for 2 judges to deny a petition addressed to 7, it must be error for 2 to interpose an iron curtain between the litigant and the remainder of the court by striking out the petition.

As for lack of authority "in the rules of the court" for petitions for rehearings en banc, we submit that it is incumbent upon the court to provide a procedure whereby the authority granted by Title 28 U.S.C. Sec. 46(c) may be invoked. In the absence of an express provision in the rules, it would seem clear that a motion or a petition addressed to the court is a proper and appropriate procedure

---

[1]In each of these cases there was a disagreement whether a retired circuit judge was entitled to vote. There was no disagreement to the proposition that a petition for rehearing en banc could be acted on only by circuit judges.

to set the machinery in motion. It is significant that there is no provision in the rules that such a motion or petition will not be received or entertained, or delegating authority to a panel to deny it or strike it out.

An application to a court for an order is by motion. R.C.P. Sec. 7(b)(1). It must follow that where a court is empowered to make an order, the litigant must have the right to apply for it, i.e., the right to file a motion or petition. The doors of courts must always be open to litigants to apply for orders which the court is competent to grant.

Legislative History of Title 28 U.S.C., Sec. 46(c)

Title 28 U.S.C. Sec. 46(c) was occasioned by a conflict between this circuit and the third. In Lang's Estate v. Commissioner, 97 F. 2d 867 (1938), this Court held that there was no basis in law for hearings or rehearings en banc. The third circuit held to the contrary in Commissioner v. Textile Mills Corporation, 117 F. 2d 62 (1940). On certiorari in the Textile Mills case, the Supreme Court upheld the third circuit.

It was then felt that the procedure approved by the Supreme Court should find more explicit expression in the statute, and S. 1053 was introduced in the 77th Congress to amend Section 212 of old Title 28 U.S.C. This bill was not then enacted, but it was adopted in substance when the Judicial Code was revised in 1948, becoming Section 46(c).

On August 16, 1948, Mr. Henry P. Chandler,

Director of the Administrative Office of the United States Courts, transmitted to the Courts of Appeal the Final Report of the Committee on Codification and Revision of the Judicial Code (Judge Maris, Third Circuit, Chairman). This report states the contents of Section 46(c) and adds:

> "These new provisions will call for changes in the rules of each of the Circuit Courts of Appeal."

It appears, however, that the rules of this Court were not changed as a consequence of the new Judicial Code, except as to the name of the court and the title of the Chief Judge.

In the hearings before the Subcommittee on Judiciary on S. 1053, 77th Congress, 1st Session, the following occurred:

> "Senator Danaher: * * * On whose motion would the court assemble en banc?
>
> * * *
>
> "Senator Danaher: Who is going to make a motion that the whole court sit on this case? The counsel in the case?
>
> * * *
>
> "Mr. Chandler: The counsel can make a suggestion of course." (p. 16)

Again:

> "Senator Danaher: Judge Groner, do you gentlemen of the bench have any thought to give us as to how we are going to let a majority of the circuit judges decide * * * when they are going to convene the court en banc?

"Judge Groner: Well, I never thought of that. My own thought in the administration of my own court would be that it would not be done unless counsel requested it, or unless the court of its own motion * * * deemed it advisable * * *" (p. 40)

Hearing En Banc Particularly Appropriate in This Case

The present case involves unique and important questions of bankruptcy and taxes. The decision conflicts with the decisions of two other circuits, the Second and the Fifth, George A. Fuller Co. v. Commissioner, 92 F. 2d 72, and the Shreveport Bank cases, Commercial National Bank in Shreveport v. Parson, 144 F. 2d 231; Commercial National Bank in Shreveport v. Connolly, 176 F. 2d 1004; Connolly v. Commercial National Bank in Shreveport, 189 F. 2d 608.

The case was decided by a panel consisting of two district judges and one circuit judge, and the opinion of the court was written by a district judge. As Judge Fee points out in his opinion of February 18th, three district judges have written opinions in the cause. Both of those sitting in the Court of Appeals concurred that the opinion written by the district judge below was wholly erroneous. Yet the two district judges writing opinions in the Court of Appeals have completely differed from each other as well as from the district judge below. And no circuit judge has written a line on the merits.

Finally, one of the participating judges has suggested a rehearing en banc.

Conclusion

We respectfully pray for leave to file the attached motion to vacate the order striking the petition for rehearing en banc, and submit that the motion should be granted and the petition for rehearing en banc should be reinstated and submitted to the court for its action under Title 28 U.S.C., Sec. 46(c).

Respectfully submitted,

HERMAN PHLEGER,
MOSES LASKY,
BROBECK, PHLEGER & HARRISON,
FRANK C. NICODEMUS, JR.,
NORRIS DARRELL,
MAHLON DICKERSON,
LeROY R. GOODRICH,

Attorneys for Appellant The Western Pacific Railroad Corporation.

HERMAN PHLEGER,
MOSES LASKY,
BROBECK, PHLEGER & HARRISON,

Attorneys for Appellant Alexis I. duP. Bayard, Receiver.

San Francisco, March 7, 1952.

Appendix I

[Caption omitted.]

ON APPELLANTS' PETITIONS FOR REHEARING

Before: Healy, Circuit Judge,
Fee and Byrne, District Judges.

Per Curiam

The petitions of the appellants and intervenors for a rehearing are denied. Insofar as the petitions seek a rehearing en banc, they are stricken as being without authority in law or in the rules or practice of the court. See Kronberg v. Hale, 9 Cir., 181 F. 2d 767.

Appendix II

[Caption omitted.]

ON APPELLANTS' PETITION FOR REHEARING

Before: Healy, Circuit Judge, and
Fee and Byrne, District Judges.

James Alger Fee, District Judge, (dissenting and suggesting a rehearing en banc of all Circuit Judges):

This cause involves the disposition of over $21,000,000.00. The solution requires application of novel statutory language affecting the fields of bankruptcy and taxes. I have expressed myself heretofore and still feel that the findings of the lower court do not support the determination made by two judges on the panel here.

I am unable to agree with either the denial or rehearing or the striking of the petitions which ask for a rehearing by the full complement of Circuit Judges of this Court en banc. Two District Judges and one Circuit Judge constituted the panel which heard the case. As has been pointed out in this serious and important litigation, three District Judges have, respectively, expressed three widely divergent views, while no member of the Court of Appeals has written a line on the merits.

I therefore suggest to the Court of Appeals a rehearing en banc of all the Circuit Judges. For this there is precedent in this Circuit.[1] The practice, as I understand it, substantially accords with that of the Third Circuit,[2] which is admirable. Inasmuch as this might be the court of last resort in this case, it seems fairer to have the issues disposed of by Circuit Judges.

---

[1]Judges Denman, Mathews and Stephens sat in Hopper vs. United States, 9 Cir., 142 F. 2d 167, and Judges Wilbur, Denman and Healy sat in Crutchfield vs. United States, 9 Cir., 142 F. 2d 170. At page 177 of 142 F. 2d appears Circuit Judge William Denman's motion for a rehearing en banc of the Hopper case, supra, wherein it is stated that the cause is "now pending for rehearing in this Court." Accordingly, the rehearing of that case was held en banc before Judges Wilbur, Garrecht, Denman, Mathews, Stephens and Healy, being all of the Circuit Judges of this Court. Hopper vs. United States, 9 Cir., 142 F. 2d 181.

[2]United States vs. Gallagher, 3 Cir., 183 F. 2d 342, was heard by a panel of two Circuit Judges and one District Judge, and, upon suggestion of one of the Judges, was heard en banc by all Circuit Judges.

The Supreme Court of the United States at least once has given permission to an appellant to apply to this court for hearing en banc, 316 U.S. 649.[3] In taking that action, reference was made to Textile Mills Securities Corporation vs. Commissioner of Internal Revenue, 314 U.S. 326.

[Endorsed]: Filed February 18, 1952. Paul P. O'Brien, Clerk.

Appendix III

In the United States Court of Appeals
for the Ninth Circuit
No. 12,506

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, RECEIVER,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY AND DELTA FINANCE CO., LTD.,

Appellees.

Motion to Vacate Order Striking Petition for Rehearing En Banc and Reinstating Said Petition, and Petition for Rehearing En Banc

[3]See Robinson vs. Johnston, 9 Cir., 130 F. 2d 202.

Appellants, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, hereby move the court for an order vacating the per curiam order of January 30, 1951, striking these appellants' petition for rehearing en banc and reinstating said petition for action thereon by the Court.

The motion is based on the records of this Court and is made on the ground that rehearings en banc are authorized by Title 28 U.S.C., Sec. 46(c), that a petition for a rehearing en banc is an appropriate procedure under said section, and that appellants are entitled to the action on said petition of the Circuit Judges of the Ninth Circuit who are in active service.

And appellants, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, hereby petition the court for a rehearing en banc of the decision of October 29, 1951.

Dated March 7, 1952.

HERMAN PHLEGER,
MOSES LASKY,
BROBECK, PHLEGER & HARRISON,
FRANK C. NICODEMUS, JR.,
NORRIS DARRELL,
MAHLON DICKERSON,
LeROY R. GOODRICH,

Attorneys for Appellant, The Western Pacific Railroad Corporation.

HERMAN PHLEGER,
MOSES LASKY,
BROBECK, PHLEGER & HARRISON,
Attorneys for Apellant, Alexis I. duP. Bayard, Receiver.

Received March 10, 1952, U.S.C.A.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

PRAECIPE FOR RECORD ON PETITION FOR WRIT OF CERTIORARI

To the Clerk of the above-entitled court:

The appellants Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, are about to file with the United States Supreme Court a petition or petitions for writ of certiorari to review the judgment entered herein on October 29, 1951, and this Court's order of January 30, 1952, striking appellants' petition for rehearing en banc from the files.

In connection with said proposed petition for certiorari and pursuant to Rule 39 of the Rules of the United States Supreme Court, you are hereby requested to prepare, certify and transmit to the Clerk of the United States Supreme Court, so as

to be in his hands on or before April 28, 1952, the transcript of the record in the above-entitled cause. Please include therein the following:

1. The entire record on which the cause was heard and decided in the above-entitled court.

2. The order of submission.

3. The order directing the filing of the opinions herein.

4. The order made on or about November 16, 1951, extending the time in which appellants might file petition for rehearing.

5. Entry showing the filing herein of petition for rehearing on December 18, 1951. (Shows on order denying.)

6. The order denying petition for rehearing and striking the petition for rehearing en banc.

7. The opinion of Fee, D.J., on petition for rehearing, dissenting and suggesting a rehearing en banc of all circuit judges, filed herein on or about February 18, 1952.

8. Entry showing filing herein on or about March 10, 1952, of "Petition for Leave to File a Motion to Vacate Order Striking Appellants' Petition for Rehearing En Banc and Reinstating Such Petition." (Show on pet. itself.)

9. Petition for leave to file a motion to vacate order striking appellants' petition for rehearing en banc and reinstating such petition.

10. This praecipe.

Dated: April 16, 1952.

HERMAN PHLEGER,

MOSES LASKY,

BROBECK, PHLEGER & HARRISON,

FRANK C. NICODEMUS, JR.,

NORRIS DARRELL,

MAHLON DICKERSON,

LeROY R. GOODRICH,

Attorneys for Appellant the Western Pacific Railroad Corporation.

HERMAN PHLEGER,

MOSES LASKY,

BROBECK, PHLEGER & HARRISON,

Attorneys for Appellant Alexis I. duP. Bayard, Receiver.

[Endorsed]: Filed April 17, 1952.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Transcript of Record in Six Volumes, containing 2284 pages, numbered from and including 1 to and including 2284, to be a full, true and correct copy of the entire record excluding certain original exhibits of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 10th day of June, 1952.

[Seal] PAUL P. O'BRIEN,
Clerk.

No. 12506

United States
Court of Appeals
For the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Appeals from the United States District Court, Northern District of California, Southern Division

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

United States Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Wednesday, July 9, 1952.

Before: Denman, Chief Judge;
Mathews, Stephens, Healy, Bone, Orr and Pope, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS ON MOTION TO VACATE ORDER, ETC., AND DENYING SAID MOTION

By Direction of the Court—Denman, Chief Judge, dissenting—It Is Ordered that the typewritten opinion this day rendered by this court on application of appellants for leave to file motion denominated "Motion to Vacate Order striking appellant's Petition for Rehearing En Banc and reinstating such Petition" be forthwith filed by the clerk. By direction of Chief Judge Denman, Ordered his dissenting opinion on such motion forthwith filed.

Pursuant to the majority opinion, It Is Further Ordered that the petition for leave to file motion denominated "Motion to Vacate Order striking appellant's Petition for Rehearing En Banc and reinstating such Petition" be, and hereby is denied.

United States Court of Appeals
For the Ninth Circuit

No. 12,506

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

July 9, 1952

In re Petition of Western Pacific Railroad Corporation for Leave to File a Motion Denominated "Motion to Vacate Order Striking Appellant's Petition for Rehearing En Banc and Reinstating Such Petition."

Before: Denman, Mathews, Stephens, Healy, Bone, Orr, and Pope, Circuit Judges.

Healy, Circuit Judge.

OPINION

Case No. 12,506, supra, upon its coming at issue in this court, was regularly assigned for hearing and

determination to a court or division of three judges comprising Circuit Judge Healy and District Judges Fee and Byrne. Subsequent to argument and submission of the case the court handed down an opinion and order affirming the judgment of the district court, Judge Fee dissenting. —— F. 2d ——. Thereafter the appellants petitioned for "rehearing and rehearing en banc," and the court on January 30, 1952, denied the petition, Judge Fee again dissenting. —— F. 2d ——. Insofar as the petition sought a rehearing in banc it was ordered stricken as unauthorized by law or practice.

On March 10, 1952, the Western Pacific Corporation presented the petition for leave described in the caption. In its supporting brief it asserts that it is its right under the law to have its petition for rehearing considered and acted upon by all the circuit judges. On order of a majority of the circuit judges, the court has been assembled in banc for the purpose of announcing the principles of law and practice it deems applicable in respect of in banc hearings. This course is thought appropriate in order that litigants and the bar may be advised not only of the position taken by the court but of the reasons for it.[1]

---

[1]In recent years it has become the custom of counsel almost as a matter of course to petition the full membership of the court for a rehearing in banc, upon suffering an adverse decision at the hands of a court of three judges. This hopeful concept of the right of litigants appears to stem from declarations in the dissenting opinion in Independence Lead Mines v. Kingsbury (1949), 9 Cir., 175 F. 2d

The governing statutory provision, 28 USCA §46 (c), reads:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."[2]

The obvious intendment of this statute is to perpetuate the United States Courts of Appeals as courts of three judges in all cases save those in which an in banc hearing is ordered by all or a majority of the circuit judges. No doubt Congress was

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983, at p. 992, cert. den. 338 U.S. 900, to the effect that two judges in a court or division of three are without authority to pass upon or deny a petition for rehearing addressed to all the circuit judges.

The numerous petitions of this nature have been disposed of by the court or division concerned either (1) by ignoring the application for in banc action and treating the petitions simply as ordinary petitions for rehearing, or (2) by striking them insofar as they sought in banc action. The treatment has not in the least served to discourage losing counsel or to stem the growing tide of such petitions.

---

[2]The section was enacted as part of the 1948 Judicial Code revision. In its entirety it reads as follows:

"§46. Assignment of judges; divisions; hearings; quorum

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the

fully alive to the fact that these courts, despite the increase in their membership, would be unable to keep abreast of the constantly growing volume of judicial business unless they continued in all normal circumstances to function as courts of three.

Important light will be shed on the problem under inquiry if we examine the method pursued in the assignment of cases, as prescribed by our Rule 4.[3] In practice the calendars for the court are tentatively made up by the chief judge in collaboration

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hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

---

[3]Rule 4, subdivisions 1 and 2, reads:

"Assigning of Causes For Hearing

"1. The calendars of the court shall be made up by the Clerk under the direction of the Chief Judge subject to the approval of the majority of the judges.

"2. The Chief Judge after conference with the Circuit Judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be modified or set aside by a majority of the judges."

with the clerk. On these calendars each case is assigned for hearing and determination to a court or division of three named judges, unless it has been otherwise ordered. The proposed calendar is circulated among all the judges, and any designation or assignment may be modified or set aside by a majority. When the calendar is approved by the judges their action is uniformly manifested by their initialing the same, as is done in the case of court orders generally. Thus the calendar as finally adopted evidences or necessarily implies at least the tentative determination of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc. In the instances in which at the time of assignment it is agreed by all or a majority of the judges that a particular case should be heard and determined in banc, it is calendared as such.[4] It

[4]Since the decision in Textile Mills v. Commissioner, 314 U. S. 326 (1941) approximately thirty cases in all have been heard in banc in this circuit. Nineteen of these, or about two-thirds of the whole, were assigned to the court in banc at the time they were originally calendared. Perhaps more than half of the nineteen were cases of great public consequence, such, for example, as those growing out of the suspension during the war of the writ of habeas corpus and the institution of martial law in Hawaii, or cases involving the forcible removal of the Japanese from the Pacific Coast states. Others were contempt matters involving claimed violations of the constitutional prohibition against self-incrimination.

There are no definite criteria that we know of by which to determine what cases are suitable for in banc consideration. However, causes of extraordinary public importance or those involving constitutional questions probably belong in the category.

sometimes occurs, too, that examination of a case preliminary to hearing, or consideration of it after argument, leads the judges to whom it was assigned to conclude that it is an appropriate cause for in banc consideration, and they so indicate to the remaining judges. If the latter or a majority of all agree, the case is then reassigned for hearing by all the judges.[5]

If we examine the status of Case No. 12,506 in the light of this practice, it becomes apparent that it was calendared and heard by court order as one in which in banc consideration was not deemed requisite. There remains to inquire whether the losing party in the cause is at this juncture entitled as of right to have its petition for rehearing considered and ruled upon by a court composed of all the circuit judges.

The statute, it will be recalled, commits to a "court or division of three judges" the power to hear and determine the cases and controversies assigned to it. Obviously its determination of any such case or controversy is a decision of the Court of Appeals, and as such is a final decision, subject to review only as prescribed by 28 USCA §1254. Circuit judges other than those designated to sit on such court or division are not members of it, and officially they play, and are entitled to play, no part in its deliberations at

[5]McCoy v. United States, 9 Cir., 169 F. 2d 776; Samuel v. United States, 9 Cir., 169 F. 2d 787; Tee Hit Ton Tribe v. Olson, 9 Cir., 160 F. 2d 525; Los Angeles Building & Construction Trades Council v. LeBaron, 9 Cir., 185 F. 2d 405; Price v. Johnston, 9 Cir., 159 F. 2d 234, 161 F. 2d 705.

any stage. That this is so is made clear by subdivision (a) of §46 (see Note 2 above) providing that "Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs." If regard be had for this mandate circuit judges may not intrude themselves, or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit.

A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals. If it grants a rehearing it may follow either of two courses: (a) it may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate suggest to the nonparticipating judges that the case is one which ought to be reheard in banc; and if all of a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration.[6]

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[6]This was the course followed in Hopper v. United States, 9 Cir., 142 F. 2d 181; Southern Pacific Co. v. Guthrie, 9 Cir., 180 F. 2d 295, 186 F. 2d 926; Evaporated Milk Ass'n v. Roche, 130 F. 2d 843; and Pacific Gas & Electric Co. v. SEC, 139 F. 2d 298. In the Hopper case, supra, and to a lesser degree in Southern Pacific v. Guthrie, intracircuit conflicts were resolved. The other two cases cited in this note were nondescript matters.

Adoption of the view currently being urged would render merely tentative or provisional the decisions of the court in 98 per cent or more of the cases that come before it. On petition of a dissatisfied party its decisions would automatically be subject to a species of horizontal appeal which would completely nullify the prime statutory objective of affecting a division of the court's work. The judges other than those to whom the cases had been assigned would perforce be required to acquaint themselves with the issues and problems involved in the same painstaking manner as did their associates who had heard and determined the causes initially, and this without the latter's advantage of having heard oral argument. Obviously, unless he is prepared to stultify himself, no judge would undertake to rule upon petitions for rehearing without adequate and full study and investigation of the merits.

On these considerations and in harmony with its understanding of the statutory scheme, the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc. Accordingly, in the exercise of its uncontrolled discretion the court has declined altogether to entertain petitions of litigants for such hearings. The position it takes is that, apart from the possible disqualification of a judge, the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties.

It has been remarked by some commentators that

the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts. The hazard, we think, may easily be overestimated. It is minimized by the alertness of counsel and by informal and unofficial interchanges among the judges. Where conflicts occur they are capable of remedy by in banc action without wholesale duplication of effort, as our own practice and experience have demonstrated.

The petition for rehearing in this cause has already been authoritatively denied by the division to which the cause was assigned. The petition for leave to file, addressed to the court in banc, is denied.

From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges, will be considered and disposed of by the latter as ordinary petitions for rehearing.

Denman, Chief Judge, dissenting from the court's holding that the circuit judges not participating in a division, here six of the seven such judges, (a) are without power to consider a litigant's petition for a rehearing en banc, and (b) where a rehearing or rehearing en banc has been denied by a division, are without power to vote to grant a rehearing en banc, if two of the division's judges, here with but one circuit judge, do not desire such a rehearing. This appears from the following language of the opinion:

"A petition for rehearing in any such case, whatever its form or wording, must necessarily[1] be

[1]Emphasis hereafter appearing in quoted matter is supplied.

treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals. If it grants a rehearing it may follow either of two courses: (a) it may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate suggest to the nonparticipating judges that the case is one which ought to be reheard in banc; and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration."

* * *

"The statute, it will be recalled, commits to a 'court or division of three judges' the power to hear and determine the cases and controversies assigned to it. Obviously *its* determination of any such case or controversy is a decision of the Court of Appeals, and as such is a final decision, subject to review Only as prescribed by 28 U.S.C. §1254." Thus squarely is denied the power of the court en banc to review a division's decision in a "rehearing en banc * * * ordered by a majority of the circuit judges." See 28 U.S.C. 46 (c).

* * *

"From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing."

In this case the Western Pacific Railroad Corporation, hereafter the Corporation, petitions the

Court en banc for leave to file a petition for a rehearing en banc. The latter seeks to establish, inter alia, that the judgment of the division which heard the case decided the main issue therein contrary to the decision of a prior division of this court.

The division in the instant case, consisting of one circuit judge and two district judges, has ordered "stricken" a petition addressed to the seven judges constituting the court en banc. This order follows a precedent of similar strikings of petitions for rehearings en banc in the cases of Kronberg v. Hale, 181 F.2d 767 (Cir. 9), Fruehauf Trailer v. Myers, 181 F.2d 1008 (Cir. 9), Northwestern Mut. Ins. Co. v. Gilbert, 182 F. 2d 256 (Cir. 9).

Since Kronberg v. Hale, the Clerk has distributed no petitions for rehearings en banc to the non-participating circuit judges. From a casual remark of counsel in a social contact, I learned of the Corporation's instant petition and instructed the Clerk to distribute it to the six circuit judges not sitting in the division. But for this casual discovery and my suggestion that the stature and determination of the Corporation's counsel made it likely they would seek mandamus in the Supreme Court, the petition would have had the "striking" treatment of the above cases.

The court's opinion came after a conference originally called for the consideration of the adoption of the rule considered last in this dissent, which would have made the burden of such petitions one we easily could bear.

A. The court's decision violates (as well as ignores) the Supreme Court's decision in United States ex rel., Robinson v. Johnston, 316 U. S. 649, 650, a decision aimed to settle differences in the circuit's divisions.

The case of Textile Mills Corp. v. Commissioner, 314 U.S. 326, held that notwithstanding the three-judge provision of section 212 of title 28, U.S.C., 1940 ed., a court of appeals might lawfully consist of a greater number of judges, and that the five active circuit judges of the third circuit might sit in banc for the determination of an appeal.

The Third Circuit in C.I.R. v. Textile Mills Corp., 117 F.2d 62 at page 70, in holding that its five circuit judges could sit en banc, states that otherwise they would not have the power to correct differing views of the judges in the divisions of the court such as the Supreme Court describes as occurring in the Fifth Circuit in John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181.[2]

The Supreme Court in its Textile Mills case at page 334 in affirming the Third Circuit and overruling our decision in Lang's Estate v. C.I.R., 97 F.2d 867, 869, where we held we could not sit en

[2]Following this the Textile Mills case states at page 71:

* * * "Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court, it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question * * *"

banc where two divisions of the court differed as to the law controlling, states of rehearings en banc[3] that:

* * * "Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases * * *"

In enacting 28 U.S.C. § 46 (c) Congress codified the Textile Mills decision, the Reviser's Notes stating that that section "preserves the interpretation established by the Textile Mills case."

Prior to this codification of the Textile Mills decision, there was decided by one division of this circuit the case of Robinson v. Johnston, 118 F.2d 998,

[3] What is said of the need of rehearings en banc for the then Third Circuit applies a fortiori today to the Ninth Circuit. The Third Circuit in the 1941 fiscal year had but five judges and 285 docketings. The Ninth Circuit has had an increase in population of six million in twelve years. In the fiscal year 1952 it had 446 docketings. On the national average of docketings for circuit judges the Ninth Circuit should have ten judges. It has seven judges but the Senate has passed a bill increasing the judgeships to nine and the House Judiciary Committee has agreed they are needed. No doubt within a year we will have nine judges with three divisions sitting simultaneously. That is to say, we have 56% more docketings and will have almost half again the number of divisions in which exist the hazard of conflicting decision referred to in the Textile Mills decisions.

and later in a division of three other judges, the case of Crockett v. United States, 125 F.2d 547. The two divisions differed on the controlling law. Certiorari was sought in the Robinson case before the Crockett case was decided and it was denied. A petition for rehearing in the Supreme Court was denied. The Crockett case was then called to the attention of the court in a second petition for rehearing which was granted. The order denying the petition for certiorari was set aside and the writ of certiorari granted. Certainly this action of the Supreme Court was purposeful and deliberate.

In granting certiorari the Supreme Court in United States ex rel. Robinson v. Johnston, 316 U.S. 649, held it was the duty of this court en banc to entertain a petition for leave to file a petition for rehearing en banc, for it vacated our judgment and remanded the case to us, stating:

"* * * In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston, 118 F.2d 998, 1001, and Crockett v. United States, 125 F.2d 547, 548, 549), and in view of this Court's decision in Waley v. Johnston, ante, p. 101, reversing 124 F. 2d 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including leave to petitioner to apply for a hearing before the court en banc. See Textile Mills Corp. v. Commissioner, 314 U.S. 326 * * *"

The Corporation strongly urges the above contentions in its denied petition, all of which is ignored

in this court's opinion. Instead it is said of the seeking of the leave to file the petition, that consideration of such action by any of the circuit judges not in the division (here six) would be, "to intrude upon a * * * division on which they have not by order of the court been directed to sit."

How absurd it was, one must conclude, for the Supreme Court to order such an intrusion in Robinson v. Johnston!

B. The Cavalier Refusal of the Court to Consider the Contentions of the Corporation's Petition.

The shabby treatment of the litigant and his counsel in refusing to consider their contentions and authorities comes after the court's claim that its opinion gives consideration to "the principles of law * * * which it deems applicable to en banc hearings."

No self-respecting federal judge sleeps comfortably if he is conscious of having rendered an opinion deciding a case in which he has purposely failed to consider a substantial contention supported by authorities submitted to him and by such evasion has based his decision on a ground directly opposed to the evaded contention.

A possible explanation for the silent treatment of the litigant's contention and authorities in this case is that Robinson v. Johnston was deemed irrelevant because decided before the codification of the Textile Mills case in 28 U.S.C. §46 (e). That seems absurd, however, for the Supreme Court's construction of a law before its exact codification, as here,

is applicable after codification. Otherwise, why in 28 United States Code Annotated are there the thousands of citations in sections of the Judicial Code, enacted in 1948, which codifies the then law and statutes?

C. The Opinion's Absurd Misstatements Respecting the Assignment of Cases to the Court's Divisions.

The opinion states:

"* * * Thus the calendar as finally adopted evidences or necessarily implies at least the tentative predetermination of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc * * *"

The Supreme Court in the Textile Mills case has established a definite criterion for the rehearings en banc provided for in 28 U.S.C. § 46 (c). It is the only one there stated, though there are others. It is that conflicts of law between the decisions of two of the court's divisions are cause for rehearing en banc. By clearing the law en banc, the circuit does so for the 96.3% of litigation in which this court's decisions are final.

Such en banc action prevents the burden on the Supreme Court, such as in the certification of the question of such differing divisions in Lang's Estate v. C.I.R., 97 F. 2d 867, 869, a burden the Supreme Court later refused to assume in its return of Robinson v. Johnston for our en banc consideration of our divisions' divergencies.

It is almost a rude question to ask, "How, in heaven's name, are the seven judges en banc to know tentatively or otherwise that the division to which they assign the case will thereafter decide it without conflict with a prior decision of a different division"? The phrase, "How, in heaven's name," is used advisedly, for our tentative decision would require divine omniscience.

The opinion states that another criterion is whether the case to be assigned to a division is "one involving constitutional questions."

The slightest reflection shows that the court en banc could make its tentative assignment of a case to a division because not involving a constitutional question only by examination of all the briefs in all the cases to be assigned to determine whether such a constitutional contention is at issue.

Were this truly what we have done, it would have involved a volume of judicial effort comparable to that the court's opinion seeks to avoid with petitions for rehearings en banc.

In the eleven years since the Textile Mills case, the Clerk advises, we have assigned to division over two thousand two hundred cases. In but nineteen cases, less than one per cent, have they been assigned to the court en banc. These were cases whose extraordinary importance had wide newspaper notoriety. In none of the remaining two thousand two hundred cases has the court en banc assigned them to division after an examination of the briefs for that purpose.

D. Further to avoid considering the corporation's contention and authorities, the opinion misstates the source of the contention that rehearings en banc are needed to cure the divergence of divisions.

On the source of this contention the court's opinion states, "It has been remarked by some commentators that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts."

"Some commentators"! To what extent will the court go in order to avoid mentioning that this hazard was stated first by the Third Circuit in the Textile Mills case and on its appeal by the Supreme Court, and later implicitly by the Supreme Court in returning Robinson v. Johnston to this court because of the difference in viewpoint of our divisions. That is to say, in such holdings on the criterion of divergence, the Third Circuit and the Supreme Court are no more than mere commentators.

The opinion seeks to minimize the likelihood of a division overruling sub silentio a prior division's holding and this with the certainty of nine judges and three divisions in the near future.[4] The idea is that the judges in the division so acting, by informal and unofficial interchanges" with the nonparticipating judges, will advise the latter that the decision is at variance with that of a prior division. In my seventeen years on the bench I have had no associate so confess his mistaken act.

An examination of the three cases cited, supra, the Kronberg, Fruehauf Trailer and Northwestern

[4]See footnote 3, supra.

Mutual cases, in which the petitions for rehearing en banc were stricken, shows that two of them were founded on such conflict of divisions and the third on conflicts in district court decisions on important matters. Also in the seven cases of Bradley Mining Co. v. Boice, 12684; Acheson v. United States, 2772; Independence Lead Mines Co. v. Kingsbury, 11959; Tanimura v. United States, 13014; California v. United States, 12184; Sunbeam Lighting Co. v. Sunbeam Corp., 12357, and Zamlock v. United States, 12753, the division judges refused consideration of the petition addressed to the seven and thus prevented the court en banc from considering the contention in each that the division's decision conflicted with the decision of a prior division.

E. The court's confessed fear of the burden of an overwhelming volume of such petitions may be avoided by an amendment of its rules.

Against a flood of such petitions we can protect ourselves, as has the Supreme Court, by amending our Rule 25 as follows:

"Rule 25.

"Rehearing

"A petition for rehearing of a decision by a division of the court may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

"Where there has been a denial of a rehearing of a decision by a division, a petition for a rehearing in bank may be filed within fifteen days. The petition shall be in the form above described and with the same certificate of counsel. No petition will be entertained, unless one of the judges participating in that decision shall join in seeking such rehearing."

The Supreme Court has similarly protected itself on its petitions for rehearing by a provision in its Rule 33, of which the pertinent portion is:

"Such a petition * * * will not be granted unless a justice who concurred in the judgment desires it and a majority of the Court so determines."

In the last seven years there have been but 75 dissents, an average of less than 11 per year. Probably less than 11 judges per year would join in petitioning for a rehearing en banc.

In view of our prospective three divisions and the likely need for such rehearings en banc, an average of eleven such petitions would not be an intolerable burden, less than 4% of our submitted cases. It would substantially reduce the likelihood of conflict between the divisions.

By requiring first a rehearing by the division, the district judges would not be barred from the reconsideration of a decision.

The motion to file should have been considered on its merits and granted.

[Endorsed:] Opinion and Dissenting Opinion. Filed July 9, 1952. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
For the Ninth Circuit

No. 12,506

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

v.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

SUPPLEMENTAL PRAECIPE FOR RECORD ON PETITION FOR WRIT OF CERTIORARI

To the Clerk of the above-entitled Court:

The petition of appellants Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, for a writ of certiorari to review the judgment entered herein on June 29, 1951, and this Court's order of January 30, 1952, striking appellants' petition for rehearing en banc from the files

in connection with said petition was docketed in the United States Supreme Court on June 23, 1952.

On April 17, 1952, appellants filed with the Clerk of the above-entitled Court their praecipe requesting that the transcript of record in the above-entitled cause be prepared, certified and transmitted to the Clerk of the United States Supreme Court, and said transcript of record as of said date has been so prepared and transmitted as requested.

Since the preparation and transmission of said record there have been further proceedings in the above-entitled cause, and it is desired that a transcript thereof be prepared, certified and transmitted to the Clerk of the United States Supreme Court.

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Supreme Court the transcript of the record in the above-entitled cause which has not heretofore been prepared, certified and transmitted. Please include therein the following:

1. The Opinion of Healy, Circuit Judge, concurred in by Circuit Judges Mathews, Stephens, Healy, Bone, Orr and Pope, dated July 9, 1952, denying a petition of Western Pacific Railroad Corporation for leave to file a motion denominated "Motion to Vacate Order Striking Appellants' Petition for Rehearing En Banc and Reinstating Such Petition."

2. The dissenting Opinion of Denman, Chief Judge.

3. This praecipe.

Dated August 25, 1952.

/s/ HERMAN PHLEGER,

/s/ MOSES LASKY,

BROBECK, PHLEGER & HARRISON.

/s/ FRANK C. NICODEMUS, JR.,

/s/ NORRIS DARRELL,

/s/ MAHLON DICKERSON,

/s/ LeROY R. GOODRICH,

Attorneys for Appellant The Western Pacific Railroad Corporation.

/s/ HERMAN PHLEGER,

/s/ MOSES LASKY,

BROBECK, PHLEGER & HARRISON,

Attorneys for Appellant Alexis I. duP. Bayard, Receiver.

United States Court of Appeals
For the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO SUPPLEMENTAL RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 2310 pages, numbered from and including 2287 to and including 2310, to be full, true and correct copies of the documents of which they purport to be copies of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as a supplemental record, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California this 28th day of August, 1952.

[Seal] PAUL P. O'BRIEN,
Clerk.

No. 12506

United States
Court of Appeals
For the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEP RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

United States Court of Appeals
For the Ninth Circuit

No. 12,506

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

Sept. 11, 1952

SUPPLEMENT TO DISSENTING OPINION OF CHIEF JUDGE DENMAN, FILED HEREIN ON JULY 9, 1952

Since the writing of my dissenting opinion herein I have been advised by Chief Judge Harold M. Stephens of the United States Court of Appeals for the District of Columbia that that court has rendered a series of decisions in conflict with the decision of this court on the question of the right to consider a petition or motion for rehearing in banc

where made by a litigant alone or by a single judge in the division which has decided the case.

It thus appears that this case is of the character described in Rule 38 (5) (b) of the Supreme Court. The decisions of the Court of Appeals for the District of Columbia determining its practice there are those contained in the following communication to me from Chief Judge Stephens:

"Washington, D. C.
September 11, 1952

Honorable William Denman
Chief Judge
U. S. Court of Appeals
United States Post Office and Courthouse
San Francisco.

My dear Judge Denman:

In response to your inquiry regarding the practice in this court with respect to hearings in banc and rehearings in banc under the provisions of Section 46 of Title 28 of the United States Code, I wish to advise as follows:

In determining in which cases to sit in banc, two methods have been followed in the United States Court of Appeals for the District of Columbia Circuit, namely:

/1/ Any judge or judges or any division of the court may request that a case be heard originally or reheard in banc. Such judge or judges or division of the court usually addresses a memorandum to all of the active circuit judges indicating why he or they thinks the case should either be heard or re-

heard in banc, and requests the judges to notify the chief-judge of their votes on the request. If a majority favor the in banc hearing, an order to that effect is entered and the case is scheduled for the in banc hearing or rehearing.

/2/ Any party to a case may by written motion or petition request that the original hearing or a rehearing to be held in banc. Such a motion or petition is submitted to and ruled upon by all of the active circuit judges of the circuit.

In the following cases rehearings in banc were ordered on the request of one member of the division of the court which originally heard the case:

No. 10446, Kephart vs. Kephart, 193 F. 2d 677.
No. 11081, Quinn vs. U. S. Not yet decided.
No. 10943, Emspak vs. U. S. Not yet decided.

In the following case rehearing in banc was ordered on the request of a judge not a member of the division which originally heard the case:

No. 10063, Stewart vs. Overholser, 186 F. 2d 339.

In the following cases the original hearings in banc were ordered on the request of the original division:

No. 11039, Thompson Co. vs. D.C. Not yet decided.
No. 11044, D.C. vs. Thompson Co. Not yet decided.

In the following case the original hearing in banc was ordered on the request of one member of the court:

No. 10473, Overholser vs. Boddie, 184 F. 2d 240.

In the following cases rehearings in banc were ordered on the petition of one of the parties:

No. 10504, in the Matter of John W. Carter, 192 F. 2d 15.

No. 10854, Columbia National Bank vs. D.C., 195 F. 2d 942.

No. 10846, Citizens Bank vs. D. C., 195 F. 2d 946.

No. 10835, D.C. vs. Catholic Education Press. Not yet decided.

Very truly yours,

/s/ HAROLD M. STEPHENS,
Chief Judge of the United States Court of Appeals for the District of Columbia Circuit."

It is ordered that the above opinion be printed as a part of the record in this case and that a properly certified copy be sent to the Supreme Court of the United States as a part of the certiorari proceedings sought by Western Pacific Railroad Corporation.

WILLIAM DENMAN,
Chief Judge.

[Endorsed] Supplement to Dissenting Opinion of Chief Judge Denman. Filed Sep. 11, 1952. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO SECOND SUPPLEMENTAL TRANSCRIPT OF RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing pages, numbered from and including 2313 to and including 2316, to be a full, true and correct copy of the supplement to dissenting opinion of Chief Judge Denman in the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the Appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as a second supplemental transcript of record as the original thereof remains on file and appears of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 16th day of September, 1952.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. —

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver, Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 19, 1952

Upon consideration of the application of counsel for petitioners,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1952.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 19th day of April, 1952.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. —

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY & DEEP TIDEWATER SOUTHERN RAILWAY, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 24, 1952

Upon consideration of the application of counsel for petitioners,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1952.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 24th day of April, 1952.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver, Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, et al.

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, et al.

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
JUN 23 1952
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 150

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
The result was obtained by respondent's taking over petitioner's affairs and directing its actions	5
Basic and incontrovertible facts summarized	6
The decisions of the two courts below	7
Striking of petition for rehearing en banc	7
Reasons for Granting a Writ	8
I. The Decision is Based on a Novel Rule of Law, Affecting Taxes, Corporate Reorganization, and the Law of Unjust Enrichment, without Support of any Known Principle or Authority	9
Retention by respondent of the benefits received from use of petitioner's loss in consolidated returns is inconsistent with the rationale of consolidated returns and the purpose of Congress in allowing them	10
By fiat the majority opinion below makes mandatory what Congress left optional	13
One's rights or property may not be appropriated merely because he cannot use them profitably himself	15
Conflict with the Fifth Circuit	17
Conflict with the Second and Fourth Circuits	18
Petitioner was not a fiduciary for respondent. The reverse was true	19

Page

II. If an Issue of Fact Not Found On by A Trial Court is Thought Material, the Cause Should Be Remanded for Findings Thereon. The Court Below Exceeded its Appellate Office by Making Findings Ab Initio to Affirm the Judgment upon a Legal Theory Different From That on Which the Trial Court Acted, and These Findings were Contrary to What the Trial Court Made Clear It Would Have Found, Had It Considered the Issues Material, as well as Contrary to Some Actually Made 20

The Trial Court refused additional findings because it deemed them immaterial in its view of the law, which the Court of Appeals repudiated 23

Where a trial court fails to find on essential issues, the cause must be remanded 24

The majority opinion sets up a novel and false principle concerning the power of an appellate court 25

Supposed past practice in filing consolidated returns furnishes no basis for the conclusion that petitioner must file such returns after it had lost all financial interest in respondent 26

III. It Was Error to Deny Petitioner the Right To Petition for A Rehearing En Banc 27

History of rehearings en banc 27

Practice of Ninth Circuit 28

Petitions for rehearing en banc are addressed to the entire court and should not be stricken by a panel 30

Conclusion 31

Appendix (Statutes Involved) ..... App. 1

INDEX OF AUTHORITIES

Cases	Pages
Alameda Investment Co. v. McLaughlin, 28 F.2d 81 (D.C. N.D. Cal.) aff'd F.2d 120 (9 Cir.)	11
Bankers Trust Co. v. Florida East Coast Car Ferry Co., 92 F.2d 450, (5 Cir.)	18
Bigelow v. RKO Pictures, 327 U.S. 251	16n
Bondholders, Inc. v. Powell, 342 U.S. 921	12n
Boom Co. v. Patterson, 98 U.S. 403	16n
Campbell v. Campbell, 170 F.2d 809 (D.C. Cir.)	24n
Chemical Bank & Trust Co. v. Group of Industrial Investors, 343 U.S. ..... (June 10, 1952)	12n
Commercial National Bank in Shreveport v. Connolly, 176 F.2d 1004	17
Commercial National Bank in Shreveport v. Connolly, 177 F.2d 514	29n
Commercial National Bank in Shreveport v. Parsons, 144 F.2d 231, cer. den. 323 U.S. 796	17
Commissioner v. Kolb, 100 F.2d 920 (9 Cir.)	25
Commissioner v. Textile Mills Corp., 117 F.2d 62	27
Connolly v. Commercial National Bank in Shreveport, 189 F.2d 608	17
Duke Power Co. v. Commissioner of Internal Revenue, 44 F.2d 543 (4 Cir.), cer. den. 282 U.S. 903	11, 13, 19
Ecker v. Western Pacific Railroad Corp., 318 U.S. 448	4, 12n
Edwards v. Lee's Administrators, 96 S.W.2d 1028, 265 Ky. 418	16n
Fleishhacker v. Blum, 109 F.2d 543 (9 Cir.)	16n
Freuhauf Trailer Co. v. Myers, 181 F.2d 1008, (9 Cir.)	30n
George A. Fuller Co. v. Commissioner, 92 F.2d 72 (2 Cir.)	13,19
Goodacre v. Panagopoulos, 110 F.2d 716 (D.C. Cir.)	25
Handy & Harman v. Burnet, 284 U.S. 136	10
Helbush v. Finkle, 170 F.2d 41 (9 Cir.)	24n
Hurwitz v. Hurwitz, 136 F.2d 796 (D.C. Cir.)	25
Independence Lead Mines Co. v. Kingsbury, 175 F.2d 983 (9 Cir.)	29
Interstate Circuit Inc. v. United States, 304 U.S. 55	24

Pages

Jacuzzi Bros. Inc. v. Berkeley Pump Co., 191 F.2d 632 (9 Cir.) 24n
James v. Campbell, 104 U.S. 356 ..... 16n
J. D. & A. B. Spreckels Co., 41 B.T.A. 370 12
Jones v. Waterman Steamship Cor., 155 F.2d 992 (3 Cir.) 24n

Kelley v. Everglades Dist., 319 U.S. 415 24
Kistler v. Gingels, 171 F.2d 912 (8 Cir.) 24n
Kronberg v. Hale, 181 F.2d 767 ..... 29, 30

Lang's Estate v. Commissioner, 97 F.2d 867 27
Leslie v. Commercial National Bank in Shreveport, 28 F. Supp 927 ..17, 18

Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 25
McClure v. O. Henry Tent & Awning Co., 184 F.2d 636 (7 Cir.) .. 24n

North American Co. v. S.E.C., 327 U.S. 686 19
Northwestern Mutual Life Insurance Co. of Milwaukee v. Gilbert, 182 F.2d 256 ..... 30n

Paramount Pest Control Service v. Brewer, 170 F.2d 553 (9 Cir.) 24n

Reading v. The Attorney General, 1951 Appeal Cases 507, affirming Reading v. The King, [1949] 2 K. B. 232 16

Saginaw Broadcasting Co. v. F.C.C., 96 F.2d 554 (D.C. Cir.) 24
Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80 .. 24
Southern Pacific Co. v. Bogert, 250 U.S. 483 19
Stanley v. Columbia Broadcasting System, 35 Cal. 2d 653, 221 P.2d 73 ..... 16n

Textile Mills Corp. v. Commissioner, 314 U.S. 326 ..... 27, 28
Trinity Building Corp. of New York, 40 B.T.A. 1315 ..... 13, 19

United States v. Bernard, 202 Fed. 728 (9 Cir.) 16n
United States ex rel Robinson v. Johnston, 316 U.S. 649 ..... 27, 30
United States v. Sentinel Fire Ins. Co., 178 F.2d 217 ..... 29n
United States v. Oregon Medical Society, 343 U.S. 326 22
Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9 Cir.) 16n

Pages

Waialua Agricultural Co. v. Maneja, 178 F.2d 603 (9 Cir.) 24n
Woolford Realty Co. v. Rose, 286 U.S. 319 ..... 11, 12

Young v. The Higbee Co., 324 U.S. 204 20

STATUTES AND REGULATIONS

Internal Revenue Code:
Sec. 23 (g) (2) 2, 3
Sec. 23 (g) (4) 2, 3, 4
Section 52 3
Section 141 ..... 3, 4, 10n

Rules of Civil Procedure, Rule 52 (a) 3, 24

Supreme Court Rule:
38 (5) (b) 3

Treasury Regulation 104 3
Section 23.11 (a) 13, 15
Section 23.15 (a) 14
Section 23.16 (a) 13
Section 23.38 14

Treasury Regulation 110
Section 33.11 (a) 14
Section 33.38 15

United States Code:
Title 28, Sec. 46 (c) 3, 7, 27, 29, 30
Title 28, Sec. 1254 (1) 2
Title 28, Sec. 1291 2
Title 28, Sec. 1294 (1) 2
Title 28, Sec. 1331 2
Title 28, Sec. 1332 2

Pages

TEXTS AND OTHER MATERIAL

3 C. J. S., Agency, Sec. 165 ..... 16n

Final Report of the Committee on Codification and Revision of the Judicial Code (Aug. 1948) 30n

63 Harvard Law Review, 1449 29

65 Harvard Law Review, 502 16

65 Harvard Law Review, 1256-1258 ..... 8, 10, 14, 17, 18, 19, 20

Hearings before Subcommittee on Judiciary on S. 1053, 77th Congress, 1st Session, pp. 16, 40 28

5 Moore's Fed. Prac. (2d ed.) p. 2657, fn. 21 24

II Montgomery's Federal Taxes, Corporations, 1942-1943, pp. 492, 493-5 ..... 14, 15

II Montgomery's Federal Taxes, Corporations and Partnerships, 1946-47:

pp. 632, 633 ..... 10n

pp. 649, 650 13

4 Pomeroy's Equity Juris. (5th ed.) p. 263 ..... 18n

Pound and Plucknett's Readings on the History and System of the Common Law. (3rd ed. 1927) p. 629 ..... 18n

Report of the Senate Finance Committee on the Revenue Bill of 1928, 70th Congress, 1st Session, Senate Report 960, p. 8 ..... 12n

Report of the Senate Finance Committee on the Revenue Bill of 1932, 72nd Congress, 1st Session, Senate Report 665, at p. 9 ..... 12n

Restatement of Restitution:

Section 1, ... 10

Section 1, pp. 13, 15 ..... 16n

Section 136, p. 553 ..... 16n

Reviser's Notes to 28 U.S.C. Sec. 46 (c) 27

3 Scott on Trusts, Sec. 502, p. 2422 ..... 16n

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Western Pacific Railroad Corporation and Alexis I. duP. Bayard, its receiver, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 29, 1951, and also to review that court's order of January 30, 1952 striking from the files their petition for rehearing en banc.

Emphasis is supplied unless otherwise noted.

OPINIONS BELOW

The opinion of the District Court (R. 258) is reported in 85 F. Supp. 868. The opinion of the Court of Appeals (R. 2214), a dissenting opinion (R. 2239), the opinion of the court on striking the petition for rehearing en banc (R. 2260), and the opinion of Fee, J., suggesting a rehearing by all the circuit judges (R. 2261), have not yet been reported.[1]

JURISDICTION

The District Court had jurisdiction under 28 U.S.C., Sec. 1331, 1332, and the Court of Appeals under 28 U.S.C., Sec. 1291 and 1294(1). That court's judgment was entered October 29, 1951 (R. 2255). On December 17, 1951, within the time allowed by order (R. 2257-9), a petition for rehearing and a petition for rehearing en banc were filed (R. 2259-60). On January 30, 1952, the petition for rehearing was denied, and the petition for rehearing en banc was ordered stricken, as without authority in law or in the rules or practice of the court (R. 2259). On April 19, 1952, by order of Mr. Justice Douglas petitioner's time to file a petition for certiorari was extended to June 27, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Must a former parent corporation join in consolidated federal income and excess profits tax returns with its former subsidiary, so that a loss incurred by the former parent may be used to extinguish the tax liability of its former subsidiary, without any accounting by the former subsidiary to the former parent for the benefit thus obtained? The loss so utilized was the parent's loss of its entire investment in the subsidiary (I.R.C., Sec 23(g)(2) and (4)).

2. Does not a Court of Appeals exceed its appellate office and so far depart from the accepted and usual course of judicial

[1]The proofs submitted by West Publishing Co. have not been released by the Court.

proceedings as to call for this Court's power of supervision (Supreme Court Rule 38(5)(b)), where it finds facts *ab initio* to affirm a judgment which it holds to be non-sustainable on either the legal theories applied or the facts found by the trial court, particularly where its findings are contrary to those which the trial court made clear it would have found had it considered the issues material?

3. May a litigant petition a Court of Appeals for a rehearing en banc under 28 U.S.C. Sec. 46(c) after decision by a three-judge panel; or may two judges of the panel strike out such petition "as being without authority in law or in the rules or practice of this court", thus preventing the petition from being considered by the court of seven judges?

STATUTES INVOLVED

The pertinent provisions of Internal Revenue Code, Section 23(g)(2) and (4), 52, and 141, Treasury Regulation 104, Title 28 U.S.C., Sec. 46(c), and R.C.P. 52(a), are printed in an appendix hereto.

STATEMENT

As stated in the opinion of Judge Fee suggesting a rehearing en banc,

> "This cause involves the disposition of over $21,000,000.00. The solution requires application of novel statutory language affecting the fields of bankruptcy and taxes" (R. 2261).

The panel deciding this cause was composed of one circuit judge and two district judges, one of whom wrote the majority opinion and one a dissent. Both opinions concur that the trial court's legal views were erroneous. And so, as Judge Fee notes (R. 2261):

> "in this serious and important litigation, three District judges have, respectively, expressed three widely divergent views, while no member of the Court of Appeals has written a line on the merits."

This is an action by petitioner Western Pacific Railroad Corporation to compel respondent Western Pacific Railroad Company to account for the benefit obtained from the use, in consolidated income tax returns, of a $75 million loss of petitioner to satisfy respondent's own federal tax liability of $17 million.[2]

For many years petitioner had owned all the capital stock of respondent, an operating railroad. Petitioner had paid $75 million for that stock (R. 262). In 1935 respondent went into bankruptcy, and trustees were appointed, remaining in possession until December 29, 1944 (R. 1908, 1916).

The plan of reorganization proposed for respondent by the I.C.C. (233 I.C.C. 409, 452) and sustained by this Court on March 15, 1943 (*Ecker v. Western Pacific Railroad Corp.*, 318 U.S. 448), excluded petitioner from participation in the reorganization and wiped out its $75 million investment in respondent. The plan was confirmed by the District Court, October 11, 1943.

Under the Internal Revenue Code, Section 141, a parent company and its subsidiaries may file consolidated returns in which losses of all are offset against the gains of all. I.R.C., Section 23(g)(4) as amended in October 1942, provided for the first time that a loss arising from worthlessness of stock in a subsidiary is an ordinary rather than a capital loss and thus deductible from taxable income. Thereby petitioner's loss, resulting from this Court's decision of March 15, 1943, became available as an offset against income.

Consolidated returns for 1943 and 1944 and a claim for refund of the 1942 tax previously paid were filed, using petitioner's stock loss to offset respondent's income. Had respondent filed

---

[2]Petitioner Bayard is petitioner Corporation's receiver, appointed by the Delaware Chancery Court to realize on all the Corporation's assets and claims (R. 292). Any recovery will go to him for distribution to the Corporation's stockholders under the Chancery Court's supervision. For brevity we shall refer to the Corporation as petitioner and to Western Pacific Railroad Company as respondent. The other respondents were joined as defendants because they were parties to the consolidated returns, but no relief was sought against them.

separate returns, its tax liability would have been $21,000,000. As the result of a settlement with the Commissioner of Internal Revenue, the returns for 1943 and 1944 were accepted in consideration of withdrawal of the claim for refund (R. 262).

As the court below states: "Except for the offset of the capital stock loss of Corporation, the net earnings [of the respondent] would have required the payment of some $17,000,000 in income and excess profits taxes" (R. 2217-8).

Thus respondent avoided payment of $17 million in taxes by using petitioner's tax rights.[3]

THE RESULT WAS OBTAINED BY RESPONDENT'S TAKING OVER PETITIONER'S AFFAIRS AND DIRECTING ITS ACTIONS.

This extraordinary result was accomplished by respondent's taking over and managing petitioner's affairs for its own benefit, without regard for the rights of petitioner or its stockholders who had provided the $76 million, the loss of which furnished the tax credit.

As the trial court found, respondent through its tax counsel conceived the idea of using petitioner's loss to offset its own income (R. 261), decided to put the idea into effect (R. 265, 266), prepared all the operative documents, and settled the tax controversy with the government, acting under a power of attorney in petitioner's name (R. 262, 263, 470, 1442). Respondent's tax counsel who conceived the idea called it "paradoxical" (R. 265). The "paradox" lay in the fact that the loss so used to enable respondent to avoid taxes arose from the very fact that petitioner was cut off by the bankruptcy from any further economic interest in the respondent and could gain no benefit as a stockholder from the discharge of respondent's taxes.

---

[3]Respondent made accruals of over $10 million to meet its expected tax liability for 1943 and the first four months of 1944, and placed these in government bonds, first as a reserve fund for contingent tax liabilities, and later as a reserve to meet a judgment in this case, and still has the reserve (R. 263, 517-18, 616). On emerging from the reorganization respondent had an unappropriated earned surplus of $30 million (P. Ex. 20 D, p. 15), since increased to over $47 million (1951 Annual Report, Moody's Manual of Railroads).

Respondent was able to do these things because it controlled Curry, petitioner's president and actually its only officer.* As described by the trial court, Curry was "just a presiding officer and a sort of figurehead" (R. 646, 647).

Petitioner was so impoverished after this Court's decision of March 15, 1943 that it could no longer pay its officers' salaries, and respondent took them over as its own "full time employees" before the tax returns were filed. After June 1, 1943, Curry was in respondent's exclusive pay, as were most of respondent's board of directors (R. 1135-1139).

All the documents were signed and filed in petitioner's name by Curry. As the trial court found, they were never submitted to petitioner's Board of Directors for consideration or approval* (R. 261). Curry followed the instructions of respondent's tax counsel, who testified that he was responsible to respondent alone (R. 1431); his firm was later paid $300,000 by respondent for their services in the premises (R. 1749).

BASIC AND INCONTROVERTIBLE FACTS SUMMARIZED.

1. Petitioner sustained a loss of $75 million when its stock in respondent became worthless.

2. It ceased to have any economic interest in respondent on March 15, 1943.

3. Respondent thereafter used petitioner's loss to discharge respondent's tax liability of $17 million.

4. Respondent conceived the plan of using petitioner's loss and carried it into execution by directing the action of petitioner's president, who was also an officer of respondent and in its exclusive pay.

5. Respondent's tax saving resulted from the conjunction of two elements. First, it had to obtain petitioner's joinder in con-

*Petitioner's only two independent directors testified that while they supposed consolidated returns would be filed, not until shortly before this suit was commenced did either know that petitioner's stock loss was being used or that thereby respondent was saving taxes (R. 1129, 1132, 1019, 1022).

solidated returns. In addition, it had to use the loss. The loss was petitioner's loss.

Under these facts, petitioner contended that respondent must account for the benefits obtained by it through the use of petitioner's tax credits.

THE DECISIONS OF THE TWO COURTS BELOW.

The District Court held against petitioner on two legal theories. The Court of Appeals swept both of them aside as erroneous in law. The dissenting opinion of Judge Fee states the situation (R. 2239-40):

> "The Trial Court gives two reasons for decision against plaintiff: * * * Neither has any validity.
>
> "The major portion of the opinion of the Trial Court is devoted to the proposition that the 'tax escape' was a fraud upon the government, and therefore the proceeds were given to the defendant, an active wrongdoer, * * * The majority of this Court as the opinion shows, does not rely upon it.[5]
>
> "A second subsidiary theory was also advanced below with little emphasis. * * * This reason is as unstable as the first."[6]

The majority nevertheless affirmed the judgment, by (a) announcing a new principle of law (discussed at pp. 9-19 below), and (b) applying it to supposed facts not found by the trial court and contrary to what the court indicated it would have found had it believed the facts material (discussed at pp. 20-26 below).

STRIKING OF PETITION FOR REHEARING EN BANC.

After decision, petitioner not only filed a petition for rehearing but also petitioned the entire Court of Appeals for a rehearing en banc under 28 U.S.C., Sec. 46(c). The petition for rehearing en banc was never permitted to reach the whole court. The panel,

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[5]The majority opinion states of the District Court's major theory, "We do not share this view" (R. 2227-8, fn. 12).

[6]The subsidiary theory was that petitioner's claim was somehow barred by the reorganization proceedings. The majority opinion makes no reference to it.

by a per curiam order of two judges, struck it, "as being without authority in law or in the rules or practice of the court." (R. 2260).

Judge Fee, dissenting from this order, made the statements quoted at page 3 above and concluded "I therefore suggest to the Court of Appeals a rehearing en banc of all the Circuit Judges." (R. 2262)

Thereafter on March 10, 1952, petitioner filed a petition for leave to file a motion to vacate the order striking the petition for rehearing en banc, so as to reinstate it and submit it to the entire court for its consideration and action. (R. 2263, 2282) The court below has taken no action on this petition, although the time within which to petition for certiorari was extended 60 days by order of Mr. Justice Douglas to permit it to do so.

REASONS FOR GRANTING A WRIT

The court below has decided important questions of federal law which have not been, but should be, settled by this Court, as well as an important question of local law in a way in conflict with applicable local decisions. The questions are of wide public interest, concerning the rights and duties of parties to federal consolidated returns under the Internal Revenue laws and Treasury regulations. The decision of these vital questions is not only erroneous but it is in conflict with decisions of the Second, Fourth and Fifth Circuits. Furthermore, the court below has so departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

These reasons will be presented under three main heads.

The decision of the Court of Appeals is commented upon in the May, 1952, issue of the Harvard Law Review, where it is suggested that the decision is erroneous (65 Har. Law Rev. 1256-1258).

I.

The Decision Is Based on a Novel Rule of Law, Affecting Taxes, Corporate Reorganization, and the Law of Unjust Enrichment, Without Support of Any Known Principle or Authority.

The basic reasoning of the majority opinion is as follows: If respondent controlled petitioner, it had a fiduciary obligation to deal with it fairly (R. 2223). But it did not violate this duty in filing the consolidated returns or in the failure of the common officers to request and obtain an agreement for compensation for use of petitioner's tax rights, or in respondent's failure to give petitioner an opportunity to appoint independent officers who could have made such an agreement. These acts were not unfair, said the court, because petitioner was under a duty to file such returns; it could not have demanded an agreement of compensation for doing so, all because petitioner was bound to give to respondent the benefit of its loss (R. 2232-2234).

The opinion sums up: "Equity will not permit a recovery as a substitute for a bargain which would have been unfair," i.e., no bargain for any compensation would have been fair (R. 2235). In short, it was petitioner's duty to give up its sole asset to respondent for nothing.

The majority opinion thus announces a new principle of law, viz.:

That wherever the tax laws permit two corporations to join in consolidated federal tax returns, and one has a loss and the other has income, the former must join with the latter and permit its loss to be used for the latter's benefit, without payment, consideration or compensation.

And since respondent was no longer a subsidiary of petitioner,[7] the principle as applied went further, namely:

A former parent is under a duty to join in a consolidated return and permit its loss to be used to satisfy the former subsidiary's tax, without consideration or compensation, even though

[7] As the opinion itself states, "when the returns and the claim for refund were filed, affiliation no longer existed" (R. 2230-1).

it has no economic interest in the latter and can derive no benefit therefrom.

This is tantamount to holding that the income corporation can sue in equity for a mandatory injunction to compel the loss corporation to join and confer the benefit of its loss, gratis.

Fundamentally, petitioner is entitled to recover on the principles of unjust enrichment. Restatement of Restitution, Section 1. The discharge of respondent's tax liability by use of petitioner's loss was an enrichment as much as if respondent had taken dollars from petitioner and used them for this purpose. As stated in 65 Harvard Law Review at 1257, "If, as has been suggested, the Court should not have found that [petitioner] had a duty to file consolidated returns, then principles of restitution for unjust enrichment should have governed the decision."

RETENTION BY RESPONDENT OF THE BENEFITS RECEIVED FROM USE OF PETITIONER'S LOSS IN CONSOLIDATED RETURNS IS INCONSISTENT WITH THE RATIONALE OF CONSOLIDATED RETURNS AND THE PURPOSE OF CONGRESS IN ALLOWING THEM.

The principle underlying consolidated returns is this: A group of affiliated corporations is an economic entity and, unless the group as a whole in the conduct of the business enterprise shows a net profit, those who conduct the business—the parent's owners—have realized no gain. *Handy & Harman v. Burnet,* 284 U.S. 136, 140[8].

---

[8]The legislative reports and similar material are conveniently assembled in II Montgomery's Federal Taxes, Corporations and Partnerships, 1946-47 issue, pp. 632, 633.

Consolidated returns were first required, but only for excess profits tax, by Treasury Regulation in 1917. This was validated by the 1921 Act. Consolidated returns were compulsory for both normal and excess profits taxes between 1918 and 1921, inclusive. They were permissive but not mandatory for 1922-1933, inclusive. They were not permitted, except in case of certain railroad corporations, from 1934-1939, inclusive. They were permissive for all corporations with respect to excess profits taxes in 1940 and 1941. In 1942 the Revenue Act, Section 141(a), extended the privilege to all corporations for all years after December 31, 1941, with respect to both normal taxes and excess profits taxes.

The rationale "is the recognition of this common owner's right to set off against his gains in the one [corporation] his losses in the other [corporation]." *Duke Power Co. v. Commissioner of Internal Revenue*, 44 F.2d 543 at 545 (4 Cir.), cer. den. 282 U.S. 903;[9] *Alameda Inv. Co. v. McLaughlin*, 28 F.2d 81 (D.C. N.D. Cal.), aff'd 33 F.2d 120 (9 Cir.).

When the tax law permits one affiliate's profits to be offset against another's losses, its purpose and its effect is to benefit the ultimate owners of the business entity, i.e., the parent's stockholders. The means it adopts is the amelioration of the loss suffered by them because of losses of any one affiliate.

Two principles are evident: (1) The tax saving should go to the ultimate owner of the economic entity, the parent, and (2) it should go to the party suffering the loss, to ameliorate it. So long as the economic unity continues, these two principles coincide. And they coincide here, because the loss used to produce the tax savings was the former parent's loss.

The majority opinion below permits the tax saving to be retained by the former subsidiary, after severance of the economic unity—the very event producing the parent's loss—without making restitution to the parent. Thereby it defeats both equities underlying the principles of consolidated income tax reporting. New owners of the former subsidiary are reaping a sheer windfall from the misfortune of the old owners. The income tax laws are subverted into a tool to enrich strangers to the economic entity for whose protection consolidated returns are permitted.

In *Woolford Realty Co. v. Rose*, 286 U.S. 319, this Court (Cardozo, J.) held that the use of consolidated returns did not permit a corporation to deduct from its profits the loss of an affiliate sustained in a year prior to affiliation. "The mind rebels against the notion that Congress in permitting a consolidated return" was willing to permit a corporation to profit by the loss of one who was a stranger when the loss was sustained.

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[9]This case contains an excellent statement of the history and purpose of consolidated returns and the concept of the economic unity.

Here is the converse situation, for the tax savings were claimed after the economic unity was severed. The mind rebels against the notion that, after that severance, respondent may confiscate the tax utility of petitioner's loss. In the words of *Woolford*, "to such an attempt the reaction of an impartial mind is little short of instinctive."

In his dissenting opinion below Judge Fee summarized the matter thus (R. 2248):

> "If we look at it realistically, but little question arises. If the plaintiff were still the owner of the stock of defendant, then the allocation of $17,000,000 to the defendant would be reflected in the increased value of its stock. The transfer of the stock left the right untouched. Since increase in value of stock in defendant no longer is of avail to plaintiff, there should be another method of applying the remission to the loss."[10]

Senate reports on various revenue bills have justified consolidated tax reporting on the ground that "no ultimate advantage under the tax laws really results,"[11] and that "no improper benefits are obtained from the privilege."[12] On the basis of these passages, *J. D. & A. B. Spreckels Co.*, 41 B.T.A. 370, 375, held that "the framers of the statute [did not intend] that the privilege

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[10]In *Bondholders, Inc. v. Powell*, 342 U.S. 921 (Jan. 28, 1952) and again in *Chemical Bank & Trust Co. v. Group of Institutional Investors*, 343 U.S. ..... (June 10, 1952), Mr. Justice Frankfurter notes that due to erroneous estimates of future earning power, valuable equities were forfeited in a series of railway reorganizations of which the first was *Ecker v. Western Pacific Railroad Corporation*, 318 U.S. 448. Here, although petitioner's stock in respondent was declared worthless in the *Ecker* case, respondent's earned income in 1942-4 was so large that a tax of $21,000,000 would have been paid had it not been discharged by the use of petitioner's loss. The creditors of respondent, not content with wiping out petitioner's equity in respondent and acquiring it for themselves, now contend that respondent, in addition, is entitled to use petitioner's loss, without accountability.

[11]Report of the Senate Finance Committee on the Revenue Bill of 1928, 70th Congress, 1st Session, Senate Report 960, p. 8.

[12]Report of the Senate Finance Committee on the Revenue Bill of 1932, 72nd Congress, 1st Session, Senate Report 665, at p. 9.

of making consolidated returns may be enjoyed in cases where the affiliation does not serve a business purpose, as distinguished from a tax-reducing purpose."

But, unless the tax savings here are applied to ameliorate petitioner's loss, an "ultimate advantage under the tax laws" has resulted, "improper benefits are obtained from the privilege," and only a tax reducing purpose has been served: respondent has escaped its taxes because an economic stranger had a huge loss. The District Court was understandably indignant at this result. "If I had the power," it asserted, "I would order these taxes paid to the United States. That would effectively dispose of the cause." (R. 270).

Yet it left the funds with respondent, the unjustly enriched party responsible for what was done. And the majority opinion below, while disapproving the trial court's reasoning, permits its result to stand.

The consequence is that the revenue laws have been subverted and made absurd.

BY FIAT THE MAJORITY OPINION BELOW MAKES MANDATORY WHAT CONGRESS LEFT OPTIONAL.

The tax laws make clear that (1) only the parent corporation may file consolidated returns; that (2) there was no duty to file such returns; (3) that consolidated returns may be filed only if all affiliates join, and (4) that a parent is under no duty to a subsidiary, nor any affiliate to any other, to file consolidated returns, each being free to make its own decision on the basis of its own interest. Treas. Reg. 104, Sec. 23.11(a), 23.16(a), II Montgomery's Federal Taxes, Corporations and Partnerships, 1946-7, pp. 649-650. *Duke Power Co. v. Comm.*, 44 F.2d 543, 545 (4 Cir.) cer. den. 282 U.S. 903; *George A. Fuller Co. v. Commissioner*, 92 F.2d 72 (2 Cir.); *Trinity Building Corp. of New York*, 40 B.T.A. 1315.

By judicial fiat the court below makes mandatory what Congress and the Treasury left optional. Wherever consolidated returns

may be filed with a resulting tax reduction to anyone, this decision decrees that they must be.

The rule so created not only confers on one corporation a right to use another's assets, but it does so free of any requirement of just compensation.

No principle supports such a right. Rather, as Judge Fee stated (R. 2242):

> "plaintiff had a property right to file or refuse to file consolidated returns, which could neither be given away without consideration nor cut off judicially without due process."

As he further stated (R. 2243):

> "Since, under the [tax] law, all corporations concerned must consent to the filing of consolidated returns, it is clear, contrary to the statement in the majority opinion, that plaintiff had no duty requiring it to file these returns. Plaintiff had a legal right to refuse to file."

65 Harvard Law Review at 1257 comments:

> "The ground relied on by the Court of Appeals was that * * * [respondent] could have violated no duty to act fairly since [petitioner] was under a duty to file the consolidated returns anyway. The court's argument that [petitioner] had such a duty, however, is not convincing. The Internal Revenue Code imposes no such obligation."

Moreover, there are many factors besides offset of losses which bear on the question whether it is advantageous to join in consolidated returns (cf. II Montgomery, Federal Taxes on Corporations, 1942-1943, pp. 492, 493-5). Burdens as well as advantages flow from such action. Thus each company joining in the return becomes liable for the full amount of taxes owed by the group (Treas. Reg. 104, Sec. 23.15(a); T.R. 110, Sec. 33.15(a)), and is subjected to requirements affecting its future tax situation. For example, by virtue of elimination of intercompany transactions, the basis at which property is held may be affected (T.R. 104,

Sec. 23.38; Tr. 110, Sec. 33.38). In certain circumstances such returns must be filed in a later year (T.R. 104, Sec. 23.11(a); T.R. 110, Sec. 33.11(a)), although "future developments may make the filing of separate returns for future years more advantageous." (II Montgomery, p. 492). Here one consequence of petitioner's joining in the consolidated returns was to make it liable for any taxes payable by respondent. All this demonstrates how indefensible it is to hold that an independent company has any duty to assume such a liability and such possible disadvantages simply to benefit another company which wants to use its loss.

Still again Judge Fee observed (R. 2251):

> "An incontrovertible proof of the proposition that plaintiff had no duty to apply the loss for the benefit of defendant may be cited. If plaintiff had sold a gold mine for a profit of over $75,000,000.00, its loss on the stock of the subsidiary could have been applied to offset any taxes against plaintiff. In that event, the trustees in reorganization would have been required to pay taxes against the operating company. Once used, the power of applying the loss would be functus officii, and plaintiff would have received the entire benefit."

ONE'S RIGHTS OR PROPERTY MAY NOT BE APPROPRIATED MERELY BECAUSE HE CANNOT USE THEM PROFITABLY HIMSELF.

The last quotation from Judge Fee's opinion reveals the fallacy of the majority opinion.

If a prosperous corporation (e.g., Standard Oil Company) had owned respondent's stock, none would claim that it had to join in a consolidated return and give respondent the tax utility of its loss, without accounting for the benefit, for Standard could use the loss to discharge its own taxes.

But because petitioner was so unfortunate as to be left destitute and with no taxable income, the majority opinion applied a different standard. It argues that respondent "did not abuse its supposed dominant position because the officers and directors common to both corporations did not sacrifice Corporation's [peti-

tioner's] interests to those of its subsidiary" (R. 2232). The reason given is that petitioner "had no income" and so "there was no possible way for it to achieve any tax advantage to offset the loss," whereas "its affiliate [respondent] did have use for the loss" (R. 2232). "Under this state of facts these officers had a positive duty to make use of the loss as they did" (R. 2233), that is, to give it to respondent, to satisfy the taxes that otherwise it would have had to pay.

This is merely to assert that a corporation able to dominate another may take its tax credits without compensation if it can profitably use them and the dominated corporation cannot.

Almost anyone can advantageously use another's property or rights—and will, if he can get them for nothing. But the opinion below stands alone in holding that he is entitled to do so as of right. Protection of one's assets from seizure or trespass by another has never depended on what use or profit he can make of them. The contrary rule reflects itself in a host of instances in every field of law, of which a few are listed in the margin.[13]

A recent example is *Reading v. The Attorney General*, 1951 Appeal Cases 507, affirming *Reading v. The King* [1949] 2 K.B. 232, reviewed in Harvard Law Review for January 1952 at 502. There the Crown was held entitled to bribes received by a soldier

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[13]In the common law action of trespass *quare clausum fregit;* in suits for use of land where no injury has resulted and the owner could not itself have made use thereof, *United States v. Bernard*, 202 Fed. 728 (9 Cir.); in the field of eminent domain, cf. *Boom Co. v. Patterson*, 98 U.S. 403, 408, "property is not to be * * * regarded as valueless because he [the owner] is unable to put it to any use. Others may be able to use it * * *"; of patents, *James v. Campbell*, 104 U.S. 356, 358; *Bigelow v. RKO Pictures*, 327 U.S. 251, 265; of literary property, *Universal Pictures Co. v. Harold Lloyd Corporation*, 162 F.2d 354 at 368-370 (9 Cir.); *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 666, 667, 221 P.2d 73; in the field of unjust enrichment where recovery is measured by benefit received and not detriment sustained, *Edwards v. Lee's Administrators*, 96 S.W.2d 1028, 265 Ky. 418 (the famous *Kentucky Cave* case); *Restatement of Restitution*, Section 1, pp. 13, 15, Section 136, p. 553; in the fields of agency, 3 *C.J.S.* Agency Sec. 165; and trusts, 3 *Scott on Trusts*, Sec. 502, p. 2422; and in any other kind of fiduciary relationship, *Fleishhacker v. Blum*, 109 F.2d 543 (9 Cir.).

through use of his uniform, although the Crown itself could never have used the uniform to earn bribes.

65 Harvard Law Review at 1257 comments:

> "[petitioner's] stock loss was an asset having value * * * even though [respondent] was the sole market and [petitioner] could utilize the stock loss in no other way."

The tax credit was petitioner's sole asset. The majority opinion has given to that fact the very reverse of its true significance. As Judge Fee pointed out (R. 2242):

> "* * * It seems to be assumed that the officers of plaintiff could give away the property right to file or refuse to file consolidated returns either voluntarily or acting under the control of defendant or the reorganization trustees. This is strange doctrine. * * * a transfer of all the assets of a corporation * * * cannot be made even by a majority of the stock. Neither officers nor directors, without a vote of the majority, have such power. In this case it is of stellar importance that this right of plaintiff was its sole asset and that, upon appropriation thereof, it became insolvent."

As 65 Harvard Law Review 1257 says:

> "[Respondent's] enrichment may have been unjust if, having caused [petitioner] to file the consolidated returns, it deprived petitioner of the opportunity to bargain for the value of its corporate assets: the right to use its stock loss for tax purposes."

CONFLICT WITH THE FIFTH CIRCUIT.

On the subject matter of this action, the appropriation of tax credits or rights belonging to one who could not use them by another who could, the decision below is in conflict with the *Shreveport Bank* cases, a series of decisions of the Fifth Circuit. *Connolly v. Commercial National Bank in Shreveport*, 189 F.2d 608, *Commercial National Bank in Shreveport v. Connolly*, 176 F.2d 1004, *Commercial National Bank in Shreveport v. Parsons*, 144 F.2d 231, cer. den. 323 U.S. 796, affirming *Leslie v. Commercial National Bank in Shreveport*, 28 F. Supp. 927.

There an insolvent bank transferred its assets to a new bank in pledge to pay its liabilities. The State imposed a tax on the capital stock of banks, assessable against the bank. In determining assessable value, the value of real estate owned by the bank was deductible from what would otherwise be the value of the stock. Reporting the real estate transferred to it by the old bank as its own, the new bank paid less taxes than it otherwise would. It was ordered to account to the old bank for the tax savings.

These cases not only hold, as 65 Harvard Law Review 1257 says; that "a tax saving may constitute enrichment," but they also make clear that the fact that one has a tax credit or advantage which he cannot himself use does not give another the right, free, to use it to his advantage. "The fact that the Old Bank suffered no loss * * * makes no difference." *Leslie v. Comm. Natl. Bank in Shreveport,* 28 F. Supp. 927, 933.[14]

The decision below is in conflict, also, with *Bankers Trust Co. v. Florida East Coast Car Ferry Co.,* 92 F.2d 450 (5 Cir.). That case recognized the duty of an affiliate to account for tax benefits obtained from consolidated reporting to the party whose tax credits conferred the benefit.

CONFLICT WITH THE SECOND AND FOURTH CIRCUITS.

To justify its conclusion, the majority opinion below states that if the loss were respondent's and the income petitioner's, peti-

[14]The majority opinion dismisses the *Shreveport Bank* cases on the ground that the "new bank" was a "trustee." But there was no trust in the strict sense. There was a situation in which the officers were in dual relationships with respect to the two banks. *Leslie v. Commercial National Bank in Shreveport,* 28 F. Supp. 927, 933. The words "trust" and "trustees" are used in the *Shreveport* opinions because the courts were applying the "grand rule," the principle "that wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as a trustee he becomes trustee of the advantage so gained * * *," and recognized that the rule "includes persons who are not trustees properly so called, but all those who stand in what is called a fiduciary position." Pound and Plucknett's *Readings on the History and System of the Common Law* (3rd ed. 1927), p. 629; 4 *Pomeroy's Equity Juris.* (5th ed.), p. 263. On this principle respondent should account to petitioner.

tioner could have compelled respondent to confer upon it the benefit of the loss by joining in consolidated returns.

This is in direct conflict with the Second and Fourth Circuits and the Board of Tax Appeals which held that a corporation, including one in bankruptcy, is free to join or not to join in consolidated returns as it sees fit.

In *George A. Fuller Co. v. Commissioner,* 92 F.2d 72 (2 Cir.) and *Trinity Building Corporation of New York,* 40 B.T.A. 1315, the Commissioner was upheld in refusing to accept consolidated returns filed by a parent and subsidiaries, because the trustees of a bankrupt subsidiary had refused to join. *Duke Power Co. v. Commissioner,* 44 F.2d 543 (4 Cir.), cer. den. 282 U.S. 903, reached the same conclusion as to such returns filed by two subsidiaries where the parent refused to join. The taxpayers were thus unable even to utilize the losses of those who did join.

PETITIONER WAS NOT A FIDUCIARY FOR RESPONDENT. THE REVERSE WAS TRUE.

To extend its rule of mandatory filing of consolidated returns to a situation where the parent-subsidiary relationship has been severed, the opinion stated that a tax return is an historical document, that a fiduciary's duties with respect to matters arising during the fiduciary relationship continue through the period of winding up, and that the fiduciary who performs an act of winding up may not exact payment (R. 2234-5).

But petitioner was not respondent's liquidating agent nor its fiduciary. What makes one a fiduciary for another are the elements of dominance and the exercise of control and management. *Southern Pacific Company v. Bogert,* 250 U.S. 483 at 492; *North American Co. v. S.E.C.,* 327 U.S. 686 at 693; 65 Harvard Law Review, 1257. As said in 65 Harvard Law Review, 1257, "It may be strongly argued, then, that in the unique situation where the usual relationship is reversed, the subsidiary controlling the parent, the fiduciary duty is also reversed."

The majority opinion itself notes that after 1935 respondent "was no longer controlled by Corporation but by the trustees

appointed by the bankruptcy court" (R. 2223) and that after adoption of the Plan of Reorganization "affiliation no longer existed" (R. 2231). The Plan cut off all possibility of a return of control, management, or financial interest. The loss arose from the Plan. The prior association could not impose the duty on petitioner to make a free grant to respondent of the only asset which the reorganization left petitioner, i.e., the tax utility of its loss.

On the contrary, by controlling petitioner's president so as to file the tax returns, respondent assumed a "determining position over the rights" of petitioner and thereby "owed an obligation to it". *Young v. The Higbee Co.*, 324 U.S. 204, 209, 210.

II.

If an Issue of Fact Not Found on by a Trial Court Is Thought Material, the Cause Should Be Remanded for Findings Thereon. The Court Below Exceeded Its Appellate Office by Making Findings ab Initio to Affirm the Judgment Upon a Legal Theory Different from That on Which the Trial Court Acted, and These Findings Were Contrary to What the Trial Court Made Clear It Would Have Found, Had It Considered the Issues Material, as Well as Contrary to Some Actually Made.

The majority opinion holds that petitioner may not recover although respondent appropriated its rights by dominating and controlling it. Concurrently, the majority reaches its decision by factually assuming that petitioner, not respondent, filed the tax returns, and that respondent did not dominate and use petitioner's officers. But, as said in 65 Harvard Law Review, at 1258, the moment "the issue of control [is] determinative of whether there could be recovery * * *, it would seem necessary for the court to have remanded to the district court for findings on that issue."

This is not a case where an appellate court has reversed a judgment because it believes the findings to be "clearly erroneous." What occurred here is, so far as we can find, unprecedented. Here an appellate court, sweeping aside a trial court's

legal theories as unsound, has affirmed on a theory presupposing a set of facts upon which the trial court has not found and contrary to what that court has shown it would have found had it deemed them material, after hearing the witnesses and presiding over a living trial.

Nor is this a case where an appellate court, in affirming a judgment on a legal theory different from that of the lower tribunal, does so on the basis of facts found below which support the new theory. Here the legal theory is new and rests on facts found ab initio by the appellate court.

The majority opinion says (R. 2235):

> "The record is barren of evidence to support the contention that Corporation was dominated by the subsidiary, or that there was a breach of any duty owed to Corporation. As the trial court stated, 'The so-called "duality of control" much discussed and emphasized, is not important.' "

A casual reading of this extraordinary statement would suggest that the trial court had found absence of domination. But what the trial court said was this (R. 272):

> "Whether there was, or was not, 'duality of control' respecting the directorates of the two companies, appears to me to be not too important. *True, there is a preponderance of the evidence in favor of the plaintiff's contention of 'duality of control.'* "

And by "duality of control" it said that it meant

> "that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant." (R. 264)

The trial court declined to find any facts not material to the two legal theories on which it based its decision. It concluded that "there is little factual dispute pertinent to the issue decided," i.e., pertinent to *its* legal theories (R. 276), and that "The so-called 'duality of control', much discussed and emphasized, is

not important in resolving the tendered issue", i.e. the issue deemed by it to be important (R. 274).

Contrary to an assertion in the majority opinion below, the trial court gave permission to counsel to submit findings only if *"they are limited to the issues involving the essential equitable considerations upon which the decision rests"* (R. 276).

Thus, after hearing all the witnesses and performing the function which the law assigns to a trial court, the District Court made clear that, had it believed the issue material, it would have found in accordance with petitioner's claim, i.e. that respondent controlled petitioner and by means of that control caused it to file the consolidated returns for respondent's benefit. The importance which this Court attaches to a trial court's ability to see the witnesses face to face is shown by *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (Apr. 28, 1952).

But the Court of Appeals held that the trial court erred, both in what it considered the "essential equitable considerations" and in its two legal theories, and therefore that its findings did not support its judgment.

In consequence the parties have never had an opportunity to submit, argue and settle findings on the issues on which the Court of Appeals based its decision.

Judge Fee's dissenting opinion clearly states the situation (R. 2241):

> "Thus the two grounds advanced [by the Trial Court] to sustain the judgment fail. The cause should be reversed for failure to state adequate findings to support the judgment. Findings must be made in the Trial Court. Appellate courts have no such right or function. The majority opinion attempts to accomplish justification of the result below by drawing inferences, deductions and conclusions from evidence which they claim to find in the record. It would be possible for other judges to set up a diametrically opposite set of facts from which a judgment in favor of plaintiff might be based. The very reason that Rule 52 requires findings of fact is illustrated by the majority opinion. For the technical difficulties of finding a basis of fact for this

judgment are many. Indeed, such difficulties are insurmountable."

Earlier Judge Fee had said (R. 2239):

> "There are no findings of fact [by the Trial Court] which support the judgment of the Trial Court or the affirmance thereof by a majority of this Court. The cause should be remanded for this reason alone."

THE TRIAL COURT REFUSED ADDITIONAL FINDINGS BECAUSE IT DEEMED THEM IMMATERIAL IN ITS VIEW OF THE LAW, WHICH THE COURT OF APPEALS REPUDIATED.

Contrary to the majority's assertion, petitioner submitted to the trial court proposed findings going to an essential basis on which the majority decided the case (R. 277-279). Their purport was to state that respondent and not petitioner had acted in the premises. Because of the limitation placed by the trial court on proposed findings that it would receive, petitioner was precluded from asking for findings on "duality" and "domination" as such. But the same facts bore on whether petitioner took part in the tax transactions so as to be party to the wrongdoing which the trial court believed had been worked on the government. Findings on these issues were requested (Cf. R. 462, 463).

On settlement of the findings the trial court said that it agreed with petitioner's proposed finding to the effect that respondent *and not petitioner* had conducted the tax proceedings and that respondent had achieved this through control of petitioner. "There is no question about that," the court said (R. 468).

Petitioner urged, with prescience, that the facts should be stated clearly in "a set of findings so that the whole subject can be properly appraised above" (R. 463). The trial court thought that everything mentioned by petitioner could be gleaned from its "opinion some place or another" (R. 476 and see R. 470), but indicated it would make a specific finding as requested.

In the end it failed to do so and adopted its opinion as its findings. Notwithstanding the clear position of the trial court on these issues, the Court of Appeals made a contrary finding.

WHERE A TRIAL COURT FAILS TO FIND ON ESSENTIAL ISSUES, THE CAUSE MUST BE REMANDED.

R.C.P. Rule 52(a) provides that the trial judge "shall find the facts." That rule "was advisedly made mandatory * * *." 5 *Moore's Fed. Prac.* (2d ed.), p. 2657, fn. 21.

Where a finding has been made in the trial court, a Court of Appeals may set it aside where it is "clearly erroneous" and may reverse the judgment in consequence. But when a Court of Appeals does not have the benefit of an initial finding on a material fact by the trial court, it may not itself supply it.

"It is not the function of [an appellate court] to search the record and analyze the evidence in order to supply findings which the trial court failed to make." *Kelley v. Everglades Dist.*, 319 U.S. 415, 421; *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88. A reversal should follow failure to find at all on an issue held to be material. *Interstate Circuit Inc. v. United States*, 304 U.S. 55.

The Courts of Appeals have repeatedly so stated the law.[15]

There is an essential difference in the function of an appellate court and a trial court. As stated in oft-cited *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F.2d 554, 559 (D.C. Cir.), an appellate court's function is to compare (1) rulings with the law and (2) findings with the record, not to

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[15]E.g., *Waialua Agricultural Co. v. Maneja*, 178 F.2d 603, 607, 608 (9 Cir.): "It is not the function of an appellate court to make findings on its own account." "The absence of findings * * * leaves no pediment on which a judgment can stand"; *Jacuzzi Bros. Inc. v. Berkeley Pump Co.*, 191 F.2d 632, 638 (9 Cir.): "The law does not commit that function to us, but solely the power to reverse if his findings be clearly erroneous"; *Helbush v. Finkle*, 170 F.2d 41, 42 (9 Cir.): Where a determination "would necessitate findings on questions on which the District Court has made no findings * * * such findings should be made by the District Court, not by this Court"; *Paramount Pest Control Service v. Brewer*, 170 F.2d 553, 554 (9 Cir.): "This Court of Appeals has no power *ab initio* to consider" issues on which no findings were made.

So also *Jones v. Waterman SS Corporation*, 155 F.2d 992, 997 (3 Cir.); *Kistler v. Gingels*, 171 F.2d 912 (8 Cir.); *Campbell v. Campbell*, 170 F.2d 809 (D.C. Cir.); *McClure v. O. Henry Tent & Awning Co.*, 184 F.2d 636, 639 (7 Cir.).

extract findings from the record itself. When it has no specific finding before it, it has nothing to compare against the record and should reverse. So also *Commissioner v. Kolb*, 100 F.2d 920 (9 Cir.).

The vice of exploring the record to find facts *ab initio* is not only that it involves the appellate court in a new kind of task, but that it deprives the litigant of an opportunity to be heard. No proper machinery exists in an appellate court to settle findings in the first instance.

THE MAJORITY OPINION SETS UP A NOVEL AND FALSE PRINCIPLE CONCERNING THE POWER OF AN APPELLATE COURT.

The majority opinion disposes of the lack of findings to support its theory by saying that "Findings are not a jurisdictional requirement of appeal," and that an appellate court "may waive the defect on the ground that the error is not substantial in the particular case," if it feels able to find the facts itself (R. 2236). It supports this assertion by citing three cases, *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, *Goodacre v. Panagopoulos*, 110 F.2d 716 (D.C. Cir.), and *Hurwitz v. Hurwitz*, 136 F.2d 796 (D.C. Cir.).

This Court nowhere stated in the *Mayo* case that when a case comes up without findings on issues which the appellate court deems material, it may make them *ab initio*. Its opinion contained a statement that findings are intended to benefit appellate courts. That statement is converted by the court below into a declaration that if the appellate court decides to find the facts itself it may dispense with findings by the trial court.

In *Goodacre v. Panagopoulos* and *Hurwitz v. Hurwitz*, there was no lack of supporting findings, but merely informality or irregularity in the mode of expressing them.

SUPPOSED PAST PRACTICE IN FILING CONSOLIDATED RETURNS FURNISHES NO. BASIS FOR THE CONCLUSION THAT PETITIONER MUST FILE SUCH RETURNS AFTER IT HAD LOST ALL FINANCIAL INTEREST IN RESPONDENT.

In good part the majority opinion's factual conclusion that the use of petitioner's loss for respondent's benefit was petitioner's undominated act is based upon the practice in earlier years of filing consolidated returns.

But the relationship of petitioner and respondent was completely changed by this Court's approval in 1943 of the I.C.C.'s Plan of Reorganization. Prior to that time petitioner was respondent's owner. Thereafter they were total strangers to each other. A practice once followed between husband and wife is not pertinent to what should be done between divorced spouses. As Judge Fee pointed out, dissenting (R. 2248):

> "It is said, although there are no findings, that the history of prior consolidated returns is controlling. Of course, it cannot probably be shown how plaintiff heretofore dealt with a consolidated return after there has been a divorce from a subsidiary."[16]

Furthermore, the loss here resulted from worthlessness of petitioner's stock in respondent. Since the tax law did not permit such a loss to offset operating income until October 1942, there was no prior practice on the use of such a loss.

Petitioner's loss with its utility for tax saving was its sole asset. There was no past practice about giving away a sole asset.

Moreover, if past practice were relevant, petitioner would be entitled to a finding thereon by the trial court.[17]

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[16]The trial court itself had said (R. 1377):

"I just don't see the point of what any affiliated company has done in the past as a matter of practice in these returns, because they have all been decisions that have been made by the parent company, and when the parent company decided that it was proper to file affiliated returns, it filed them, * * *. What we have in this case is not concerned with that."

[17]For the 11 years prior to the first tax year here involved, there was not a single year in which respondent had any income (R. 1263), and in the last 5 years of that period neither respondent nor petitioner had any income. The losses of neither were used to offset income of the other (R. 2040, 2041). In still earlier years a subsidiary group joining with petitioner in consolidated returns did account to petitioner for the resulting tax savings (D. Ex. 40).

III.

It Was Error to Deny Petitioner the Right to Petition for a Rehearing en Banc

Petitioner duly filed a petition for rehearing and for a rehearing en banc. Two of the three judges hearing the appeal denied the petition for rehearing and struck out the petition for rehearing en banc, as "being without authority in law or in the rules or practice of this Court." Judge Fee dissented and suggested a rehearing en banc.

HISTORY OF REHEARINGS EN BANC.

Section 46(c) Judicial Code, provides that a rehearing may be held before a Court of Appeals en banc by order of a majority of the circuit judges in active service. This section was occasioned by a conflict between the Ninth Circuit and the Third (*Lang's Estate v. Commissioner*, 97 F.2d 867 (9 Cir., 1938); *Commissioner v. Textile Mills Corporation*, 117 F.2d 62 (3 Cir., 1940)). Upholding the Third, this Court held that hearings could be had en banc, *Textile Mills Corporation v. Commissioner* 314 U.S. 326.

S. 1053 was then introduced in the 77th Congress to give more explicit expression to the procedure approved by this Court. While not then enacted, it was adopted in substance as Section 46(c) upon revision of the Judicial Code in 1948. It "preserves the interpretation established by the *Textile Mills* case." (Reviser's note).

In *United States ex rel. Robinson v. Johnston*, 316 U.S. 694 (1941), this Court, on certiorari to the Ninth Circuit, remanded the case

> "for further proceedings, *including leave to petitioner to apply for a hearing before the court en banc*,"

citing the *Textile Mills* case.

The statement by the court below that a petition for rehearing en banc is "without authority in law" is contrary to what this Court said and did in the *Robinson* case. This Court necessarily

construed the statutes as giving a litigant "authority in law" to file a petition for rehearing en banc.

In the hearings before the Subcommittee on Judiciary on S. 1053, 77th Congress, 1st session, the following occurred:

> "Senator Danaher: * * * On whose motion would the court assemble en banc? * * * Who is going to make a motion that the whole court sit on this case? The counsel in the case?
>
> * * * * * * *
>
> "Mr. Chandler: The counsel can make a suggestion of course." (p. 16)

Again:

> "Senator Danaher: Judge Groner, do you gentlemen of the bench have any thought to give us as to how we are going to let a majority of the circuit judges decide * * * when they are going to convene the court en banc?
>
> "Judge Groner: Well, I never thought of that. My own thought in the administration of my own court would be that it would not be done unless counsel requested it, or unless the court of its own motion * * * deemed it advisable * * *." (p. 40)

In view of the reference to Judge Groner, we note that the Court of Appeals for the District of Columbia Circuit, as the Clerk advises, does entertain and pass on petitions for rehearing en banc, as we are informed is also the practice in the Third Circuit.

PRACTICE OF NINTH CIRCUIT.

A Court of Appeals consists of all of the judges thereof (*Textile Mills v. Commissioner*, 314 U.S. 326). There are 7 judges in the Ninth Circuit. If the panel that heard a cause may strike out a petition for rehearing en banc, two judges may prevent the other five from even being cognizant of the request for relief which the statute empowers the five to grant. Where two district judges are on the panel, as here, two district judges could prevent 7 circuit judges from granting a rehearing en banc, although only

the circuit judges are qualified to pass on the question under Title 28 U.S.C., Sec. 46(c).[18]

In *Independence Lead Mines Co. v. Kingsbury*, 175 F.2d 983 (9 Cir. 1949), Chief Judge Denman, dissenting, stated (p. 992):

> "The attempt of two judges in a panel of three judges to deny a petition for rehearing en banc violates the law as established in United States ex rel. Robinson v. Johnston * * * and Textile Mills Securities Corp. v. Commissioner * * *.
>
> "In view of the Supreme Court decisions cited above, it is too obvious to need argument that two judges cannot thus assume to act on a petition addressed to seven judges."

Commenting on the *Independence* case, 63 Harvard Law Review 1449 said that "since the three judges here could not under § 46 have ordered a rehearing, their action in considering the petition seems singular", (p. 1451), and that

> "* * * fuller development of the rules governing the procedure by which the hearings are granted or denied seems both necessary and practicable. * * * perhaps formal petition of counsel, as in the instant case, is the most suitable method for initiating a hearing en banc in a particular case. * * * The petition should, it seems, be entitled to such consideration that denial of the petition results only when a majority of the individual judges are unwilling to grant it." (p. 1450)

Although certiorari was denied in the *Independence* case, the procedure of two judges denying a petition addressed to the whole court has not been repeated in the Ninth Circuit or elsewhere, so far as known. Instead, in *Kronberg v. Hale*, 181 F.2d 767 (Feb. 1950), a new procedure was initiated in the Ninth Circuit—that of striking a petition for rehearing en banc "as being without authority in law or in the rules or practice of the

---

[18] *Commercial National Bank in Shreveport v. Connolly*, 177 F.2d 514 (1949), and *United States v. Sentinel Fire Ins. Co.*, 178 F.2d 217, 239 (1949). In each of these cases there was disagreement whether a retired circuit judge was entitled to vote, on a petition for rehearing en banc, but none that only circuit judges could do so.

court."[19] Three times since, including the present case, an identical order has been made in the same circuit, solely on the authority of *Kronberg*, by panels each consisting of one circuit judge and two district judges.[20]

PETITIONS FOR REHEARING EN BANC ARE ADDRESSED TO THE ENTIRE COURT AND SHOULD NOT BE STRICKEN BY A PANEL.

No authority may be found elsewhere for this practice of declining to entertain a petition for rehearing en banc and of permitting two judges to prevent a litigant from even reaching the ear of the court.

Since the statute provides for a rehearing en banc, there must be a procedure whereby a litigant may request a court to take the action the law authorizes it to take. The *Robinson* case, supra, necessarily so holds.

And since hearings en banc can only be ordered by a majority of the active circuit judges, a litigant must be entitled to have his request presented to all those judges for consideration and action.

If there is lack of authority for petitions for rehearing en banc "in the rules of the court," the court should provide a procedure whereby the authority granted by Title 28 U.S.C., Sec. 46(c) may be invoked.[21]

---

[19]Although certiorari was applied for and denied in *Kronberg v. Hale*, the point was not raised.

[20]The other two instances are *Freuhauf Trailer Co. v. Myers*, 181 F.2d 1008, and *Northwestern Mutual Life Insurance Co. of Milwaukee v. Gilbert*, 182 F.2d 256.

[21]On August 16, 1948, Mr. Henry P. Chandler, Director of the Administrative Office of the United States Courts, transmitted to the Courts of Appeal the Final Report of the Committee on Codification and Revision of the Judicial Code. This report states the contents of Section 46(c) and adds, "these new provisions will call for changes in the rules of each of the Circuit Courts of Appeals." But the rules of the Ninth Circuit were not changed except as to the name of the court and the title of the Chief Judge.

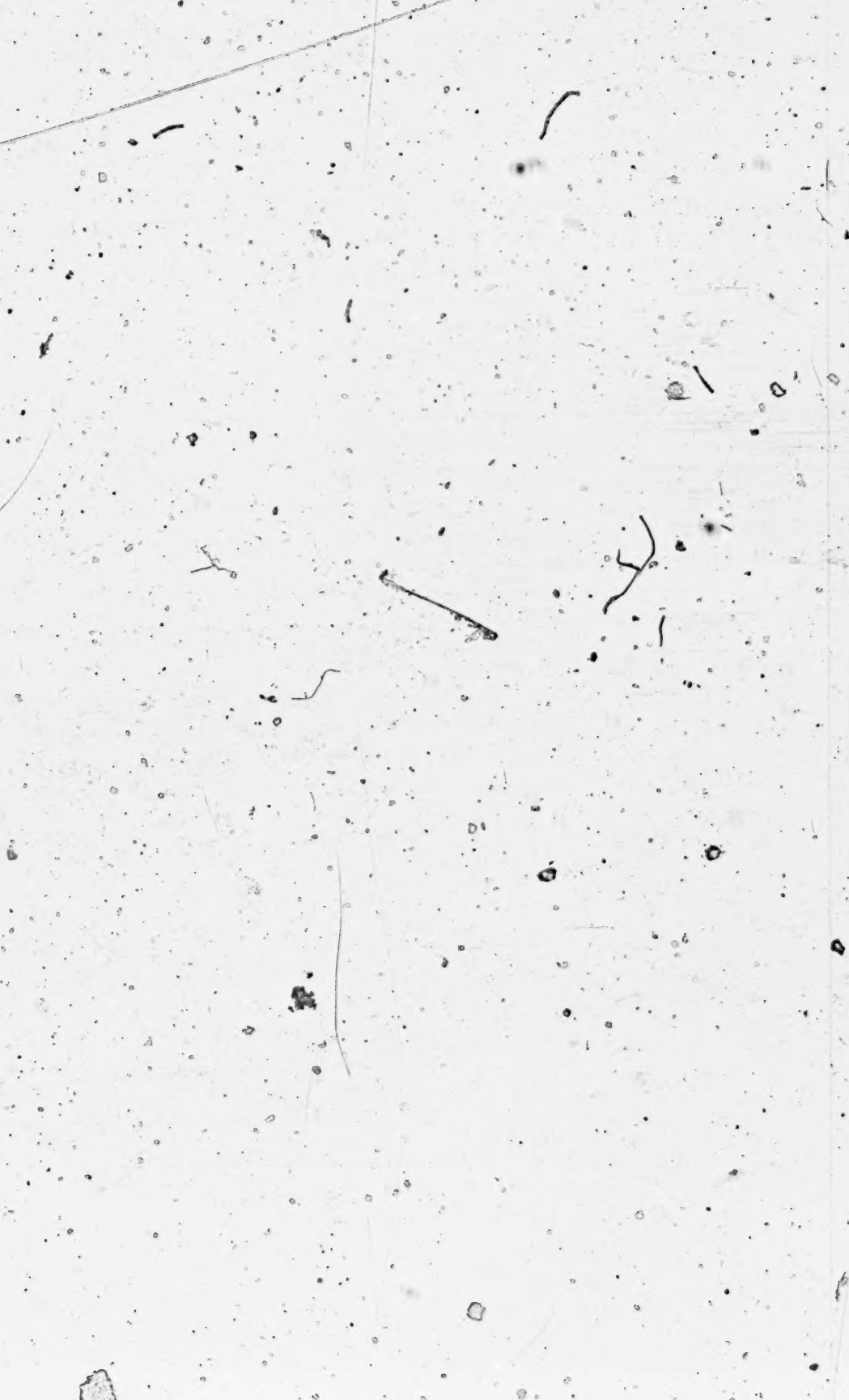
CONCLUSION

We respectfully submit that this petition for certiorari should be granted.

Dated: San Francisco, California.
June 19, 1952.

HERMAN PHLEGER
MOSES LASKY
FRANK C. NICODEMUS, JR.
NORRIS DARRELL
Attorneys for Petitioners

(Appendix follows)



APPENDIX

STATUTES INVOLVED

1. Internal Revenue Code, Section 141.

"(a) *Privilege to file consolidated income and excess-profits-tax returns.* An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making consolidated income and excess-profits-tax returns for the taxable year in lieu of separate returns. The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. The making of a consolidated income-tax return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated returns shall include the income of such corporation for such part of the year as it is a member of the affiliated group. * * * *

"(b) *Regulations.* The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making consolidated income- and excess-profits-tax returns and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income- and excess-profits-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. * * *

"(c) *Computation and payment of tax.* In any case in which consolidated income-tax and excess-profits-tax returns are made or are required to be made, the taxes shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under subsection (b) prescribed prior to the last day prescribed by law for the filing of such returns; except that the tax imposed under section 15 or section 204 shall be increased by 2 per centum of the consolidated corporation surtax net income of the affiliated group of includible corporations. * * *

"(d) *Definition of 'affiliated group'.* As used in this section, an 'affiliated group' means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

"(1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

"(2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of at least one of the other includible corporations.

"As used in this subsection, the term 'stock' does not include nonvoting stock which is limited and preferred as to dividends.

* * * * * * *"

2. Internal Revenue Code, Section 730.

Relating to excess profits tax, this is similar to Section 141.

3. Internal Revenue Code, Section 23.

"*Deductions from gross income.* In computing net income there shall be allowed as deductions:

* * * * * * *

"(g)(2) *Securities becoming worthless.* If any securities (as defined in paragraph (3) of this subsection) become worthless

during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.

* * * * * * *

"(4) *Stock in affiliated corporations.* For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purposes of this paragraph a corporation shall be deemed to be affiliated with the taxpayer only if:

"(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and"

4. Internal Revenue Code, Section 52.

"* * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control."

5. Title 28 U.S.C., Section 46(c).

"Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

6. R.C.P., Rule 52(a).

"In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

7. Treasury Regulation 104.

"Sec. 23.1. *Privilege of Making Consolidated Returns.*

"(a) Sections 141 and 152, as amended, give to the corporations of an affiliated group the privilege of making a consolidated return for the taxable year in lieu of separate returns. This privilege is given, however, for taxable years beginning after December 31, 1941, upon the condition that all corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to these regulations, and any amendments thereof duly prescribed prior to the last day prescribed by law for the filing of the return; and the making of the consolidated return is considered as such consent. * * *"

Sec. 23.15(b): *Liability of a Corporation in Bankruptcy or Receivership.*

"If, at the time of filing a consolidated return, one or more, but not all, of the members of the affiliated group are in bankruptcy under the laws of the United States or in receivership in any court of the United States or of any State, Territory, or the District of Columbia, then the liability under paragraph (a) of each such member of the group with respect to the period covered by such return shall not exceed such portion of the consolidated tax liability for such period as the several corporations included in the consolidated return may, subject to the approval of the Commissioner, agree upon, or, in the absence of such an agreement, an amount equal to its liability for such year computed as if a separate return had been filed."

Sec. 23.16(a): *Scope of Agency of Common Parent Corporation.*

"Except as provided in paragraphs (b) and (c) of this section—

"The common parent corporation shall be for all purposes, in respect of the tax for the taxable year for which a consolidated return is made or is required, the sole agent, duly authorized to act in its own name in all matters relating to such tax, for each

corporation which during any part of such year was a member of the affiliated group. The corporations, other than the common parent, shall not have authority to act for or to represent themselves in any such matter. * * *"

8. Treasury Regulation 109.

Relating to excess profits tax, this is similar to T. R. 104.

Due service and receipt of a copy of the within is hereby admitted this..... ....day of June, 1952.

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Attorneys for respondents The Western Realty Co.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Respondents.

Reply Brief in Support of Petition for Certiorari

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SUBJECT INDEX

Page

I. The Court Below Exceeded Its Appellate Office and So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for This Court's Power of Supervision, in That It Found Facts Ab Initio to Affirm a Judgment Which It Held to Be Non-Sustainable on the Legal Theories Applied and the Facts Found by the Trial Court 3

The Court of Appeals Did Make Findings Ab Initio 4

Respondent's Statement of the Case Shows That the Court of Appeals Made Findings 6

II. Respondent Seeks to Inject a False Issue, i.e., Whether Petitioner's Claim Is Barred Because Not Presented to the Bankruptcy Court in the Reorganization Proceedings 7

Respondent Is the Same Corporate Entity That Went into Bankruptcy, but Its Former Stockholders Were Completely Wiped Out 9

III. On the Substantive Question Whether a Former Parent Corporation Must Join in Consolidated Federal Tax Returns with a Former Subsidiary So That Losses of the Former May Be Used to Extinguish the Tax Liabilities of the Latter Without Accounting for the Benefit Thus Received 10

There Is an Important Federal Question 10

The Court of Appeals Laid Down a General Principle Concerning the Duty of Affiliates to Give Tax Credits to Each Other 12

Rights Do Not Depend upon the Owner's Ability to Employ Them 13

IV. It Was Error to Deny Petitioner a Right to Petition for Rehearing In Banc 19

The Ninth Circuit Holds That a Court of Appeals Has No Power to Grant a Rehearing In Banc Unless the Three-Judge Panel Approves 15

Direct Conflict with the Statute 15

Conflict with the District of Columbia and Third Circuits 16

Page

The Ninth Circuit Apparently Retains the Views This Court Disapproved in 1941 17

The Judges of the Ninth Circuit Appear to Have Three Different Views 19

Apprehension That the Court Would Be Overburdened Should Not Result in Denial of All Right to a Litigant to Petition for a Rehearing In Banc 20

No Study of Long Records Should Be Required, in Passing on a Petition for Rehearing In Banc, if the Court of Appeals Confines Itself to Its Proper Appellate Office 22

Since a Court of Appeals Has Power to Grant a Rehearing In Banc, the Litigant Should Not Be Denied the Right of Petition 23

Conclusion 23

TABLE OF AUTHORITIES CITED

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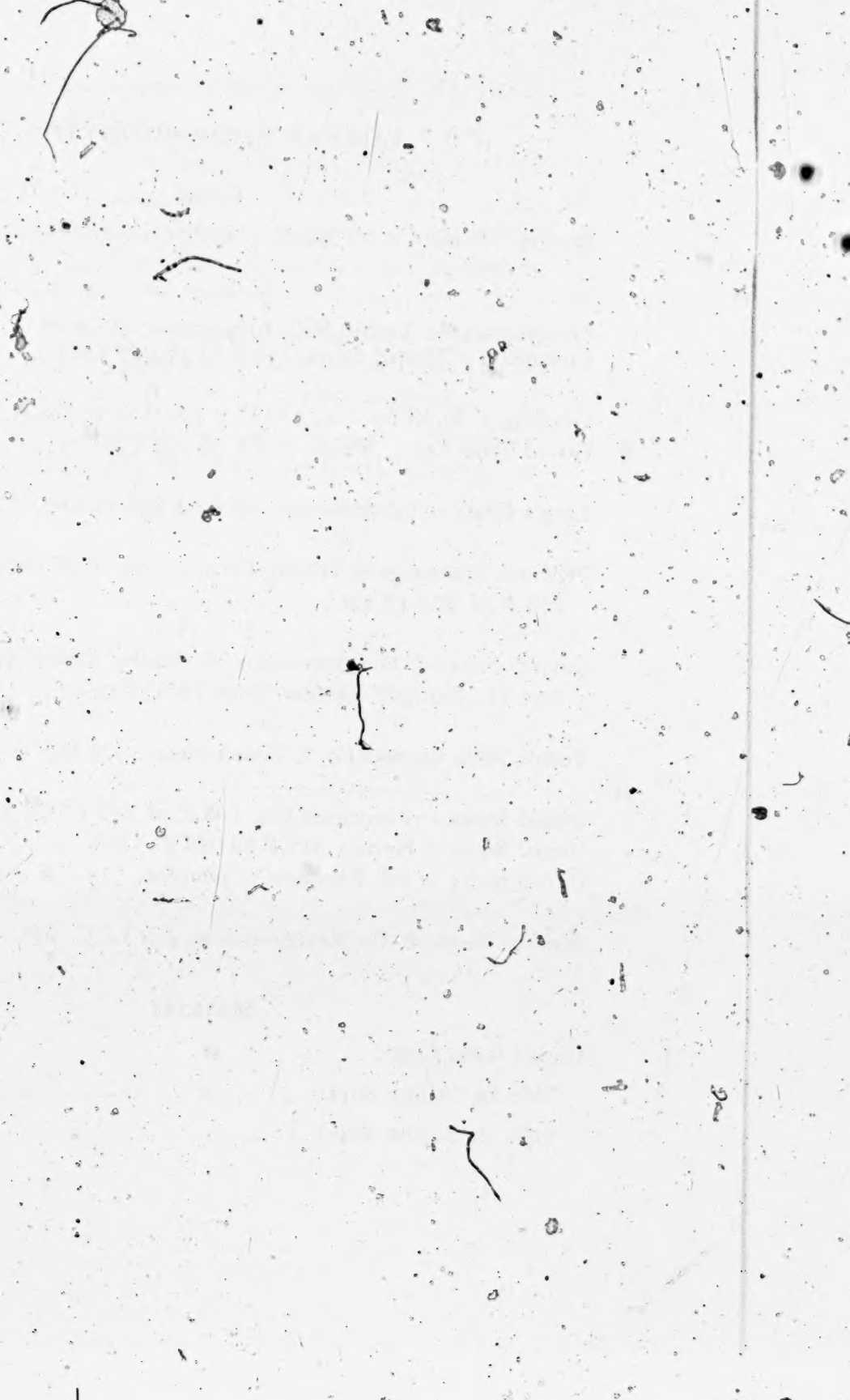
	Pages
Bradley Mining Co. v. Boice, (Ninth Circuit, August 27, 1952)	19, 20, 21, 22
Commissioner v. Textile Mills Corporation, 117 F.2d 63	18n
Crutchfield v. United States, 142 F.2d 170 (9 Cir.)	18, 19
Ginsberg v. Royal Ins. Co., 179 F.2d 152, 154 (5 Cir.)	3n
Girard Trust Co. v. Windt, 178 F.2d 359 (2 Cir.)	3n
Lang's Estate v. Commissioner, 97 F.2d 867 (9 Cir.)	17, 20
Petterson Lighterage & Towing Corp. v. New York Central R. Co., 126 F.2d 992 (2 Cir.)	3n
Sawyer, Secretary of Commerce v. R. Stanley Dollar, et al., U. S. Sup. Ct., No. 247, October Term 1951	16
Textile Mills Corporation v. Commissioner, 314 U.S. 326	17, 18
United States v. Aluminum Co., 148 F.2d 416 (2 Cir.)	3n
United States v. Forness, 125 F.2d 928 (2 Cir.)	3n
United States ex rel. Robinson v. Johnston, 316 U.S. 649	18
Western Pacific R. Co. Reorganization, 233 I.C.C. 409	11

STATUTES

United States Code:	
Title 28, Section 46(a)	15
Title 28, Section 46(c)	2, 15, 17



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Respondents.

Reply Brief in Support of Petition for Certiorari

When the petition for certiorari was filed herein on June 23, 1952, the Court of Appeals had not yet acted upon our petition for leave to file a motion to reinstate a petition for rehearing in banc, which had been stricken on January 30th, by the order of two judges, as unauthorized in law.

On April 19th, we applied for and received from Mr. Justice Douglas an extension to June 27, 1952, in which to petition for certiorari, in order to give the court below an opportunity to pass on the pending petition. But it finally became necessary to file without awaiting action by that court.

Emphasis in quotations is supplied unless otherwise indicated.

Thereafter, on July 9, 1952, recognizing the importance of the question presented, the court did act, all seven active circuit judges participating. The importance of the question was stated thus by the court (R. 2289):

> "On March 10, 1952, the Western Pacific Corporation presented the petition for leave described in the caption. In its supporting brief it asserts that it is its right under the law to have its petition for rehearing considered and acted upon by all the circuit judges. On order of a majority of the circuit judges, the court has been assembled in banc for the purpose of announcing the principles of law and practice it deems applicable in respect of in banc hearings. This course is thought appropriate in order that litigants and the bar may be advised not only of the position taken by the court but of the reasons for it."

With Chief Judge Denman dissenting, the court denied the petition for leave to file the motion. Copies of the majority and dissenting opinions are before this Court in a Supplemental Transcript of Record (R. 2287-2311).

As the dissenting opinion of Chief Judge Denman points out, the court's holding is based on the proposition that the full court is without power to grant or even to consider a petition for rehearing in banc without the prior approval of a majority of the panel which heard the cause.

In part IV below we comment on the decision of July 9th as deciding an important question of judicial administration and doing so in conflict not only with the statute (28 U.S.C. Sec. 46 (c)) but the practice and procedure in the Third and District of Columbia Circuits. Since the court refused to entertain our motion to reinstate the petition for rehearing, the erroneous ruling to which certiorari lies is the order of January 30th. But the opinions of July 9th show the wide importance of the question and the desirability of granting a writ.

First, however, we point out the inadequacies in respondent's brief in opposition to our petition for certiorari. The theory of that brief seems to be that if it can make the issues in a case appear

to be thoroughly confused, so that time and labor will be required for its consideration and disposition, this Court will not entertain the cause.*

We believe respondent to be in error in this view. The issues presented by the petition for certiorari are clear and involve important questions of federal law and procedure as well as important questions of local law. They do not involve questions of fact. Confusion is produced only by respondent's effort to convert, and by the action of the court below in converting, an appellate court into a fact-finding body. That action furnishes the second of the three issues presented by our petition for certiorari. Because an answer to what respondent states on that issue will dispose of its attempt to confuse, we turn to it first.

I.

THE COURT BELOW EXCEEDED ITS APPELLATE OFFICE AND SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION, IN THAT IT FOUND FACTS AB INITIO TO AFFIRM A JUDGMENT WHICH IT HELD TO BE NON-SUSTAINABLE ON THE LEGAL THEORIES APPLIED AND THE FACTS FOUND BY THE TRIAL COURT.

Respondent does not attempt to justify action of an appellate court in finding facts *ab initio* to affirm a judgment which it holds to be non-sustainable on the legal theories applied and the facts found by the Trial Court† (Pet. for Cer., pp. 20-25). It merely asserts that "the findings and conclusion of the District Court were sustained" by the court below (Br. 11) and that the latter made

*For instance, respondent's brief has an Appendix II purporting to give the range of stock quotations of the Western Pacific Railroad Company from 1943 to 1952, although this appears nowhere in the record and has no possible bearing on the issues.

†In addition to cases cited in the petition, cf. L. Hand, J. in *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 F.2d 992 (2 Cir.); *Girard Trust Co. v. Windt*, 178 F.2d 359 (2 Cir.); *United States v. Aluminum Co.*, 148 F.2d 416, 433 (2 Cir.); *United States v. Forness*, 125 F.2d 928, 942 (2 Cir.); *Ginsberg v. Royal Ins. Co.*, 179 F.2d 152, 154 (5 Cir.).

no findings of its own and disapproved none of the Trial Court (p. 14). To create an impression that both lower courts decided the case on the same ground, it asserts that both found that plaintiff's claim had no equity (Br. 10, 11, 14), and it notes the Court of Appeals' statement (Br. 11, 14) that "We agree with the principal holding of the trial court * * *." But this "principal holding" was merely the ultimate decision that plaintiff recover nothing. While both courts concluded that equity, i.e., "the law", did not entitle plaintiff to recover, they had totally different views of what the controlling principles of law were and rested on totally different views of the facts.

The Court of Appeals Did Make Findings Ab Initio.

The two courts agreed upon the ultimate decision, but they wholly disagreed upon the grounds of that decision, both factual and legal. This is pointed out by Judge Fee in his dissent (R. 2239-2241, et seq.), and it is perfectly clear from a reading of the decisions. The majority opinion, addressing itself to Judge Fee's objection that it was supplying new findings to support the judgment, did not deny the fact but asserted a power to do so by saying that "findings are not a jurisdictional requirement of appeal which this court may not waive" (R. 2236).

The District Court felt that respondent had defrauded the Treasury* and that a court should not lend its aid to determine who should have the avails of the fraud.† Wholly disagreeing

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*It said, "If I had the power * * * I would order these taxes paid to the United States" (R. 270).

†It stated its main ground of decision as follows:

"To assume * * * that the Congress intended by 23(g)4 to statutorily authorize what was done in this case, is to attribute plain stupidity to the Congress of the United States * * *

"But here the inexplicable occurred. For $4,144,828, the United States released $21,346,567 in taxes upon a basis which is completely incomprehensible. The tax 'escape' invites a type of scrutiny which this Court is powerless to give it.

"Obviously the Court cannot pass judgment upon the validity of the tax compromise and settlement. It is now closed. It is final and

with this view, the Court of Appeals, by a two-to-one decision, held that the former parent had a fiduciary duty to join in a consolidated return and give its former subsidiary the benefit of its tax loss of $17 million without any consideration whatever.

Respondent asserts that no problem of findings was raised in the Court of Appeals, since we assigned no error for failure to find, and our opening brief stated that "the facts * * * are not in dispute" (Br. 14, 15). The facts which in our submission require judgment for plaintiff are not in dispute; the facts found by the Trial Court require such judgment. The vice of the Court

---

cannot be reopened except for fraud. [R. 270]

* * * * * * * *

"Perhaps it may be said that it is impertinent for the Court to concern itself with a closed tax transaction and agreement such as this. But if equity principles are our guide, then this tax settlement is of the web and woof of the issue to be decided. Equity has no precise boundaries, and certainly not in this unique controversy.

"* * * this so-called 'saving' is inextricably entwined with the equities. Its very nature shapes and molds these equities. It is a 'pot of honey equally attractive to principals and advocates.' When equity is invoked to divide or distribute the 'pot', it cannot be blindfolded as to the origin or nature of the 'honey'.

"* * * in my opinion, the tax escape was erroneous and unjust. It cannot be cured by committing the further inequity of distributing the gain thus made to others.

"Debtor having made good its 'escape', now comes plaintiff and prays for a share, if not all, of that which 'escaped'. Whether there was, or was not, 'duality of control' respecting the directorates of the two companies, appears to me to be not too important. True, there is a preponderance of the evidence in favor of the plaintiff's contention of 'duality of control'. Be that as it may, I am compelled to rest decision upon the fundamental issue of the justice and equity of plaintiff's right, if any, to be paid for that which was escaped. Analytically speaking, what the plaintiff seeks is to collect from the defendant an amount equal to all, or a substantial part of, taxes that the debtor did not pay to the United States." (pp. 271, 272)

The Court of Appeals disagreed with this whole line of reasoning (R. 2227, 2228).

Contrary to respondent's assertion, the theory that the Treasury should not have permitted tax savings was not dictum; it is the fundamental ground of one of the two reasons on which the District Court concluded that there was no equity in the cause. It is erroneous not only for the reason stated by the Court of Appeals, but also, as noted in the opinion of Judge Fee, because it left the proceeds with the "active wrongdoer" (R. 2240, and fn. 4 on 2250).

of Appeal's decision is that, advancing an entirely different theory of law under which a new range of facts became material, it then proceeded to find them for itself and found them inconsistently with the facts as determined by the trial court or as it made clear it would have determined them.

Respondent's Statement of the Case Shows That the Court of Appeals Made Findings.

Respondent's own statement of the case belies its claim that the Court of Appeals made no findings, since its characteristic feature is the assertion, as fact, of matters which are so declared by the Court of Appeals but were either not found upon by the trial court at all or are contrary to what it did find; e.g., assertions about past practice (Br. 4, 5), and statements that the tax transactions were handled in the ordinary course of business (Br. 6), that the tax savings were not accomplished by respondent's taking over and managing petitioner's affairs (Br. 7), and that respondent did not dominate and control petitioner for its own benefit. The District Court explicitly refrained from finding on the issue of domination because it considered is to be irrelevant on its theory of the law. Yet it made it clear that, if material, it would have found such control, domination and taking over.

Respondent asserts (Br. 29) that

> "The District Court recognized the fact of dual relations but concluded that 'The so-called "duality of control" much discussed and emphasized, is not important in resolving the tendered issue' (R. 274). The Court of Appeals expressly approved (R. 2235)."

But the two courts were not saying the same thing. The Trial Court said that, if it were material, it would find "duality" and that by "duality" it meant that respondent controlled petitioner's board of directors and by reason of that control caused the consolidated returns to be filed for its own benefit (Pet. 21). The Court of Appeals, on the other hand, held the fact to be relevant and found that there was no domination and control.

The issue presented to this Court is not which fact is true but whether a Court of Appeals has a right to make such findings.

Respondent's further assertion (Br. 29) that petitioner "has no standing to exploit the domination theory in view of its expressed denials of all allegations of 'domination and control' by its answer to the Complaint in Intervention in this cause," is without any justification. Subsequent to that answer, petitioner filed a supplemental bill of complaint (R. 208) in which it alleged such domination and control for respondent's benefit and in entire disregard of petitioner's rights. As the opinion of the Trial Court pointed out, in the supplemental bill, petitioner "further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of defendant" (R. 264). This position was maintained throughout the trial and afterwards. In the light of this record, respondent's assertion is not only without merit; it is inexplicable.

II.

RESPONDENT SEEKS TO INJECT A FALSE ISSUE, I.E., WHETHER PETITIONER'S CLAIM IS BARRED BECAUSE NOT PRESENTED TO THE BANKRUPTCY COURT IN THE REORGANIZATION PROCEEDINGS.

Respondent also seeks to introduce a false issue by suggesting that petitioner's rights were cut off, even though valid, because not presented to the Bankruptcy Court in respondent's reorganization proceedings.

This defense was strenuously urged in both courts below, but it was adopted by neither. Each held for respondent on different grounds and it is no answer to a petition for certiorari to argue that the particular judgment might be supported on a wholly different basis not stated.

Only one judge even adverted to respondent's contention, Judge Fee, and he did so to state that it had no merit (R. 2240-2241). That this is so is shown by the following:

First, petitioner's claim arose after the revesting of the assets in respondent and the trustees' surrender to it of the property in December, 1944 (R. 2215). The claim for refund of 1942 taxes, as well as the 1944 tax return, was filed thereafter (R. 2217). The trustees had nothing to do with either. Respondent argues that the income to which the returns pertained accrued while the railroad was being operated by the trustees. But respondent assumed the obligation to pay the taxes on that income by an "Assumption Agreement" (R. 1711-1713), required of it under the revesting order (R. 36, 40, 76). The liability thereafter remaining was respondent's, not the trustees'. It was the reorganized respondent, not the trustees, who then utilized petitioner's loss and rights to avoid paying taxes and to discharge that liability.

As respects the 1943 taxes, as well as those just mentioned, a claim for an accounting of the tax savings could not accrue before there were tax savings, i.e., before August, 1947, when the Treasury accepted the returns pursuant to a settlement wholly negotiated and effected by respondent after it emerged from the reorganization, as the Trial Court found (R. 262, 468; Resp. Br. 6).

Even if it could be said that the trustees had become liable to petitioner upon the filing of the consolidated returns for 1943, respondent assumed that liability by the Assumption Agreement. The revesting order discharged various liabilities but excepted those which it directed to be assumed, and pursuant thereto respondent executed an assumption agreement in which it agreed to

> "2. *Assume* any and all outstanding current liabilities and obligations incurred by said Trustees * * * and *generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business*, including liabilities and obligations hereafter arising up to midnight December 31, 1944." (R. 1711, 1713.)

Evidently respondent does not apply the same argument to the claim of its tax counsel. They were employed by the trustees.

rendered services to the trustees, presented no claim in bankruptcy, yet were paid $300,000 by respondent for their services in conceiving and consummating the tax saving (R. 1749).

Second, respondent succeeded to and now possesses intact the $10,000,000 funded reserve of which most had been set aside by the Trustees to discharge the taxes in question and which later, after the taxes were discharged by the use of petitioner's loss, was set aside by respondent to pay any judgment in this action.

Third, it is ungenerous as well as unfounded to suggest that the Bankruptcy Court did not intend that the trustees should meet any just obligations incurred by them.

Respondent Is the Same Corporate Entity That Went Into Bankruptcy, but Its Former Stockholders Were Completely Wiped Out.

Respondent seeks to distinguish between the "prereorganization The Western Pacific Railroad Company", the "reorganized The Western Pacific Railroad Company" and the trustees during the reorganization. This effort, coupled with its assertions that the taxes accrued while respondent was in bankruptcy and were not incurred by it, that the filing of consolidated returns was in accord with past practice, and that petitioner's interest in respondent was cut off at the outset of the bankruptcy in 1935, is in part immaterial and in part contradictory.

Respondent is the same corporate entity for whose stock petitioner paid $76 million. The assets taken over by the trustees in 1935 were revested in the same corporate entity in December, 1944. The difference is that the capital stock was owned by different people after the reorganization than before. Respondent emerged from the reorganization entirely shed of petitioner's stock interest which was wiped out by the Reorganization Plan. From the moment respondent went into bankruptcy, petitioner lost all control over and interest in it. During all the time involved in these tax returns, petitioner and respondent were complete economic strangers, and petitioner had no control whatever over respondent.

That being so, and the relationship of parent and subsidiary which formerly existed having been completely and permanently severed, how unjustifiable it is to contend (1) that former income tax procedures when the parties were still parent and subsidiary is of the slightest materiality,* and (2) that the former parent, stripped of its control and all economic interest, could be under any fiduciary duty to give away to a total stranger the sole remaining asset of its stockholders who had lost their $76 million investment.

III.

ON THE SUBSTANTIVE QUESTION WHETHER A FORMER PARENT CORPORATION MUST JOIN IN CONSOLIDATED FEDERAL TAX RETURNS WITH A FORMER SUBSIDIARY SO THAT LOSSES OF THE FORMER MAY BE USED TO EXTINGUISH THE TAX LIABILITIES OF THE LATTER WITHOUT ACCOUNTING FOR THE BENEFIT THUS RECEIVED.

On the important substantive issue, respondent's arguments may be reduced to two: (a) that no federal question is involved (Br. 12, 15) and (b) that the court below laid down no general rule but decided the case on particular equities (Br. 12, 13, 15). Neither contention is sound.

There Is an Important Federal Question.

It is little short of amazing to assert that a judgment determining the legal consequences attaching to the filing of consolidated tax returns under federal tax laws raises no question of federal concern. If that is not a federal question, it is certainly a novel and important question of equity jurisprudence and of local law arising in an exclusively federal context and is equally within this Court's certiorari jurisdiction.

In fact, it is a federal question, and it would be a perversion of the tax laws to rule, as the court below did, that the mere fact of

*The trial judge considered it not to be material. He said, "I just don't see the point of what any affiliated company has done in the past as a matter of practice in these returns * * *. What we have in this case is not concerned with that" (R. 1377).

past affiliation gives former subsidiary corporations a right to appropriate their former parent's tax credits to extinguish their tax liabilities.

Like its competitor railroads, the Southern Pacific and the Santa Fe, respondent was expected to pay federal taxes on its war-swollen traffic. There is no reason in public policy why this railroad, emerging from bankruptcy, should not pay taxes like any other. When the Interstate Commerce Commission approved the Reorganization Plan, it provided that respondent should pay its taxes (233 I.C.C. at 455). The Bankruptcy Court's "revesting order" provided that it should do so (R. 36, 40). The amendment to the Revenue Act which first permitted the use of petitioner's stock loss to achieve the tax savings here involved was enacted after the Reorganization Plan was promulgated. The only reason of public policy that excused respondent from paying its taxes was that petitioner's stockholders had lost $76 million and the resulting tax remission was to ameliorate that loss.

Had the parties filed consolidated returns and paid the taxes before tax counsel had discovered the utility of petitioner's loss, and if claims for refund had then been filed based on the use of that loss,* the refund would have come, under the tax laws, to petitioner, and it would now be in possession of the $17 million. The result cannot be different merely because petitioner's credit was utilized when the returns were first filed.

Respondent attempts to answer the argument that Congress intended tax benefits arising from losses to ameliorate those losses, by its prejudiced assertion that Congress did not intend to confer special benefits on holding companies (Br. 16, 17). Congress intended precisely that, for none but a parent company could suffer the loss that Congress made allowable. However, Congress certainly did not intend, when it granted the loss allowance to the parent, to confer windfall benefits on one-time subsidiaries. The Congressional purpose in allowing consolidated returns was

*This was in fact done for 1942, and the parties stipulated and the Trial Court considered that the refund had been allowed in part (R. 163, 169).

similarly to recognize an economic unity and thereby to ameliorate the losses of the party economically suffering them, again the parent and not the subsidiary.

Neither does respondent answer petitioner's claim when it deprecates "the sort of bargaining about tax losses which is demanded here" (Br. 25). That principle applies to arrangements made to prevent the accrual of taxes. It has no application to respondent's efforts to evade the debt it incurred when it used petitioner's property right to discharge its own tax liability.

The Court of Appeals Laid Down a General Principle Concerning the Duty of Affiliates to Give Tax Credits to Each Other.

Respondent's next major argument is that the court laid down no general principle concerning the obligation of one affiliate to join in consolidated returns with another and to confer upon it, gratis, the tax advantage of its losses. It asserts that the court's decision that it was the former parent's duty to join in the returns was rested on the special equities of the case (Br. 12, 13, 15). In truth, the court laid down a sweeping rule as to the obligation of any affiliate, having a loss, to another, having income, regardless of which was subsidiary or parent. For example, respondent proffers as one of the special equities that petitioner had been respondent's stockholder and that respondent's creditors received less than full payment of their debts in the reorganization. But no such consideration entered into the court's decision. On the contrary, it said that if respondent had the loss and the petitioner the gain, petitioner could have compelled respondent to join in consolidated returns and to confer the benefit upon it (R. 2233).

Nor does the circumstance that respondent's creditors were not paid in full constitute any special equity against petitioner. Creditors of a reorganized company, after wholly supplanting the former shareholders as they did here, no matter under what sanction of law, have no right to appropriate still other property of the former shareholders. The reorganized respondent certainly could not have with impunity seized $17 million cash of

petitioner to pay its taxes, merely because the prereorganization creditors had not been paid in full.

In asking that the benefit of the tax savings be adjudged to belong to it, petitioner does not remotely seek something in the nature of equity or value for its former stock ownership. It accepts in full the consequences of the plan of reorganization. The plan was drastic and wiped out the entire stock ownership of the old stockholders. But its consummation, having stripped petitioner of that ownership, left it with something in its place—a huge loss which had a tax utility. It was then that respondent went beyond the plan and seized what petitioner had left. Respondent emerged from the reorganization with a just obligation to pay its taxes and with more than ample funds to do so. If petitioner is denied recovery, the new owners of respondent will not only have taken ownership of the company from petitioner, as the plan contemplated, thereby inflicting a $75 million loss, but they will also have taken from petitioner, now an economic stranger impoverished for respondent's benefit, petitioner's tax credits to enrich their position by an additional $17 million.

How absurd and how unmoral to contend that because an unfortunate corporation has lost its total investment in its subsidiary the bankruptcy laws, after completely wiping out that investment, intended further stripping of the unfortunate owner of its sole remaining asset.

Rights Do Not Depend Upon the Owner's Ability to Employ Them.

Little need be said of the other alleged "special equities." One of them, the so-called past practice, has already been discussed. The major one on which respondent relies is that petitioner has no rights because it was not harmed, "it had no use for its tax credit"—directly contrary to the decision of the Fifth Circuit in banc in the Shreveport Bank Cases (see Pet. for Cer., 18). It is strange doctrine that one may be despoiled of his rights simply because he has no use for them. Those rights were

worth $17 million to respondent, to pay its taxes, as valuable to it as $17 million in gold. They were so valuable that respondent was happy to pay a $300,000 fee to its tax counsel, who discovered their value and used them. Petitioner's right was property to the extent that it was usable and used for respondent's benefit.

The "paradox" in the case arises from the fact that petitioner is poor and has no funds, that its officers and the majority of its directors were in the pay of respondent and did its bidding, and that respondent, emerging from bankruptcy as a prosperous railroad enjoying war time earnings, escaped the payment of taxes because it appropriated its former parent's sole remaining asset.

If petitioner were a wealthy corporation, one could not even conceive of respondent appropriating its tax credit and paying nothing for it. Petitioner's rights cannot depend on its wealth.

IV.

IT WAS ERROR TO DENY PETITIONER A RIGHT TO PETITION FOR REHEARING IN BANC.

The Court of Appeals' July 9th opinion, after noting the importance of the question of rehearings in banc, makes clear that "in the exercise of *its uncontrolled discretion* the court has declined altogether to entertain petitions of litigants for such hearings" (R. 2295). "From this time forward," it concludes,

> "petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing." (R. 2296)

The issue is not whether a rehearing in banc should be granted in a particular case, nor yet what criteria a Court of Appeals may validly establish by rule to govern the granting of such rehearings. The issue is more fundamental. It is whether the court has the power to grant a rehearing in banc and whether the litigant has the right to gain the court's ear in order to call its attention to considerations that should impel it to grant such a hearing. The Ninth Circuit answers "no" to both questions.

The Ninth Circuit Holds That a Court of Appeals Has No Power to Grant a Rehearing In Banc Unless the Three-Judge Panel Approves.

The court below assigns two reasons for refusing to entertain petitions for rehearing in banc.

The first reason given is that once a case has been assigned to a panel of three judges, it belongs to them, and that it would be an act of intrusion for the remainder of the court to participate, unless at least two of the three judges should vote to relinquish the case to the whole court. Referring to the provision of 28 U.S.C. Sec. 46(a) that "Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs," it asserts (R. 2294) that

> "If regard be had for this mandate circuit judges *may not intrude themselves,* or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit"

and after assignment to a division,

> "If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals."

Again, it states (R. 2294):

> "A petition for rehearing in any such case [i.e., one assigned to and decided by a panel of three] whatever its form or wording, *must necessarily be treated as addressed to* and is solely for disposition by the court or division to which the case was assigned for determination."

This reasoning is equivalent to a statement that a three-judge panel, once constituted, is the court, and the other circuit judges are powerless to take over the cause even should they feel inclined to do so.

Direct Conflict With the Statute.

Thus the court below recognizes that it has the power to direct a hearing in banc but reasons that the power is lost by an assign-

ment to a panel and that the court has no power to grant a rehearing in banc unless the panel approves.

This is contrary to the statute. 28 U.S.C. Sec. 46(c) provides:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing *or rehearing before the court in banc* is ordered by a majority of the circuit judges of the circuit who are in active service."

The statute draws no distinction between the power to order a hearing in banc and the power to order a rehearing in banc.

Conflict With the District of Columbia and Third Circuits.

We have quoted the statement by the court below that a petition for rehearing in a case decided by a panel must necessarily be treated as addressed to that panel alone and subject to its sole disposition.

Contrast this with the views of the District of Columbia Circuit. They are shown by this Court's records in *Charles Sawyer, Secretary of Commerce v. R. Stanley Dollar, et al.*, No. 247, October Term 1951. There the Attorney General of the United States filed a motion addressed to the whole Court of Appeals for a hearing in banc, stating, "This motion is made pursuant to 28 U.S.C. (Sup. II) 46(c)." (No. 247, Oct. 1951 Term, R. 52.) Judge Clark, presiding, responded that the statute

> "* * * allows you to file a motion for rehearing before the Court en banc, at which time the full court passes upon it." (No. 247, Oct. 1951 Term, R. 61)

The panel then presented the motion to the whole court and later announced,

> "The motion for hearing in banc has been considered by the full Court, and denied" (No. 247, Oct. 1951 Term, R. 62).

We are advised that the same practice obtains in the Third Circuit.

The Ninth Circuit Apparently Retains the Views This Court Disapproved in 1941.

The problem is the identical one, and again there is the identical conflict between the Ninth Circuit, on the one side, and the Third Circuit, which led this Court to grant certiorari in *Textile Mills Corporation v. Commissioner,* 314 U.S. 326. The problem was there stated to be

> "whether a Circuit Court of Appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc*",

and this Court stated that

> "We granted the petition for certiorari because of the public importance of the * * * problem and the contrariety of the views of the court below * * * and the judges of the Circuit Court of Appeals for the Ninth Circuit (*Lang's Estate v. Commissioner,* 97 F.2d 867) as respects its solution."

The reasons assigned by the court below for refusing to entertain petitions for hearing in banc are the same reasons why the same court held in 1938 in *Lang's Estate v. Commissioner,* 97 F. 2d 867, that a Court of Appeals lacked power to sit in banc. Although this Court, in *Textile Mills Corporation v. Commissioner,* 314 U. S. 326, held the Ninth Circuit to be in error, and although Congress thereafter enacted 28 U.S.C. Section 46(c) to eliminate any basis for the reasoning that prompted the action of the Ninth Circuit, that court appears to adhere to its original position.*

In *Lang's Estate v. Commissioner,* the Ninth Circuit reasoned that a court had no power to sit in banc because

> "Any other interpretation of the legislation would lead to grave difficulties of administration. If, because there are four or six circuit judges in a circuit, a four or six-judge court were deemed created by Congress, *then each judge may well*

*In *Lang's Estate v. Commissioner, supra,* Judge Denman, now Chief Judge, wrote the opinion, but as shown by his dissenting opinion of July 9th in this cause, he now gives full effect to this Court's reasoning in the *Textile Mills* case and to the policy expressed by Congress in 1948.

have the right and the duty to demand his place in the hearing on each appeal." (p. 870)

Since this Court thereafter held, and Congress declared, that there is power to sit in banc, it would follow, on the Ninth Circuit's own reasoning of 1938, that the other judges do have a right, and in a proper case the duty, to sit. Yet the court now fails to follow the logic of its own prior statements.

This Court in *Textile Mills Corporation v. Commissioner,* 314 U. S. 326, agreeing with the Third Circuit,* said of the view of the Ninth, that it "would not only produce a most awkward situation; it would on *all* matters disenfranchise some circuit judges," [Italics are the court's] and that it would "imply that Congress prohibited some circuit judges from participation in the most important function of the 'court' (the hearing and decision of appeals)" (p. 333).

Despite this Court's decision in the *Textile Mills* case, and despite its later order to the Ninth Circuit in *United States ex rel Robinson v. Johnston,* 316 U.S. 649, to permit a petition for a hearing before the court in banc, the Ninth Circuit appears to have remained fixed in its view that a case becomes the exclusive jurisdiction of a particular panel of three judges once it has been assigned to them. For example, in 1943, dissenting in *Crutchfield v. United States,* 142 F.2d 170, Judge Denman stated:

> "The senior circuit judge still refuses to convene the court en banc *even to consider* the question of the jurisdiction of the court en banc to take over a case pending before three judges, in which judgment has been rendered by two judges

*In *Commissioner v. Textile Mills Corporation,* 117 F.2d 63, the Third Circuit disagreed with the Ninth Circuit, stating (p. 71):

> "Common sense and sound practice dictate that the five judges of this court should be in a position to decide the principles of law and practice to which the court is to be committed."
>
> "The whole cannot be less than the sum of its parts. To hold otherwise is not merely to affirm a plain contradiction in terms, but is also to destroy the authority of the court as a court and to open the way to possible confusion and conflict among its personnel and in its procedure and decisions." (p. 70)

of a three-judge panel, either on the petition of the litigant or myself, a dissenting judge of the three-judge panel.

"* * * As I understand it, the ground of the senior circuit judge's refusal is that once the three judges so assigned by the whole court to consider the case have rendered judgment, though the judgment is not the final action of the court and the case is still before the court during the period for rehearing, only the setting aside of the judgment by two or more of the three judges participating in the decision permits a petition for a rehearing en banc. That is to say, that the seven judges have resigned to two judges selected by the seven the jurisdiction to prevent a rehearing by the seven of a decision of the two not yet final." (Italics are in the original) (p. 180)

This statement made in 1943 would seem to describe the majority opinion of July 9, 1952.

The Judges of the Ninth Circuit Appear to Have Three Different Views.

In *Bradley Mining Co. v. Boice*, decided by the Ninth Circuit on August 27, 1952, Circuit Judge Pope, dissenting from an order of a panel denying a petition for rehearing in banc, stated that he disagreed with Judge Denman's interpretation of the court's decision of July 9th in the present case, which appears at R. 2296, 2297. Judge Pope thought that the full court could grant a rehearing in banc but that a litigant was not entitled to petition for such action; he believed that Judge Denman had misinterpreted the court's decision as holding that the full court lacked all power unless the panel first relinquished the cause to it. A copy of the opinions in *Bradley Mining Co. v. Boice* is attached hereto as an appendix.

Judge Pope's construction of the July 9th opinion runs counter, we submit, to the declarations in that opinion that "circuit judges may not intrude themselves * * * upon a court or division", that if the panel, or a majority of it, denies a petition for rehearing "that ends the matter", and a petition must "necessarily be treated as addressed to and is solely for disposition" by the panel.

Judge Pope's expressions in the *Bradley* case are significant as indicating that there are at least three views on the subject among the judges of the court below.

Apprehension That the Court Would Be Overburdened Should Not Result in Denial of All Right to a Litigant to Petition For a Rehearing In Banc.

The second ground stated in the opinion of July 9th for holding that petitions for rehearing in banc should not be permitted is that a contrary holding would burden the court with overwork and "completely nullify the prime statutory objective of effecting a division of the court's work" (R. 2295). But this is the same reasoning stated by the same court in *Lang's Estate v. Commissioner*, 97 F.2d 867. There, the court had said:

> "More important still, it would increase so greatly the amount of work of each individual judge that it would cause again the arrearages which the additional judges have been created to remove." (p. 870)

We do not mean to depreciate the matter of overwork. But we think it a fair submission that the apprehension should not lead to a total denial to litigants of the right of petition.

Neither the District of Columbia Circuit nor the Third Circuit finds that recognition of the litigant's right produces an intolerable burden. The Third Circuit, like the Ninth, has 7 judges, and the District of Columbia has 9.

In many cases no petitions for rehearing are filed at all. In still fewer are requests made for a rehearing in banc. Not only is the federal bar not inclined to waste time and effort, but it does possess self-restraint and a sense of professional obligation to the court. Rules of practice should not be created on the premise that the bar does not.

A petition for rehearing in banc was here filed because of the unusual combination of factors: (a) the case involved important and novel questions of law, (b) the panel had consisted of but one circuit judge and two district judges, (c) although the ma-

jority affirmed the decision of the District Court, it disapproved the District Court's reasoning and decided the cause on a wholly different ground, (d) no Circuit Judge wrote a line on the merits, and each of the three District Judges participating expressed an entirely different view of the law. The appropriateness of a rehearing in banc was indicated by the request of one of the three-judge panel that it be granted. Before such a cause should be presented to this Court upon petition for certiorari, it seemed proper that it should be brought to the notice of the entire Court of Appeals.

The art of the law is discrimination. No doubt petitions for rehearing in banc will not often be granted, and overwork may be a proper factor to consider in deciding whether to grant a petition in a particular cause. But we cannot believe that it is a logical basis for denying all right to file such petitions.

Courts are made for litigants, not litigants for the courts. The device of having an appellate court sit in divisions is but the equivalent of having a number of coordinate intermediate appellate courts answerable to another superior to them. Both devices are in common use throughout the country, and the propriety and necessity of permitting a petition to the whole court, where it sits in divisions, or to the higher court, is not only obvious, but the practice is widespread.* The certiorari jurisdiction of this Court is an example.

Unless petitions for rehearing in banc are recognized, there would be in the Ninth Circuit not one Court of Appeals but a multiplicity of them. Chief Judge Denman speaks of three panels, but in fact seven judges can be constituted into 35 different panels of three. Where District Judges sit on the Court of Appeals, as was the case here, there could be a much greater number of panels, increasing greatly the opportunity for divergent views between different panels. If there is to be an opportunity to review their decisions, there must be a right to petition for rehearing in banc

*As we are informed, in California, where there are 8 intermediate appellate courts, at least half their decisions are followed by a petition for hearing in the State Supreme Court.

unless the burden is to fall on this Court in its certiorari jurisdiction. If there is a burden on courts by reason of the quantity of litigation, it cannot be escaped. It can merely be passed from Courts of Appeals to the Supreme Court.

No Study of Long Records Should Be Required, In Passing on a Petition For Rehearing In Banc, If the Court of Appeals Confines Itself To Its Proper Appellate Office.

In *Bradley Mining Co. v. Boise,* Judge Pope explained his concurrence in the July 9th opinion on the ground that a judge should not be expected, and that the statute should not be construed as requiring him, to read long records in cases in which he has not sat in the original hearing. But a reading of a whole record should not ordinarily be necessary to pass on a petition for rehearing in banc, any more than to pass on a petition for certiorari, since the question presented is not the final decision but merely the desirability of consideration by the court. That ordinarily should turn on the kind of issues presented, not the evidence. An examination of such petitions for rehearing in banc as are filed should usually suffice to show whether they are worthy of more careful consideration. Appropriate screening rules could be adopted.*

The instant case is a good illustration. The face of the majority opinion on the merits (R. 2214, et seq.) showed that it announced a sweeping rule of law. No delving into the record was necessary to appraise the importance of that legal issue. It also showed that the majority was usurping the office of the District Court in making findings. No exploration of the record was necessary to determine the facts, because the issue was whether the Court of Appeals should or could find facts at all. No brief in opposition to the petition for rehearing was filed, so that no statement of fact was challenged. The desirability of granting a rehearing in banc was determinable on the face of the petition and the majority and dissenting opinions.

*For example, as suggested by Chief Judge Denman (R. 2307), a court might adopt a rule that a petition for rehearing in banc would not be granted unless at least one of the judges on the panel so voted.

Since a Court of Appeals Has Power to Grant a Rehearing In Banc, the Litigant Should Not Be Denied the Right of Petition.

The ground stated by Judge Pope in *Bradley Mining Co. v. Boice* for concurring in the July 9th opinion herein is that, while the court may grant a rehearing in banc, a litigant has no right to request it. This view, we submit, is not supportable. A litigant must have the right to request a court to exercise a power which it possesses and to grant the kind of relief which the law empowers it to grant. The question is not, as stated in the opinion of July 9th, whether a court may "be compelled on the petition of a losing party" to sit in banc, but whether the litigant may request the judges to do so, if they think it warranted in the particular cause.

Chief Judge Denman's dissenting opinion denominated the denial of any right to petition as "shabby treatment of the litigant" (R. 2302). The majority opinion itself uses the term "uncontrolled discretion". Whatever the characterization, and either is enough to give one pause, it would appear that to deny a litigant the right to petition a court to exercise its power is arbitrary, and our system of jurisprudence looks with disfavor on arbitrary and uncontrolled power.

Supplemental Opinion of Chief Judge Denman.

On September 11, 1952, Chief Judge Denman filed a supplement to his dissenting opinion of July 9th. A supplemental record containing it will go forward to this Court. In it he quotes a letter to him from Chief Judge Stephens of the Court of Appeals for the District of Columbia Circuit. Judge Stephens states that in his court any party to a case may, by motion or petition, request that a rehearing be held in banc and that such motion or petition is submitted to and ruled upon by all the active Circuit Judges. He also lists a number of cases where rehearings in banc have been ordered, including several ordered on the petition of one of the parties.

CONCLUSION

We respectfully submit that the petition for certiorari should be granted.

Dated: San Francisco, California
September 12, 1952.

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(Appendix follows)

APPENDIX

United States Court of Appeals
for the Ninth Circuit.

BRADLEY MINING CO., a corporation, *Appellant,* vs. EDWARD H. BOICE, *Appellee.*	No. 12,684 Aug. 27, 1952

Before: HEALY, BONE, and POPE, Circuit Judges

PER CURIAM

In this case we affirmed a judgment against the appellant, one member of the court dissenting. 194 F.2d 80. Appellant petitioned for a rehearing in banc, and rehearing was denied. Application for certiorari followed and was denied. 343 U.S. 941. Upon the coming down of the mandate appellant moved for leave to file a motion to vacate the denial of its petition for rehearing in banc and for the reinstatement of its petition. That motion is the matter before us for disposal.

The case was not in any aspect of such character as to suggest the advisability of its being heard or reheard in banc. It involved purely factual issues. Depending upon how the jury might evaluate the evidence, or how appraise the credibility of the witnesses, it was concededly a case in which both actual and exemplary damages were awardable. The charges made against the defendant, and presumably accepted by the jury as true on the evidence before it, were for conduct of a nature calculated to blast at the threshold the efforts of a young doctor to establish himself in his profession. The problem presented bore scant resemblance to Southern Pacific Co. v. Guthrie, 186 F.2d 926, and speculation as

to the probable attitude here of the judges who participated in *Guthrie* has no perceivable basis.

The judge who presided at the trial, convinced that the jury was not motivated by passion or prejudice and that its verdict, while large, was not excessive, denied a motion for a new trial.* Being ourselves disinclined to usurp the functions of the jury or to invade the province of the district judge, and being, moreover, of opinion that the judge was right in refusing to disturb the verdict, we affirmed. Appellant has had its appeal and its opportunity for certiorari or other relief in the Supreme Court. It is not entitled to pursue the process a second time.

The motion for leave to file is denied.

POPE, Circuit Judge, dissenting.

I think that a just disposition of this case requires that the appellant be granted an opportunity to reargue the case before the court sitting in banc.

In a recent opinion of this court in banc in Western Pacific Railroad Corporation, et al., appellants, v. Western Pacific Railroad Company, et al., appellees, No. 12506, handed down July 9, 1952, the court, after denying the right of a defeated litigant to require all of the judges of the court to consider a petition for rehearing of a case originally heard by a division of the court, pointed out that it recognized that certain cases are appropriate ones for consideration by a court in banc. The opinion enumerated certain types of cases which have frequently been treated in this manner.†

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*92 F. Supp. 750.

†I have a somewhat different view of the purport of the opinion in the Western Pacific Railroad Corporation case mentioned above than that which Judge Denman expressed in his dissent in that case. As I understand the majority opinion, it went no further than to hold that a disappointed litigant in the position of the appellant in that case could not, by filing a petition for rehearing in banc, require all the judges of the court to consider and pass upon that petition. I concurred in that opinion because in my mind a contrary holding would mean that the court would, as a practical matter, lose the opportunity which it now has to expedite its disposition of

In my opinion the circumstances make this particular case, in the light of the views expressed by all the members of the court with respect to some of the problems here involved, one in which a hearing in banc should be granted. I think that we, as members of this division which heard the case originally, should recommend a hearing in banc and by our action invite all the judges to participate.

My views in this respect are not based upon the mere fact that I have disagreed with the result reached in the majority opinion here, nor upon my feeling that a grave miscarriage of justice has been given the stamp of approval by this court. Rather my views are based upon the demonstrable probability that were this case heard by all seven judges a different result would be achieved. A study of the views expressed by all seven of the judges in Southern Pacific Company v. Guthrie, 186 F.2d 926 (1951), will disclose why I think it evident that a hearing in banc would produce a different result.

As I have pointed out in my previous dissent in this case, the verdict upon which judgment has been entered here has the vice not merely of being excessive in amount but its validity is tainted by the errors in injecting into the case matters highly prejudicial and calculated to arouse the passion and prejudice of the jury. It is a stronger case than was Guthrie.

The point that I am making is that in any case where the division hearing the matter can say that there is a fair probability

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cases through the hearing of matters before divisions. For instance, in the present case the record fills four printed volumes comprising nearly 2000 pages and I know what a task it was to read that whole record. I do not think the statute intended that I, not a member of the division which heard the Western Pacific case, should have to read all the record in that case, as I might well find necessary in order to vote intelligently upon the petition.

There is language in subdivision (c) of § 46 of Title 28 which would seem to grant to a majority of the circuit judges of the circuit the right to order a hearing or rehearing in banc in any case, a procedure which I am of course not proposing here. That is a question which was not determined by the majority opinion in the Western Pacific case, although Judge Denman seems to think that it was. Upon that question I reserve judgment until such time as determination becomes necessary.

that all seven of the judges would arrive at a different conclusion than that expressed by a mere majority of a division, the case is an appropriate one for a hearing in banc. It is unthinkable to me that a division of the court may lay down a rule or enter a judgment knowing that a majority of the judges who constitute this court would probably disagree. That is this case and for that reason I think that a rehearing should be granted.

(Endorsed:) Per Curiam Opinion and Dissenting Opinion. Pope, C. J. Filed Aug. 27, 1952. Paul P. O'Brien, Clerk.

Due service and receipt of a copy of the within is hereby admitted this ..... day of September, 1952.

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In the Supreme Court of the United States

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No. 150

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU P. BAYARD, RECEIVER,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY AND DELTA FINANCE CO., LTD.,

Respondents.

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SUBJECT INDEX

	Page
Chronology	Flyleaf
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
A. Petitioner's Loss: How it came about; the economic unity of petitioner and respondent and its severance	6
The twofold consequences of this Court's decision of March 15, 1943	6
How the tax benefit was obtained	8
B. The respondent conceived the tax saving, took over and handled petitioner's tax affairs, appropriated petitioner's tax credits in order to accomplish the tax saving, and ignored its fiduciary relation to petitioner by refusing to account	10
1. Summary of the facts	10
2. Statement of the facts	11
Petitioner's stunned condition	11
Petitioner's lack of independent representation	12
Messrs. Coulson and Polk	15
Mr. Coulson introduced himself into the parties' tax matters, February 1943, and his firm became tax counsel for the respondent March 1943	16
Petitioner was under no duty under the tax laws to file consolidated returns	17
1942 tax returns	18
The 1943 returns: The decision to use petitioner's stock loss was made by respondent	19
1942 refund claim based on carry-back of petitioner's loss	21

Page

1944 tax returns:—Mr. Curry in Mr. Coulson's office 21

The power of attorney and the settlement with the government 23

Coulson and Polk never advised petitioner of its rights 27

Petitioner learns of the use of its stock loss and files this suit in 1946 27

Supplemental complaint filed December 1947 27

3. Findings 27

C. Other relevant facts 31

Stipulation of August 1947 and pre-trial order 31

Consummation of the reorganization 32

Respondent is the same corporate entity that went into bankruptcy, but its former stockholders were completely wiped out 33

The $10,100,000 reserve fund to pay the taxes 35

D. Summary recapitulation of basic and incontrovertible facts 36

E. Decisions of the two courts below 36

Specifications of Error 39

Summary of the Argument 40

Argument 49

I. The Relief Sought by Petitioner Does Not Circumvent Respondent's Bankruptcy Reorganization or Permit Petitioner to Share in the Equity Which the Reorganization Plan Denied It 49

II. Petitioner Is Entitled to Recover Under Principles of Unjust Enrichment 56

A. The basic principle 57

B. The Shreveport Bank cases:—The duty of restitution applies where the enrichment consists of tax savings 58

Page

C. The retention of the benefits received by respondent would be unjust for two major reasons 60

III. First Major Reason Why Retention of the Enrichment Received by Respondent Would Be Unjust: Such Retention Is Inconsistent with the Rationale of Consolidated Returns and the Purpose of Congress in Allowing Them 60

The law and regulations concerning joinder in consolidated returns by one in receivership or bankruptcy 66

S.E.C. decisions 68

Petitioner's right to recover is supported by equitable rules of contribution 72

Severance of the economic unity may not be ignored 75

IV. Second Major Reason Why Retention of the Enrichment Received by Respondent Would Be Unjust: Respondent, Occupying a Fiduciary Position to Petitioner, Appropriated Petitioner's Rights to Its Own Use 76

A. Petitioner neither made nor could make a gift to respondent 77

B. Respondent and its attorneys were fiduciaries to petitioner in the conduct of the tax matters 79

A corporation which dominates its affiliate is a fiduciary of it 84

C. As a fiduciary, respondent must account for benefits gained 85

D. The existence of common officers requires the highest standards of conduct in intercorporate dealings: duality 89

E. Respondent must account for an enrichment resulting from acts of its agents who were fiduciaries of petitioner 93

V. All Arguments Advanced Against Recovery by Petitioner Are Opposed to Elementary Principles 93

Page

A. Petitioner was under no duty to join in consolidated returns or to confer upon respondent the benefits of its tax credits 94

No such duty can be found in the tax laws or regulations 94

The bankruptcy-court could not have compelled petitioner to give its loss to respondent 96

No such duty can be found in any principle of law or equity 97

Petitioner assumed burdens in filing consolidated returns 98

Petitioner was not a fiduciary for respondent. The reverse was true 99

Common officers may not sacrifice the rights and assets of one corporation for the benefit of the other 100

Conflict with the Second and Fourth Circuits and Tax Court 101

No duty such as the Court of Appeals postulates can be extracted from the rights of respondent's pre-reorganization creditors 102

The alleged duty is incontrovertibly refuted by considering the situation of a corporation having income 103

B. Petitioner's right rests on benefits conferred and is not confined to detriment sustained. One's property or rights cannot be appropriated merely because the owner cannot use them profitably himself 104

Suits for the use of land 106

In unjust enrichment cases recovery is measured by benefit received 106

Where a fiduciary profits from the relationship .. 110

S.E.C. case 111

The utility to respondent gave value to petitioner 112

Page

That only one person may have a use for property does not give him the right to appropriate it 114

Cases of eminent domain 115

In the field of patents and literary property 115

C. Respondent's claims that it committed no wrong and that petitioner had no property right are not valid 116

Respondent's tax saving did not result automatically from the tax law; it required the use of petitioner's loss in consolidated returns 117

Petitioner had a "property" right 118

Regardless of terminology, petitioner should recover 119

D. Respondent may not retain the enrichment by refusal to recognize the severance of the economic unity and by invoking alleged "past practice" 121

E. Respondent may not retain the enrichment on the theory that petitioner could not have made an agreement with it about allocation of the tax savings 124

F. Respondent may not retain the enrichment on the theory that the treasury should not have allowed the use of petitioner's loss to offset respondent's income 128

G. Petitioner is not barred by non-presentation of its claims to the bankruptcy court 131

Petitioner's claims arose after the revesting of the railroad properties in respondent 131

Respondent assumed all liability for petitioner's claims 135

VI. Respondent May Not Retain the Enrichment by Denying That It Dominated and Controlled Petitioner's Officers. To the Extent That the Court of Appeals Proceeded on the Premise of Lack of Such Domination and Control, It Exceeded Its Appellate Office 138

Page

A. The assertion that there was no domination and control has no support in the record; it cannot be substantiated and is simply a conclusion based on irrelevancies 139

B. The court below made findings ab initio to affirm the judgment upon a legal theory different from that on which the trial court acted, and these findings were contrary to what the trial court made clear it would have found, had it considered the issues material, as well as contrary to those actually made 142

C. The function to find facts is in the trial court, not the Court of Appeals 146

The majority opinion sets up a novel and false principle concerning the power of an appellate court 147

VII. The Court of Appeals Erred in Denying Petitioner the Right to Petition for a Rehearing In Banc 148

Conflict with the statute 149

Conflict with the holding of this court 149

Conflict with other circuits 152

The right to petition comports with reason and principle 152

The right to petition comports with fair and efficient judicial administration 153

VIII. Judgment Should Be Directed for Petitioner for the Full Amount of the Tax Savings 155

Conclusion 156

App. Page

Appendix One—Statutes Involved 1

Appendix Two—Legislative history of Consolidated Reporting 6

Chart, plaintiff's Exhibit 1: Corporate Relationships Chart.

Chart, plaintiff's Exhibit 2: Duality Chart; positions occupied by Officers, Directors and Counsel of The W.P.R.R. Corporation with W.P.R.R. Company and Trustees, Their Compensation and Source Thereof during the period June 1, 1943 to October 10, 1946.

TABLE OF AUTHORITIES CITED

Cases	Pages
Addison v. Holly Hill Co., 322 U.S. 607	56n
Alameda Inv. Co. v. McLaughlin, 28 F.2d 81 (D.C. N.D. Cal.), aff'd 33 F.2d 120 (9 Cir.)	61
Bancokentucky Co.'s Receiver v. National Bank etc., 137 S.W. 2d 357, 281 Ky. 784	85
Bankers Trust Co. v. Florida East Coast Car Ferry Co., 92 F.2d 450 (5 Cir.)	72, 73, 74, 76
Barney v. Saunders, 16 How. (U.S.) 534	85, 129
Bartlett v. Cicero Light, Heat & Power Co., 52 N.E. 339, 177 Ill. 68	137n
Bernheim v. Louisville Property Co., 214 S.W. 801, 185 Ky. 63	91
Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251	116
Bondholders, Inc. v. Powell, 342 U.S. 921	51
Boom Co. v. Patterson, 98 U.S. 403	115, 117
Boston and Lowell Railroad Corporation v. Salem and Lowell Railroad Co., 2 Gray (68 Mass.) 1	118
Botany Worsted Mills v. United States, 278 U.S. 282	26
Bradley Mining Co. v. Boice, 198 F.2d 790 (9 Cir.)	153n
Brayton v. Welch, 39 F. Supp. 537	78
Brooks v. Martin, 2 Wall. (U.S.) 70	79
Bull v. United States, 295 U.S. 247	128
Cabell v. Markham, 148 F.2d 737 (2 Cir.)	66
Callaway v. Benton, 336 U.S. 132	51, 55, 97, 132n
Campbell v. Campbell, 170 F.2d 809 (D.C. Cir.)	147n
Central R. Co. of New Jersey, In re, 136 F.2d 633 (3 Cir.), cer. den. 320 U.S. 805	136
Chelrob v. Barrett, 57 N.E.2d 825, 293 N.Y. 442	89, 90
Chemical Bank & Trust Co. v. Group of Institutional Investors, 343 U.S. 982	51
Commercial Nat. Bank in Shreveport v. Connelly, 176 F.2d 1004 (5 Cir.)	58, 60, 79, 83, 88, 111, 114, 126, 130
Commercial Nat. Bank in Shreveport v. Parsons, 144 F.2d 231, 145 F.2d 491 (5 Cir.), cer. den. 323 U.S. 796	58, 59, 79, 83, 85, 88, 89, 111, 114, 126, 130

Pages

Commissioner v. Kolb, 100 F.2d 920 (9 Cir.) 147
Commissioner v. Textile Mills Corporation, 117 F.2d 62 (3 Cir.) 149
Commissioner of Internal Revenue v. Owens, 78 F.2d 768 (10 Cir.) 82
Connolly v. Commercial Nat. Bank in Shreveport, 72 F. Supp. 961 ..... 59, 79, 83, 88, 111, 114, 126, 130
Connolly v. Commercial National Bank in Shreveport, 189 F.2d 608 (5 Cir.) 58, 60, 79, 83, 88, 111, 114, 126, 130
Consolidated Electric and Gas Company, In the matter of, 15 S.E.C. 161 ..... 68, 69, 127
Consolidated Electric and Gas Company, In the matter of, 13 S.E.C. 649 ..... 70, 71n, 111, 127
Crutchfield v. United States, 142 F.2d 170 (9 Cir.) 151ff

Daniel v. Daniel, 116 Wash. 82, 198 Pac. 728 130
De Martin v. Phelan, 115 Cal. 538, 47 Pac. 356 83
Duke Power Co. v. Commissioner of Internal Revenue, 44 F.2d 543 (4 Cir.), cer. den. 282 U.S. 903 ..... 61, 94, 95, 102

Ecker v. Western Pacific R. Corp., 318 U.S. 448 ..... 6n, 51, 66
Edwards v. Lee's Administrators, 96 S.W.2d 1028, 265 Ky. 418 ..... 107, 114, 115
Epstein, In re, 4 F.2d 529 (6 Cir.) 129
Eshleman v. Keenan, 187 Atl. 25, 2 A.2d 904, 23 Del. Ch. 234 ..... 89n
Estate of John B. Lewis, 10 T.C. 1080 75

Fleishhacker v. Blum, 109 F.2d 543 (9 Cir.), cer. den. 311 U.S. 665 ..... 88, 110
French v. Shoemaker, 14 Wall. 314 ..... 125n
Freuhauf Trailer Co. v. Myers, 181 F.2d 1008 (9 Cir.) 151n

Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 ..... 89, 90
George A. Fuller Co. v. Commissioner of Internal Revenue, 92 F.2d 72 (2 Cir.) 95, 101
Ginsberg v. Royal Ins. Co., 179 F.2d 152 (5 Cir.) 147n
Girard Trust Co. v. Windt, 178 F.2d 359 (2 Cir.) 147n
Glenn-Colusa Irrigation District, In re, 62 F. Supp. 651 136
Globe Woolen Co. v. Utica Gas & Electric Co., 121 N.E. 378, 224 N.Y. 483 ..... 89n

Pages

Goodacre v. Panagopoulos, 110 F.2d 716 (D.C. Cir.) 147, 148
Goodell v. Verdugo Canon Water Co., 138 Cal. 308, 71 Pac. 354 ..... 89n
Greene County Nat. Farm Loan Assn. v. Federal Land Bank, etc., 57 F. Supp. 783 78

Handy & Harman v. Burnet, 284 U.S. 136 61
Hanlon v. Smith, 175 Fed. 192 ..... 137n
Helbush v. Finkle, 170 F.2d 41 (9 Cir.) 146n
Helvering v. Morgan's, Inc., 293 U.S. 121 64
Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 119 Pac. 82 ..... 56n
Hurwitz v. Hurwitz, 136 F.2d 796 (D.C. Cir.) 148

In re Central R. Co. of New Jersey, 136 F.2d 633 (3 Cir.), cer. den. 320 U.S. 805 136
In re Epstein, 4 F.2d 529 (6 Cir.) 129
In re Glenn-Colusa Irrigation District, 62 F. Supp. 651 (N.D. Cal.) 136
In re James' Estate, 86 N.Y.S.2d 78 ..... 91, 92
In re Kaufman's Estate, 10 N.Y.S.2d 616 129
In re Mayer's Estate, 22 N.Y.S.2d 468 129
In re Western Pacific R. Co., 124 F.2d 136 (9 Cir.) 6n
In the Matter of Consolidated Electric and Gas Company, 13 S.E.C. 649 ..... 70, 71n, 127
In the Matter of Consolidated Electric and Gas Company, 15 S.E.C. 161 ..... 68, 69, 70, 127
In the Matter of Missouri Pacific Railroad Company, Debtor, (U.S.D.C. E.D. Mo.), July 29, 1947, No. 6935 127
Independence Lead Mines Co. v. Kingsbury, 175 F.2d 983 (9 Cir.) 151n, 152
Interstate Circuit Inc. v. United States, 304 U.S. 55 146
Investment Building v. Finance Co. of America, 105 F.2d 345 (3 Cir.) 136

Jacuzzi Bros. Inc. v. Berkeley Pump Co., 191 F.2d 632 (9 Cir.) 146n
James Estate, In re, 86 N.Y.S.2d 78 ..... 91, 92
James v. Campbell, 104 U.S. 356 115
J. D. & A. B. Spreckels Co., 41 B.T.A. 370 65

Pages

Johnston v. 20th Century-Fox Film Corp., 82 C.A.2d 796, 18 P.2d 474 118
Jones v. Waterman SS Corp., 155 F.2d 992 (3 Cir.) 147n

Kaufman's Estate, In re, 10 N.Y.S.2d 616 129
Kelley v. Everglades Dist., 319 U.S. 415 146
Kistler v. Gingels, 171 F.2d 912 (8 Cir.) 147n
Koppers Co., 8 T.C. 886 ..... 74, 126
Koppers Co., 11 T.C. 894 74
Kronberg v. Hale, 181 F.2d 767 (9 Cir.) 151n

Lang's Estate v. Commissioner, 97 F.2d 867 (9 Cir.) 149, 150, 153
Leslie v. Commerical Nat. Bank in Shreveport, 28 F. Supp. 927 ..... 59, 79, 83, 88, 89, 111, 114, 126, 130

Marshall v. Packard Bell Co., 106 C.A.2d 770, 236 Pac.2d 201 ..... 125n
Matarese v. Moore-McCormack Lines, 158 F.2d 631 (2 Cir.) 119, 125, 126
Mayer's Estate, In re, 22 N.Y.S.2d 468 129
Mayflower Hotel Stock, P.C. v. Mayflower Hotel Corp., 173 F.2d 416 (D.C. Cir.) 88
Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 ..... 147, 148
McClure v. O. Henry Tent & Awning Co., 184 F.2d 636 (7 Cir.) 147n
McKinley v. Lynch, 58 W. Va. 44, 51 S.E. 4 82
Meinhard v. Salmon, 164 N.E. 545, 249 N.Y. 458 ..... 79, 83, 156
Merger Mines Corporation v. Grismer, 137 F.2d 335 (9 Cir.), cer. den. 320 U.S. 794 ..... 89n
Metropolis etc. Sav. Bank v. Monnier, 169 Cal. 592, 132 Pac. 833 ..... 85n
Missouri Pacific Railroad Company, Debtor, In the matter of, No. 6935, U.S.D.C., E.D. Mo. 127

North American Co. v. S.E.C., 327 U.S. 686 ..... 84, 99
Northwestern Mutual Life Insurance Co. of Milwaukee v. Gilbert, 182 F.2d 256 (9 Cir.) 151n

Oldland v. Gray, 179 F.2d 408 (10 Cir.), cer. den. 339 U.S. 948 83
Overfield v. Pennroad Corporation, 42 F. Supp. 586, 48 F. Supp. 1008 ..... 81, 89, 90

Pages

Paramount Pest Control Service v. Brewer, 170 F.2d 553 (9 Cir.) 146n, 147n
Perrine v. Pennroad Corp., 47 Atl.2d 479, 29 Del. Ch. 531 ..... 81n
Petterson Lighterage & Towing Corp. v. New York Central R. Co., 126 F.2d 992 (2 Cir.) 147n
Peyton v. William C. Peyton Corp., 7 A.2d 737, 23 Del. Ch. 321 91
Phillips-Jones Corp. v. Parmley, 302 U.S. 233 74
Potter v. Sanitary Co. of America, 194 Atl. 87, 22 Del. Ch. 110 85
Price v. Standard Oil Co., 55 N.Y.S.2d 890 ..... 89n

R.F.C. v. Denver & R. G. W. R. Co., 328 U.S. 495 ..... 7n
Re James Estate, 86 N.Y.S.2d 78 91
Reading v. The Attorney General, 1951 Appeals Cas. 507 ..... 83, 88, 107, 126, 130
Reading v. The King, [1948] 2 K.B. 268 ..... 83, 88
Reading v. The King, [1949] 2 K.B. 232 ..... 83, 88, 107, 126, 130
Reese v. Beacon Hotel Corporation, 149 F.2d 610 ..... 132n

Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554 (D.C. Cir.) 147
San Diego Land etc. Co. v. Neale, 78 Cal. 63, 20 Pac. 372 115
Sawyer, Secretary of Commerce v. Dollar, No. 247, October Term 1951, pp. 52, 61, 62 152
Seaboard Air Line R. Co. v. Savannah Union Station Co., 181 F.2d 267 (5 Cir.) 131
Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80 146
Sekulow v. 11th & F St. Valet, 162 F.2d 19 (D.C. Cir.) 125n
Sinclair Refining Co. v. Jenkins, 289 U.S. 689 116
Southern Pacific Co. v. Bogert, 250 U.S. 483 ..... 81, 84, 99
Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 221 Pac.2d 73 ..... 112, 116

Texas & Pacific Railway Company v. Bloom, 164 U.S. 636 ..... 137n
Texas & Pacific Railway Company v. Johnson, 151 U.S. 81 ..... 131, 136, 137n

Pages

Textile Mills Corporation v. Commissioner, 314 U.S. 326 ..... 149, 150, 151
Thompson v. Terminal Shares, 104 F.2d 1 (8 Cir.), cer. den. 308 U.S. 559 ..... 97n
Trice v. Comstock, 121 Fed. 620 ..... 99n
Trinity Building Corp. of New York, 40 B.T.A. 1315 ..... 95, 101, 102
Truncale v. Universal Pictures Co., 76 F. Supp. 465 ..... 112, 113, 114, 127

United States v. Aluminum Co., 148 F.2d 416 (2 Cir.) 147n
United States v. Bernard, 202 Fed. 728 (9 Cir.) 106
United States v. Forness, 125 F.2d 928 (2 Cir.) 147n
United States v. Hutcheson, 312 U.S. 219 66
United States v. Oregon Medical Society, 343 U.S. 326 144
United States v. Pierce Auto Lines, 327 U.S. 515 129
United States v. Willow River Co., 324 U.S. 499 118
United States ex rel. Robinson v. Johnston, 316 U.S. 694 ..... 150, 151
Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 116

Van Beeck v. Sabine Towing Co., 300 U.S. 342 66

Waialua Agricultural Co. v. Maneja, 178 F.2d 603 (9 Cir.) 146n
Wendt v. Fischer, 154 N.E. 303, 243 N.Y. 439 ..... 156n
Western Pacific R. Co. Reorganization, 233 I.C.C. 409 ..... 6n, 32, 52
Western Pacific R. Co., In re, 124 F.2d 136 (9 Cir.) 6n
Westinghouse Co. v. Wagner Mfg. Co., 225 U.S. 604 116
Whiting v. Hudson Trust Company, 138 N.E. 33, 234 N.Y. 394 93
Wolters v. Henningsan, 114 Cal. 433, 46 Pac. 277 74
Woodford Realty Co. v. Rose, 286 U.S. 319 63

Young v. Higbee Company, 324 U.S. 204 ..... 86, 99, 110

STATUTES AND REGULATIONS

Bankruptcy Act, Section 77 ..... 6, 97n, 137n
Subd. (a) 97n
Subd. (c) 7n

California Civil Code, Section 2235 ..... 85n
California Corporations Code, Section 15030 ..... 99n

	Pages
Internal Revenue Code:	
Section 23	App. 3
Section 23(g)(2)	3
Section 23(g)(4)	3, 8, 66, 67
Section 52	3, 66, App. 3
Section 122(b)(1) and (2)	9
Section 141	3, 8n, App. 1, 2
Section 141(b)	126, App. 1, 2
Section 141(d)	75, App. 2
Public Utility Holding Company Act of 1935, Section 12	68
Revenue Act of 1921, Sec. 240(b)	126n
Revenue Act of 1924, Sec. 240(b)	126n
Revenue Act of 1926, Sec. 240(b)	126n
Revenue Act of 1942:	
Section 123(a)	8n
Section 141(a)	61n
Rules of Civil Procedure, Rule 52(a)	3, 146, App. 4
Securities and Exchange Commission Regulation U-45	68
S. 1053, 77th Congress, 1st. Sess., a bill to amend Section 212 of Old Title 28 U.S.C.	150
42 Stat. 260	126n
43 Stat. 288	126n
44 Stat. 825	126n
49 Stat. 911	137n
Supreme Court Rule 38(5)(b)	3
Treasury Regulation 104	3, 8n
Section 23.1	App. 4
Section 23.10(b)	18
Section 23.11(a)	17, 94, 98
Section 23.15(a)	98, 127
Section 23.15(b)	66, App. 5
Section 23.15(d)	127
Section 23.16(a)	17, 31, 94, App. 5
Section 23.38	98
Treasury Regulation 110	8n, App. 5
Section 33.11(a)	98
Section 33.15(a)	98
Section 33.38	98

Pages

Treasury Regulation 129 ..... 8n

Uniform Partnership Act, Section 30 ..... 99n
United States Code:
Title 11, Section 205 ..... 6n, 137n
Title 11, Section 205(a) 97n
Title 11; Section 205(c)(7) 138n
Title 11, Section 205(e) 7n
Title 11, Section 205(f) 138n
Title 28, Section 46(c) ..... 3, 148, 149, 150, App. 4
Title 28, Section 1254(1) 2
Title 28, Section 1291, 1294(1) 2
Title 28, Section 1331, 1332 2

TEXTS, TREATISES AND OTHER MATERIAL

American Jurisprudence:
Vol. 2, Agency, Sec. 268, p. 215 87
Vol. 54, 249 110

Annotations and cases, 114 A.L.R. 308 ..... 89n

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p. 78 83
p. 79 88
p. 80 ..... 81n
pp. 82, 83 83
p. 152 88

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p. 53 88
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Pages

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p. 632 ..... 61n
p. 633 ..... 60, 61
pp. 649, 650 ..... 17, 18, 94

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Restatement of Agency:
Sections 387, 388 87
Sections 390, 392 91

B. The Respondent Conceived the Tax Saving, Took Over and Handled Petitioner's Tax Affairs, Appropriated Petitioner's Tax Credits in Order to Accomplish the Tax Saving, and Ignored Its Fiduciary Relation to Petitioner by Refusing to Account.

We have just related the bare facts of how respondent received a benefit of $17 million through the use of petitioner's loss. Under principles to be discussed in the Argument, these facts, without more, entitle petitioner to judgment.

But beyond that, the manner in which the transaction was handled, the relationship of the parties, the resulting duties and obligations, not only fortify petitioner's claim but furnish an independent ground of recovery.

The taxes were saved through a method conceived, planned and executed by respondent while occupying a fiduciary relation to petitioner in disregard of its fiduciary obligations. Under the law and the Treasury regulations, consolidated returns must be filed in the name of the parent corporation, claims for refund are filed in its name, and all refunds are payable to it. Respondent used petitioner for its own purposes, without any consideration for petitioner's rights. It was able to do this because it controlled Curry, petitioner's president and actually its only officer. As described by the trial court, Curry was "just a presiding officer and a sort of figurehead" (R. 646, 647).

1. SUMMARY OF THE FACTS.

One week after this Court's decision on March 15, 1943, respondent employed the firm of Whitman, Ransom, Coulson and Goetz (attorneys for the James Interests) as its tax attorneys. One of the partners was Polk, who had formerly been employed in the Bureau of Internal Revenue. He con-

ceived the plan of using petitioner's loss to cancel respondent's tax liability. He convinced respondent of the possibility of success of his plan, obtained its authority to proceed, and carried through his plan. He was employed, directed and compensated solely by respondent, and never gave petitioner any advice as to its rights.

Petitioner was in an impoverished condition following this Court's decision of March 15, 1943. It could not even pay officers' salaries. Its officers were taken over as "full time employees" by respondent on July 1, 1943, before the tax returns were filed, and continued as such until May 1, 1945, when Mr. Curry, petitioner's president, accompanied by petitioner's files, was moved to Polk's office to be available for these tax matters, ostensibly as an employee of Polk's firm but actually compensated by respondent.

Pursuant to his plan Polk used these officers to file consolidated tax returns in petitioner's name and caused its loss to be offset against respondent's income, without knowledge of petitioner's Board of Directors. Polk obtained from Curry a document naming him petitioner's 'attorney-in-fact'. Without petitioner's knowledge, but only after specific authorization of respondent, he made and carried through an offer of settlement with the Treasury in petitioner's name as its "attorney-in-fact".

2. STATEMENT OF THE FACTS.

Petitioner's Stunned Condition.

Respondent Polk, and all connected with the transaction, considered petitioner a dying corporation and gave no consideration whatever to its rights.

After this Court's decision of March 15, 1943, petitioner was, to select an appropriate metaphor, in a state of coma,

Pages

Restatement of Restitution:
Section 1 ..... 57, 106
Section 1, Comment a 57
Section 1, Comment b 57
Section 1, Comment, pp. 13 and 14 ..... 106, 107
Section 1, Comment, p. 15 ..... 110n
Section 81, comment under Section 81, sections following, and Introductory Note under Topic 3, pp. 327, et seq 72
Section 136 ..... 108, 109
Chapter 6 110
Page 493 ..... 110n

Restatement of Trusts:
Section 9(c) and (b), pp. 30, 31 ..... 82, 83
Section 170 91
Section 203 87

Scott on Trusts:
Vol. 1, p. 70 83
Vol. 2, Section 269.3, p. 1520 77
Vol. 2, p. 1098 110
Vol 3:
Section 344 ..... 99n
Section 468, p. 2336 ..... 88n
Section 502, p. 2422 ..... 88, 110

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Vol. 1, p. 9 ..... 56n
Vol. 5, Sec. 1606 ..... 125n

CHRONOLOGY

1916		Petitioner invests $75 million for entire stock of respondent railroad.
1935		Respondent goes into bankruptcy under Sec. 77B—Trustees appointed.
1939		I.C.C. approves plan of reorganization of respondent excluding petitioner's stockholding as worthless.
1943		
Mar.	15	Supreme Court approves I.C.C. Reorganization Plan.
Mar.	23	Coulson firm employed as Tax Counsel for respondent.
May	15	1942 consolidated tax returns filed for petitioner and respondent.
June	1	Petitioner's president, secretary and employees taken over as full time employees of respondent.
Oct.	11	District Court confirms I.C.C. Plan.
1944		
Jan.	11	Coulson opinion letter advising respondent that petitioner's stock loss could be used to offset respondent's income.
Mar.	3	Respondent's 1943 tax accruals reversed and $7,100,000 placed in contingent tax reserve.
Apr.	30	Income tax affiliation terminated.
July	15	1943 consolidated tax returns filed with petitioner's loss used to offset respondent's income.
Dec.	14-29	Railroad revested in respondent and Assumption Agreement executed by it assuming liabilities of Trustees.
1945		
Mar.	9	Refund Claim for 1942 taxes filed, based on petitioner's loss.
Mar.	26	Additional $3 million placed in contingent tax reserve by respondent.
May	1	New York offices closed. Curry and Valouch, petitioner's president and secretary, go to Coulson's office on his payroll.
June	15	1944 consolidated tax returns filed, with petitioner's loss used to offset respondent's income.
1946		
Oct.	10	This suit filed.
1947		
Feb.	11	First offer of tax settlement.
Aug.	13-28	Tax settlement with Government. Respondent's $10,100,000 funded contingent tax reserve transferred to reserve to meet any judgment in this suit.
Dec.	17	Supplemental complaint filed.

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuP. BAYARD, RECEIVER,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY AND DELTA FINANCE CO., LTD.,

Respondents.

Brief for Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the District Court (R. 258) is reported in 85 F. Supp. 868. The opinion of the Court of Appeals (R. 2214), a dissenting opinion (R. 2239), the opinion of the

All emphasis is supplied unless otherwise indicated.

References to pages of the record are shown by the page number in parentheses: (R.).

Exhibits are indicated thus: Plaintiff's (P); Defendants' (D.), the number of the exhibit following the letter.

Court striking the petition for rehearing in banc (R. 2260), the opinion of Fee, J., suggesting a rehearing by all the circuit judges (R. 2261), the opinion of the Court in banc denying leave to reinstate the petition for rehearing in banc (R. 2288), and a dissenting opinion (R. 2296) are reported in 197 F.2d 994. A supplement to the last dissenting opinion (R. 2313) has not yet been reported.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C., Sec. 1331, 1332, and the Court of Appeals under 28 U.S.C., Sec. 1291 and 1294(1). That court's judgment was entered October 29, 1951 (R. 2255). On December 17, 1951, within the time allowed by order (R. 2257-9), a petition for rehearing and a petition for rehearing in banc were filed (R. 2259-60). On January 30, 1952, the petition for rehearing was denied, and the petition for rehearing in banc was ordered stricken as without authority in law or in the rules of practice of the court (R. 2259). On April 19, 1952, by order of Mr. Justice Douglas petitioner's time to file a petition for certiorari was extended to June 27, 1952. The petition for a writ of certiorari was filed June 23, 1952, and granted October 13, 1952. The jurisdiction of this Court rests on 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Must a former parent corporation join in consolidated federal income and excess profits tax returns with its former subsidiary, so that a loss incurred by the former parent may be used to extinguish the tax liability of its former subsidiary, without any accounting by the former subsidiary

to the former parent for the benefit thus obtained? The loss so utilized was the parent's loss of its entire investment in the subsidiary (I.R.C., Sec. 23(g)(2) and (4)).

2. Does not a Court of Appeals exceed its appellate office and so far depart from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision (Supreme Court Rule 38(5)(b)), where it finds facts *ab initio* to affirm a judgment which it holds to be non-sustainable on either the legal theories applied or the facts found by the trial court, particularly where its findings are contrary to those which the trial court made clear it would have found had it considered the issues material?

3. May a litigant petition a Court of Appeals for a rehearing in banc under 28 U.S.C. Sec. 46(c) after decision by a three-judge panel; or may two judges of the panel strike out such petition "as being without authority in law or in the rules or practice of this court", thus preventing the petition from being considered by the court of seven judges?

STATUTES INVOLVED

The pertinent provisions of Internal Revenue Code, Section 23(g)(2) and (4), 52 and 141, Treasury Regulation 104, Title 28 U.S.C., Sec. 46(c), and R.C.P. 52(a), are printed in Appendix One hereto.

STATEMENT OF THE CASE

Throughout this brief the term "petitioner" will be used to denote The Western Pacific Railroad Corporation, the plaintiff in the District Court. The term "respondent" will denote The Western Pacific Railroad Company, the principal defendant.

Petitioner seeks to compel respondent to account for a $17,201,739 federal tax benefit derived from respondent's use of a right belonging to petitioner. Respondent obtained that benefit by causing consolidated income and excess profits tax returns to be filed by petitioner and by using in those returns a $75 million loss of petitioner to offset respondent's taxable income. Thereby taxes otherwise payable by respondent were discharged. As the trial court found and the Court of Appeals repeated, the amount of the tax benefit so obtained by respondent from its use of petitioner's loss was $17,201,739 (R. 267, 2217-18). For convenience, this will be referred to as $17 million.[1]

The co-petitioner, Mr. Bayard, is the receiver of petitioner, appointed in October 1949 by the Chancery Court of Delaware on the petition of the Attorney General of that state for the purpose of realizing on all of petitioner's assets and claims (R. 292). The receiver was then joined as a party plaintiff in the present case (R. 317), was one of the appellants (R. 326), and is a co-petitioner here. The term "petitioner" in this brief includes the receiver after November 1949 unless the context shows otherwise.

The real parties in interest on petitioner's side are its 4,700 stockholders, living throughout the United States,

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[1]Six additional companies were named as defendants and are respondents here but for practical purposes may be ignored. Four were and are wholly owned subsidiary companies of the principal defendant. Another, Western Realty Company, was wholly owned by petitioner. The sixth was wholly owned by Western Realty and is now wholly owned by the principal defendant. These companies were joined as defendants merely because they were parties to the consolidated income tax returns; no relief was sought against them.

The corporate relationships are shown on a chart (P 1). Printing of this exhibit in the record was dispensed with by order of the court, but it is reproduced at the end of this brief.

more than 1,000 of them in California (R. 659). They had invested $110 million in petitioner's stock.[2] It in turn had invested over $75 million in the stock of respondent, and it was the loss of that stock which created the loss which respondent used to discharge its taxes.

Any recovery by petitioner will go to the receiver for distribution to petitioner's preferred stockholders[3] under the Delaware Chancery Court's supervision.

The petitioners in No. 160, a case companion to this, were interveners below. They were stockholders of petitioner who had filed a stockholders' suit in New York against it and its directors, alleging (among other things) that the directors had failed to protect and enforce petitioner's interest in connection with the use of its loss in the tax returns mentioned above. Thereafter, petitioner brought this suit in California, and these stockholders were permitted to intervene. This was prior to the appointment by the Chancery Court of Delaware of Mr. Bayard as receiver and his joinder as co-plaintiff here. The interveners present no claims of their own, and their interest is identical with that of petitioner.

The District Court rendered judgment for respondent although it found the facts to be as contended by petitioner. On appeal the Court of Appeals, composed of one Circuit Judge and two District Judges, found the District Court's legal theories to be erroneous but affirmed the judgment on a different legal theory. Judge Fee dissented.

The decisions of the two courts are more fully described at pages 36-38 below, after the facts have been stated.

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[2]P 4B, Schedule C; printing of this exhibit was also dispensed with by order.

[3]The preferred stock exceeds the amount recoverable in this suit (R. 1717).

A. Petitioner's Loss: How It Came About; the Economic Unity of Petitioner and Respondent and Its Severance.

Until April 30, 1944, petitioner owned all of the capital stock of respondent, an operating railroad company. For this stock petitioner had invested $75 million in respondent (R. 262).

In 1935, the respondent went into bankruptcy under Section 77 of the Bankruptcy Act[4] (R. 1908). Trustees were appointed on September 23, 1935 (R. 1916), and remained in possession until December 29, 1944. The term "respondent" or "Company" as used in this brief includes the trustees during that period.

On June 21, 1939, the Interstate Commerce Commission approved a plan of reorganization, which found that petitioner's stock in respondent was without equity or value and was not entitled to participate in the reorganization.[5] The bankruptcy court approved the Commission plan (R. 1666). On November 28, 1941 the Ninth Circuit reversed,[6] but on March 15, 1943, this Court affirmed the bankruptcy court's approval of the plan.[7]

THE TWOFOLD CONSEQUENCES OF THIS COURT'S DECISION OF MARCH 15, 1943.

Following this Court's decision, the reorganization plan was confirmed by the bankruptcy court on October 11, 1943 (R. 1674). The consequences were twofold.

First, this Court's decision of March 15, 1943 established that petitioner's entire $75 million investment in respondent

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[4] 11 U.S.C., Sec. 205.

[5] *Western Pacific R. Co. Reorganization*, 233 I.C.C. 409, 452.

[6] *In re Western Pacific R. Co.*, 124 F.2d 136 (9 Cir.).

[7] *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448.

was worthless and confirmed its loss in that amount. Petitioner had no other substantial assets.[8]

Second, the economic unity which had previously existed between petitioner and respondent was severed forever, and they became economic strangers. The proprietary interest of petitioner in respondent was at an end; the community of economic interest was over.

For the purpose of determining the relative rights and duties of the parties this Court's decision marks the date of the loss. It then became the duty of the District Court (in the absence of some unusual circumstances) to confirm the plan if the requisite percentage of creditors voted in favor of it and probably even if they did not.[9] The James Interests, the largest stock interest in both petitioner and respondent (R. 1717; Chart, P 1), had previously fought the plan and sought to maintain petitioner's equity in respondent.[10] But immediately after this Court's decision the James Interests decided to support the plan and entered into an agreement with other major creditors to work wholeheartedly for its prompt consummation (R. 577, 578, 618).

For tax purposes it is immaterial whether petitioner's loss was in March or October, 1943, for in either event it is a 1943 loss. But for the purpose of fixing the relative rights, duties and obligations of the parties, the date of March 15, 1943 is important.

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[8]Substantially all its remaining assets consisted of stock of the Denver & Rio Grande Western Railroad Company. The investment in the latter was wiped out by a plan of reorganization of that railroad (R. 575); see *R.F.C. v. Denver & R. G. W. R. Co.*, 328 U.S. 495.

[9]Bankruptcy Act, Sec. 77(e); 11 U.S.C., Sec. 205(e).

[10]For the identity of the James Interests, cf. pp. 15, 16, infra, and Chart, P 1, reproduced at the end of this brief.

HOW THE TAX BENEFIT WAS OBTAINED.

Under the Internal Revenue Code,[11] a parent company and its subsidiaries may file a consolidated tax return in which losses of all are offset against gains of all, and taxes are paid only on the net. In October 1942 Section 23(g)(4), I.R.C. was amended so as to provide for the first time that a loss arising from worthlessness of stock in a subsidiary is an ordinary rather than a capital loss and thus deductible from taxable income.[12]

As just noted, this Court's decision of March 15, 1943, fixed the date when petitioner sustained a $75 million loss, and, at the same instant, its financial interest in respondent terminated and it became a complete economic stranger. In this state of facts respondent's tax counsel conceived the plan of having petitioner and respondent file consolidated returns in order to set off the petitioner's loss against respondent's income, and thus discharge respondent's tax liabilities.

This respondent then caused to be done.

Respondent made large profits in the war years of 1942, 1943 and 1944, at which time the excess profits tax was in effect. Taxable net profits were nearly $11 million in 1942, over $18 million in 1943, and in 1944 up to April 30th nearly $3 million (P 3, 4, 5). Throughout 1943 and the first four months of 1944 respondent made accruals of $10,100,000 to meet its anticipated tax liability (R. 915, 1818-1824).

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[11] Internal Revenue Code, Sec. 141; Treasury Regulation 104, relative to income taxes, and Regulation 110, relative to excess profits taxes. Regulations 104 and 110 were merged into Regulation 129, applicable to tax years beginning December 31, 1949. We shall therefore refer to 104 and 110, since they were in effect during the years here involved.

[12] Revenue Act of 1942, Sec. 123(a), adding subsection 4 to Section 23(g), I.R.C.

Consolidated income and excess profits tax returns for 1943 were filed in petitioner's name on July 15, 1944 (P 4A and B). They reported petitioner's stock loss of $75 million sustained in 1943, used $18 million of it to offset that amount of respondent's taxable net income, and thus reported no net income and no tax due.

The unused portion of the loss could be carried forward and back (I.R.C., Sec. 122(b)(1) and (2)). On March 9, 1945, respondent's tax counsel filed a claim for refund in petitioner's name to recover the $4,201,821 paid as respondent's 1942 taxes (R. 1656), the basis of the claim being the use as a carryback of over $10 million of the unused portion of petitioner's 1943 loss. And on June 15, 1945 respondent's tax counsel filed consolidated returns in petitioner's name for the period January 1-April 30, 1944 (P 5A, 5B), offsetting against nearly $3 million of respondent's income another portion of petitioner's loss, thus reporting no tax due.

In 1947, the taxes were finally settled by agreement with the Treasury Department on the basis of the returns as filed, the 1943 and 1944 taxes being nil, and the claim for refund for 1942 being rejected (see further detail at pp. 23-26, infra). The net tax benefit accruing to and retained by respondent from the use of petitioner's stock loss was $17,201,739 (R. 267).

The question before this Court is whether petitioner and its stockholders, who provided the capital which was lost and who sustained the loss, are entitled to an accounting by respondent of the benefit obtained by it through its use of that loss.

stunned by the misfortunes heaped upon it. It had lost its chief asset, its $75 million investment in the respondent. Its other assets were pledged to secure loans then in default (R. 571-573; also R. 1767, 1768, 1695-98). Consequently, in March 1943, its directors were contemplating dissolution and so advised its chief creditors, including the James Interests (R. 571). The James Interests would be the controlling interest in the reorganized respondent (Corporate Relationship Chart, P Ex. 1), and they were represented by Mr. Coulson, Polk's partner.

Petitioner's Delaware franchise taxes were in default, but Polk considered it essential that it remain in existence until the reorganization was consummated (R. 1764). Funds to pay these taxes were then provided by the James Interests (R. 713).

Petitioner's Lack of Independent Representation.

The positions occupied during the critical period by those who were directors or officers of petitioner and respondent are shown by plaintiff's Exhibit 2A, which we reproduce at the end of this brief.[13]

Prior to June 1, 1943, petitioner had maintained its offices jointly with those of the respondent and the Trustees in New York. Its officers were also employees of respondent, and their salaries and the expenses of the office had been jointly paid.

As of June 1, 1943, petitioner was incapable of further paying salaries or office expenses. Thereupon all of the officers and employees of the New York office, including

[13]Printing of this exhibit in the record was dispensed with by order.

petitioner's president and secretary, were taken over by respondent by decision of its president. In his words, they became its "full time" employees (R. 1738). This situation continued until respondent's New York offices were closed on May 1, 1945, at which time petitioner's president and secretary, accompanied by petitioner's files, were moved to the offices of respondent's tax counsel and thenceforth received their compensation from them, they being ultimately reimbursed by respondent (R. 1735, 1738).

From June 1, 1943, until this suit was filed in October 1946, nine persons were at one time or another directors of petitioner. With three exceptions (Messrs. Osborn, Wood and Hatton), every one of them was an employee of respondent from which they received their livelihood, and one of them, Mr. Schumacher, was not only a director and Chairman of the respondent's Executive Committee but was also one of its trustees in bankruptcy.

Of the three who were not employees of respondent and who did not receive compensation from it, one of them, Mr. Osborn, was a director of respondent and another, Mr. Hatton, was a clerk in the employ of the Denver & Rio Grande Western Railroad and as such recognized Mr. Schumacher as his superior and chief, for Mr. Schumacher was an officer of that company (R. 1135). Three of the nine were clerks in respondent's employ—Miss Sheehan, switchboard operator; Mr. Wienken, stenographer; Miss Valouch, stenographer and clerk. Miss Sheehan and Mr. Hatton were put on the board to make up a quorum (R. 1138, 1139), and Miss Valouch did not become a director until the day the New York office was closed, when she became a regular employee of respondent's tax counsel.

Of the entire group of directors, none—other than Mr. Wood and Mr. Osborn—had the capacity, business experience or financial independence to give competent disinterested attention to petitioner's affairs in any matter wherein respondent could have an adverse interest. Yet not until shortly before the present suit was filed in October 1946, did either Wood or Osborn ever know or was either advised that petitioner's stock loss was being used in tax returns or that thereby respondent was saving taxes; neither knew or was advised of the legal or economic consequences of the filing of the returns involved in this case (Wood, R. 1129, 1132; Osborn, R. 1019, 1022).[14]

Meanwhile, petitioner had, actually, only one officer, Mr. Curry. Mr. Curry was a competent chief clerk, and he so regarded himself (R. 639, 646, 647, 736, 756). When Mr. Schumacher retired as petitioner's president, primarily because of petitioner's financial distress (R. 644, 645, 743), there was "nothing facing us but liquidation and dissolution * * * he [Schumacher] felt I [Curry] could carry through", and Mr. Curry was therefore, on February 1, 1942, appointed president and treasurer (R. 743). He was, at the same time, an employee of the respondent, its vice president, assistant secretary, assistant treasurer, a director and a member of its executive committee.

[14] Wood and Osborn were under the impression that consolidated returns were being filed, but they did not know of the use of petitioner's stock loss. The idea of using the loss in such returns was considered by Polk, respondent's tax counsel, as a mere speculation of a possibility when he first thought of it in May, 1943, "commented on rather than suggested * * * since it is paradoxical," and for that reason not recommended to be used until December, 1943 (R. 1448, 1484) and never brought home to Wood or Osborn.

After June 1, 1943, although Mr. Curry continued as petitioner's president, he received no compensation from it (R. 645) and thereafter received his livelihood from respondent until May 1, 1945 (R. 1729-33) when he went on pension from the respondent (R. 530, 532) and a retainer from its tax counsel at its ultimate expense (R. 1744, 1749). He did not consider that he had any understanding of, or competence in, tax matters and relied implicitly on tax counsel for respondent. "Tax matters were wholly Greek to me", he testified (R. 808).

The trial court observed Mr. Curry on the witness stand and summed up its estimate of him and of the significance of his testimony by describing Curry as "just a presiding officer and a sort of figurehead". Curry responded, "I admit that this is so" (R. 646, 647). He was a signing officer and "signed whatever documents they told you to sign" (R. 642).

Messrs. Coulson and Polk.

A description of what was done requires an identification of Mr. Coulson and his partner, Mr. Polk, and of the James Interests.

From 1925 until his death in 1941, Mr. Arthur Curtiss James and his wholly owned companies owned 8.8% of petitioner's preferred stock and 61% of its common stock (Chart, R 1). Mr. Coulson and his firm (Whitman, Ransom, Coulson and Goetz) were attorneys for Mr. James and his companies and were and are attorneys for all the James Interests, including the James Foundation of which Mr. Coulson is a trustee (R. 536).

James died in 1941, and after this Court upheld the plan of reorganization on March 15, 1943, Mr. Coulson and the

James Interests decided to cast their lot with respondent, although as a major creditor they could still have voted against the plan (R. 577, 578).[15]

The common stockholdings of the James group in petitioner became worthless when the plan was approved by this Court. On the other hand, their securities in respondent gave them stock and convertible bonds of the reorganized respondent, for both of which they ultimately received 28% of its stock (Chart, P 1).

Mr. Coulson Introduced Himself Into the Parties' Tax Matters, February 1943, and His Firm Became Tax Counsel for the Respondent March 1943.

On February 24, 1943, three weeks before this Court's decision, when his firm was not tax counsel for either petitioner or respondent, Mr. Coulson introduced himself into their federal tax matters by writing to respondent's president for tax information (R. 537). He did so on behalf of the James Interests (R. 538) because, so he testified, the effect of taxes on respondent was of vital concern to the James Interests (R. 965). Disturbed by the reply, on March 15th, the day of this Court's decision, he asked his partner, Mr. Polk, to look into the situation, stating (R. 539):

> "Actually, I happen to know that the only person over at the corporation [petitioner's] office here in New York who has any knowledge of taxes is a girl who is primarily Schumacher's secretary * * * I would be a little surprised if the report were intelligently prepared."

[15]Mr. James' allegiance during his lifetime lay with petitioner; he sought to save its equity in the respondent and was active in resisting the plan of reorganization of the Interstate Commerce Commission which denied that equity (R. 536).

Polk replied that "Only the lady referred to [Valouch] had any part in the preparation of the return * * *. Mr. Curry says they are too impoverished to hire accounting help." (R. 540)

Eight days later, on March 23, 1943, Mr. Coulson and his firm became tax counsel for the Trustees and the respondent, and the actual work was delegated to Mr. Coulson's law partner, Polk, who specialized in tax matters (R. 543-6).

Messrs. Coulson and Polk and their firm obtained all their compensation and received all their instructions from respondent,[16] but they conducted themselves as attorneys at law and attorneys-in-fact for petitioner as well.

Petitioner Was Under No Duty Under the Tax Laws to File Consolidated Returns.

Under the law and the regulations, only the parent corporation can file consolidated returns (Reg. 104, Sec. 23.16 (a)). The fact that a consolidated return has been filed in one year gives rise to no duty or obligation to file such a return in a subsequent year, if the law or regulations have been so changed as to make it less advantageous (Reg. 104, Sec. 23.11(a)). In that case separate returns may be filed.

Each of the years 1942, 1943 and 1944 was one in which any member of an affiliated group was free to file separate returns, irrespective of whether consolidated returns had been previously filed (II Montgomery's Federal Taxes, Cor-

[16]On November 15, 1948, Coulson rendered a final statement to respondent "covering professional services in the tax disputes as to the taxable period January 1, 1942 through April 30, 1944" in the amount of $300,000. At the same time he also rendered a bill to respondent for the retainer payments to Curry, petitioner's president, for the period July 1, 1945 to December 31, 1948, in the amount of $10,500 (R. 1749). These respondent paid.

porations and Partnerships, 1946-7, pp. 649, 650). And at the time each return in question here was filed, there existed the right in petitioner not to file a consolidated return if it was so advised. Unless the respondent could become a party to consolidated returns with plaintiff, it would have to file or pay taxes on the basis of separate returns. Mr. Polk was aware of these facts (R. 1458).

Prior to this Court's decision tentative returns on a consolidated basis had been filed for 1942 and an extension obtained until May 15, 1943 for the final returns. Under the regulations, the filing of a tentative consolidated return did not preclude filing the final returns on a separate basis (Reg. 104, Sec. 23.10(b)). Whether the final return should be a consolidated one was one of the first questions considered by Mr. Polk (R. 544).

The severance of the economic unity between petitioner and respondent took place between the filing of the tentative returns and the filing of the final returns for 1942.

1942 Tax Returns.

Without calling any of these factors to petitioner's attention, Mr. Polk decided that it was in the interest of respondent that consolidated returns should be filed (Polk, R. 1444, Coulson, R. 1482). He had these returns prepared and placed before Mr. Curry, vice president of the respondent and president of the petitioner, for signature. Mr. Curry had been informed by Mr. Schumacher that Mr. Polk was tax counsel for both companies (R. 660). When the returns were laid before him for signature, he therefore inquired whether they had Mr. Polk's approval. Being informed that they had, he signed without consulting or advising the

petitioner's board of directors and without being advised by Mr. Polk or anyone else that petitioner did not have to file consolidated returns (R. 663, 664).

The 1943 Returns: The Decision to Use Petitioner's Stock Loss Was Made by Respondent.

The use of a loss of the character of petitioner's as an ordinary, rather than a capital, loss was first made possible by the October 1942 amendment to the Revenue Act. The idea of using petitioner's stock loss occurred to Mr. Polk in May 1943. In a letter to Mr. Curry as vice president of respondent, on May 20, 1943, he stated it to be a mere speculation of a possibility and was "commented on rather than suggested * * * since it is paradoxical" ("paradox letter," R. 588, P. 50). Polk sent no advice of it to petitioner. The "paradox" lay in the fact that the loss to be used to enable respondent to avoid taxes arose from the very fact that petitioner was cut off by the bankruptcy from any further economic interest in the respondent and could gain no benefit as a stockholder from the discharge of respondent's taxes.

In December 1943, Mr. Polk first decided to advise the use of the petitioner's stock loss (Polk, R. 1448; Coulson, R. 1484). When he came to that conclusion, he did not advise petitioner or Mr. Curry. Instead, he went to San Francisco to discuss the tax matters with respondent's officers, the agents of the reorganization trustees, and in January 1944 he recommended to them the filing of consolidated returns and the use of petitioner's loss (R. 1448, 1484), although he refused to advise that respondent could "bank" on the Treasury's allowing the deduction.[17] Without

[17]Mr. Elsey, respondent's president, testified that (R. 1268), "Mr. Polk advised me that we were within our legal right in taking

advising or consulting petitioner, he told respondent's president, that "We [the respondent] were within our legal right in taking the corporation's stock loss as a deduction in our consolidated return" (R. 1268).

The decision to use petitioner's loss was made in San Francisco by respondent's president, in January 1944 (R. 1448, 1484). He insisted on a written opinion to protect him (R. 1268), and such an opinion, dated January 11, 1944, signed by Mr. Coulson, was addressed to him as president of respondent. Petitioner was not consulted. Nevertheless, the opinion stated flatly,

> "Accordingly, there will be allowed in the consolidated return a loss to the parent company of approximately the cost of the railroad company stock. This loss however computed would appear to far exceed the incomes of the other members of the affiliated group. Accordingly, for the year 1943 on a consolidated return basis there would appear to be no excess profit tax or income tax liability." (R. 605, at 609, 610).

A copy of this letter was sent to Mr. Schumacher as one of respondent's Trustees (R. 613, 614). But no one sent a copy to the petitioner or advised it (R. 665). Respondent's annual report for 1943, issued May 1, 1944, 2½ months before the returns for 1943 were filed, contained a statement that "A consolidated tax return for 1943 can and will be filed by the holding company" (R. 512). This determination that the petitioner "will" file a consolidated re-

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the corporation's stock loss as a deduction in our consolidated return. * * * I was very much surprised at that statement, and asked him if I could bank on it. He said no, that that matter will not be finally decided until the Treasury Department completes their audit on our '43 returns." Note that in this conversation petitioner's loss is treated as though it belonged to respondent.

turn was not made by it but by respondent without consultation with petitioner. The decision was made in the office of respondent's president (R. 1277, 1278, 1450).

In due course the 1943 returns were prepared under Mr. Polk's direction and were laid before Mr. Curry for signature as president of petitioner. Mr. Curry had had no part in their preparation, but, being assured that Mr. Polk approved them, he signed, again without consulting petitioner's board of directors and without being advised that petitioner need not file a consolidated return if it did not wish to do so (R. 663-665).

1942 Refund Claim Based on Carry-Back of Petitioner's Loss.

In March 1945, the claim for refund of 1942 taxes based on the carry-back of petitioner's loss was prepared by Mr. Polk on his own initiative and without discussing it with any representative of petitioner. Mr. Polk sent it to Mr. Curry with the request that he sign it as petitioner's president (R. 1418, 1450, 1451), and Mr. Curry, being told that Mr. Polk wanted him to sign, did so, again without consulting petitioner's board of directors (R. 667).

1944 Tax Returns:—Mr. Curry in Mr. Coulson's Office.

Late in 1944, Mr. Polk decided to recommend consolidated returns for the first four months of 1944, again using petitioner's loss (R. 1486). He so advised respondent (R. 623). But petitioner was not advised about this decision. The decision to file such consolidated returns was made by respondent (R. 1450).

These returns were not filed until June 1945. By that time Mr. Curry was occupying office space with Mr. Coul-

son's firm. On May 1, 1945, respondent's New York offices had been closed and all employees let out. On April 21, 1945, in anticipation of that event, Mr. Coulson wrote respondent's president to obtain approval of retaining Mr. Curry at $3000 per year; Mr. Coulson wished to hire petitioner's president for the purpose of serving respondent's interests in the tax matters here involved (R. 1496). He wrote,

> "As president of the old holding company [petitioner] which is a party in interest (without financial stake) in the consolidated return period, it seems to us essential that we have Mr. Curry available to secure us necessary data from the files of the holding company" (R. 1743, 1744)

Mr. Coulson did not advise the petitioner that it had no financial stake in the consolidated returns, nor did he advise it of his purpose in taking Mr. Curry on this retainer. Respondent approved Mr. Curry's retainer.

On June 1, 1945, Mr. Curry, together with petitioner's files, were moved to Mr. Coulson's office. There he remained until September 10, 1948, when, after the statute of limitations had run against any tax deficiency claim (see p. 26, infra), Mr. Coulson requested him to vacate (R. 656). For 3½ years while in Mr. Coulson's office, Mr. Curry received $3000 per year from Mr. Coulson's firm, for which it was reimbursed by respondent (R. 1749). The only services which Mr. Curry performed for his retainer was to sign the 1944 tax return and execute, as petitioner's president, a power of attorney in its name in favor of Polk (R. 657-8).

The 1944 return was filed June 15, 1945. It was prepared in Mr. Polk's office and brought to Mr. Curry, who occupied

a room a few feet away (R. 1442), to sign (R. 1418). When Mr. Curry first moved to Coulson's office, he was told by Mr. Coulson that he was "to put himself at Mr. Polk's disposal in connection with the consolidated return" (Coulson, R. 1498). When told that Mr. Polk wanted him to sign the 1944 return, he signed, again without consultation with his board of directors and without being advised that petitioner need not file a consolidated return (R. 666).

The Power of Attorney and the Settlement with the Government.

The extent to which petitioner was disregarded and its tax affairs were taken over by respondent is shown by the way the tax settlement with the government was carried out. All negotiations for settlement were conducted by Mr. Polk in petitioner's name but without its knowledge (Polk, R. 1451).

On May 31, 1946, Mr. Polk wrote to the Internal Revenue Agent in Charge, justifying the use of petitioner's loss (R. 1779) but never, at any time, did he advise the petitioner or Mr. Curry of that letter (Polk, R. 1443; Curry, R. 667).

Since the government recognizes only the parent corporation in consolidated returns, it then became necessary for Mr. Polk to obtain a power of attorney from petitioner to continue settlement negotiations. On June 26, 1946, he prepared such a power of attorney running to himself (R. 1784) and sent it to Mr. Curry to sign. Mr. Curry signed because he was told that Mr. Polk wanted it (Curry, R. 668) and he did so without consulting his board of directors. Thereafter, Mr. Polk "conducted all the negotiations in the name of the plaintiff Corporation under [this] power of attorney" (Polk, R. 1441, 1451).

On February 11, 1947, Mr. Polk made to the Commissioner of Internal Revenue the offer of settlement that was accepted by the government in August 1947 (R. 1662). It was made and signed in petitioner's name by Mr. Polk; yet he showed no copy to petitioner or to Mr. Curry, sent no copy to them, and did not even advise them what was going on until April 1947, although during that period Mr. Curry was occupying a room in the Coulson suite (Polk, R. 1442; Curry, R. 654), and despite the fact that this suit had been filed the previous October and was then pending.

While ignoring petitioner, Messrs. Polk and Coulson were meticulous in obtaining authority from respondent to make the offer of settlement in the name of petitioner. Mr. Polk, in Washington negotiating with the Treasury, telephoned Mr. Coulson in San Francisco to secure respondent's authority to make the offer. Mr. Coulson and Mr. Elsey, respondent's president, agreed that this would require authorization by respondent's directors (R. 1283, 1284). It was only after respondent's directors had been polled and approved the offer that Polk delivered it (Coulson, R. 1493-4; Polk, R. 1430). This may be contrasted with his action in writing and delivering the offer in petitioner's name and under its power of attorney, not only without consulting it, but without informing it until two months later.

The reason assigned by Mr. Polk on the witness stand for ignoring petitioner was that he supposed "my responsibility was to them [respondent] and not the Corporation [petitioner]" (R. 1431), although the offer was made in the name of the petitioner and not the respondent. However, "I knew of the pending litigation," and finally it dawned

upon him that his conception of his duty was peculiar, and "I came to the conclusion that they should be notified" (R. 1431). Mr. Polk was in San Francisco conferring about this case with the respondent's attorneys when this revelation came upon him; he telephoned to his New York office to send out a letter over his signature to Mr. Curry as president of petitioner and this was done on April 2, 1947 (R. 1461, 1787).

Therein he requested petitioner's approval of the offer of settlement. Mr. Curry referred it to petitioner's board of directors. Not until then did the board know that Mr. Curry had signed a power of attorney (R. 1023). The board caused a reply to be sent to Mr. Polk on May 5, 1947 (R. 1794). It did not grant approval of the settlement. Commenting on

> "the action of the Western Pacific Railroad Company in opposing judicial settlement of the allocations of tax benefits, if any, derived from the application of the capital losses of the Corporation for the benefit of the Group," it said: "Had there been any question of the Railroad Corporation's right to a determination of the question of allocations of tax benefits, we feel sure that counsel representing both the Railroad Company and the Railroad Corporation would have specifically stipulated, at the time of the filing of the consolidated returns, for such allocation to be determined by the court, if the parties found themselves unable to agree thereto. Inasmuch as in the proposed settlement the Railroad Corporation foregoes its refund claim of $4,200,000, we think it appropriate that a stipulation promptly be entered into between the Railroad Company and the Railroad Corporation, and the other members of the Group, which will insure the Corporation its day in court for a settlement of the questions of proper and

equitable allocations of tax savings, if any, as well as fixing the amount of the refund as the basis for such savings. * * *"

In the meanwhile, on May 6th, Mr. Polk again wrote to petitioner requesting approval of the offer of settlement (R. 1797). But on that very day, without awaiting a reply and knowing that petitioner's request of May 5th had not been met, Mr. Polk renewed the offer of settlement, in petitioner's name, in a conference with Treasury officials, and confirmed that renewal by letter of May 19, 1947 (R. 1799). He signed that letter in petitioner's name and in it he asserted that "The taxpayer [i.e., petitioner] on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liabilities of said corporation for the taxable years 1942, 1943 and 1944 in the amount shown on the returns as filed," although the petitioner had not yet given him the authority requested in his letter of May 6th. Mr. Polk never informed petitioner of this letter (Polk, R. 1443), and Curry never heard of it until the trial (R. 681).

Polk's offer of settlement to the Treasury was that the tax returns be accepted as filed, the 1943 and 1944 returns showing no tax, and the claim for refund of the 1942 tax be rejected (R. 171). This offer was accepted by the Treasury on August 13, 1947 (R. 174) and the claim for refund was formally rejected on August 26, 1947 (R. 175).

This settlement could have been repudiated by either party (*Botany Worsted Mills v. United States*, 278 U.S. 282), but was not, and the tax saving became certain and final for the first time on June 30, 1948, when the statute of limitations ran against any deficiency assessment (R. 1751).

Coulson and Polk Never Advised Petitioner of Its Rights.

At no time did Mr. Coulson or Mr. Polk give any advice to any officer of petitioner as to what its rights might be against any other member of the group arising out of the filing of consolidated returns or the use of petitioner's stock loss, or advise petitioner that it was free not to file consolidated returns, although they knew that to be true (Polk, R. 1451-1458).

Petitioner Learns of the Use of Its Stock Loss and Files This Suit in 1946.

In June 1946, a stockholder's bill was filed in New York by certain of petitioner's stockholders (the petitioners in No. 160), charging that petitioner's directors had violated their duty in various respects, including a failure to prosecute petitioner's claim against respondent for its use of petitioner's stock loss in consolidated returns to the advantage of respondent. It was from that suit that petitioner's directors first learned of the use of its loss (R. 1024). Thereupon petitioner's directors caused this suit to be filed in October 1946 (R. 5, 11)

Supplemental Complaint Filed December 1947.

In December 1947, petitioner filed its supplemental complaint, in which it alleged that respondent through its officers and attorneys had controlled petitioner and that by virtue of that control petitioner was caused to file the consolidated returns for the benefit of respondent (R. 208, 231).

3. FINDINGS.

The trial court found the facts in accordance with petitioner's contention. Thus it found:

"On December 17, 1947, plaintiff filed a supplementary bill of complaint * * * It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control'." (R. 264)

And:

"* * * there is a preponderance of the evidence in favor of the plaintiff's contention of 'duality of control.'" (R. 272)

Again:

"* * * in 1943, after the filing of the 1942 return and payment of the tax, *the tax attorneys for defendant* 'discovered' Section 123 of the Revenue Act of 1942. (26 USC 23(g)(4).) *They* proposed what they denoted a 'paradoxical' theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some $75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation." (R. 261, 262)

And again:

"* * * the *tax attorneys caused the filing of* consolidated tax returns for 1943 and for the forepart of 1944 *in the name of plaintiff*, in which sufficient portions of the $75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show no net income." (R. 262)

"* * * *the tax attorneys for the defendant* conceived a 'paradoxical' plan. *They decided* that *they would* file

> * * * consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss * * * as an income tax deduction against the operating profits." (R. 265, 266)

And:

> "The returns * * * were prepared by the employees of the debtor [respondent] and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration" (R. 261)

Also:

> "a claim for refund * * * was filed *in the name of* the plaintiff" (R. 262)
>
> "The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had *between the tax counsel for the defendant* and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns" (R. 262, 263).

In short, the trial court found that respondent filed the returns and effected the settlement with the government, making use of petitioner's name, and that petitioner was not the actor. This is further shown by the proceedings on the settlement of the findings.

In its opinion the trial court admonished that it would only receive proposed findings pertinent to its theories (R. 276); petitioner was thus precluded from requesting findings on "duality" and "domination" as such (see p. 36, infra), but the same facts bore on the issue whether peti-

tioner took part in the tax transactions so as to be party to the wrongdoing which the trial court believed had been worked on the government. The matter was therefore raised.

On the settlement of the findings, the trial court said that it agreed with the petitioner's proposed finding on the subject. Noting that the court's opinion "decided the case on the basis that the taxes ought to have been paid the government" which sounded "on the principle that the court will not interfere between wrongdoers, or possibly like the doctrine of unclean hands," petitioner's counsel said that his proposed findings "in essence * * * go to the fact * * * *that the plaintiff did not itself conduct the tax transaction*" (R. 462, 463). And this colloquy occurred:

> "* * * the evidence certainly discloses that the tax operations, however they may be characterized, were conducted by the defendant and its tax counsel, not by the plaintiff.
>
> "The Court: *There is no question about that.*" (R. 468)
>
> * * * * * * * *
>
> "The Court: Why couldn't one finding be sufficient to cover that, then: that the court finds that in the preparation of the documents, in the conferences and in all matters having to do with the settlement arranged with the Bureau of Internal Revenue, *the plaintiff did not participate?* Couldn't you simplify that by making one finding?
>
> * * * * * * * *
>
> "Mr. Lasky: Your Honor's opinion of course also referred to the signing of various papers by the plaintiff's president. Of course Mr. Curry was the plaintiff's president, and our point here was that while he signed them, that really was not the plaintiff's act.

"The Court: *Didn't I say too the Board of Directors were not—*

"Mr. Lasky: I think you may have said it with respect to some matters but not others. I don't think it was said with respect to the power of attorney." (R. 470).

The court then said "that most everything you have mentioned is really in the opinion some place or another" (R. 476) and finally entered an order adopting its opinion as its findings (R. 319).

C. Other Relevant Facts.

STIPULATION OF AUGUST 1947 AND PRE-TRIAL ORDER.

Settlement with the government in August 1947 had not yet been effected when this suit was commenced in October 1946.

Petitioner was concerned that the form of the settlement should not prejudice its rights. Under the law and regulations, any refund of 1942 taxes would be paid to it (Reg. 104, Sec. 23.16(a)). But the form of the proposed settlement called for rejection of the claim for refund and would thus leave respondent in possession of all the tax savings.

Petitioner therefore negotiated with respondent for a stipulation to protect it. Before it was executed, intervening stockholders (petitioners in No. 160), being fearful that the stipulation did not adequately protect petitioner's rights, applied to the District Court for relief. After hearing (R. 335-339) that Court made a pre-trial order construing the stipulation (R. 163), upon the basis of which the parties executed it on September 3, 1947 (R. 168-175).

The effect of the pre-trial order was to distribute the tax savings of $17 million over the three-year period, attrib-

uting $3,385,290 to 1942. The claim for refund was not to be deemed to have been abandoned but to be diminished in proportion to the diminution of the entire tax savings, and placed in the same status as if it had actually been refunded and paid by the government to the petitioner and by it paid into court to await judgment.

CONSUMMATION OF THE REORGANIZATION.

The reorganization plan provided that it could be carried out either by revesting the properties (then in the trustees' hands) in the debtor, or by transferring them to a new corporation formed for the purpose (233 I.C.C. 453). The Reorganization Committee concluded that it would be advantageous to have the properties revested in respondent (the debtor) (R. 621). But to permit this, it would be necessary to secure the surrender by petitioner of its stock in respondent.

Accordingly, on November 22, 1943, the Reorganization Committee made a contract with petitioner and certain of its creditors, whereby petitioner agreed to surrender its shares to the Committee or its nominee for this purpose. On December 17, 1943, the bankruptcy court approved the "use of the debtor company" in carrying out the plan (R. 1930), and on April 30, 1944, the stock was surrendered by petitioner to the Reorganization Committee (Chart P 1).

Thus the affiliation for income tax purposes between petitioner and respondent did not cease until April 30, 1944. But the economic interest of petitioner in respondent had ceased for all time in 1943 when this Court affirmed the I.C.C. decision denying petitioner any participation in the reorganization and declaring its stock holding to be worth-

less. All control of respondent by petitioner had forever ceased when the bankruptcy trustees were appointed in 1935.

The reorganization plan was confirmed in October 1943 (R. 1674). In November 1944 the bankruptcy court made its revesting order (R. 36). Pursuant to that order and on December 29, 1944, the properties were turned back to respondent by Trustees' deed and, under date of December 14, 1944, respondent executed an Assumption Agreement assuming, among other liabilities, "any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use, or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business * * *" (R. 1711, 1713). Pursuant to the plan respondent also assumed all taxes due the United States from the debtor or the debtor's trustees for any period prior to January 1, 1945 (R. 36 at 49).

The tax returns for 1943 and 1944 and the claim for refund for 1942 were all filed after the economic unity of the group had ceased and also after tax affiliation had ended. The filing of the 1942 refund claim and the 1944 returns also occurred after respondent was out of the hands of the Trustees.

RESPONDENT IS THE SAME CORPORATE ENTITY THAT WENT INTO BANKRUPTCY, BUT ITS FORMER STOCKHOLDERS WERE COMPLETELY WIPED OUT.

Respondent has sought to distinguish between the "pre-reorganization The Western Pacific Railroad Company," the "reorganized The Western Pacific Railroad Company" and the trustees during reorganization.

But respondent is the same legal entity in which petitioner made its original investment of $75 million. It is and was the same legal entity throughout, before, during, and after bankruptcy. The actual railroad operations continued without interruption during the bankruptcy in the name and under the direction of respondent's officers.[18] And, as just noted, the assets were revested in the same corporate entity at the end of 1944.

But respondent is now a complete financial stranger to petitioner and has been since March 15, 1943, albeit "paradoxically" affiliated for income tax purposes until April 30, 1944. From the moment respondent went into bankruptcy in 1935 and its properties passed into the control of the bankruptcy trustees (R. 1916), petitioner lost all control over it, and never regained it. During all the time involved in the tax returns, petitioner and respondent were complete economic strangers, and petitioner had no control whatever over respondent.

As the Court of Appeals correctly stated, after 1935 respondent "was no longer controlled by Corporation [petitioner] but by the trustees appointed by the bankruptcy court" (R. 2223), and after adoption of the plan of reorganization "affiliation no longer existed" (R. 2231).

When it emerged from reorganization on December 29, 1944, the respondent had entirely new owners. Petitioner's investment of $75 million had been wiped out as well as its advances amounting to $7,750,000. No other interest was exterminated except that of a subsidiary of petitioner

[18] The court order provided that the "business shall be conducted in the name of the debtor by its regularly elected or appointed corporate officers, agents and employees, but under and subject to the direction of said trustees" (R. 1921).

amounting to $61,667. Other interests were given income or equity securities in place of fixed debt, or scaled down, but these securities were greatly enhanced in value by the operations during bankruptcy when $30 million of revenue was devoted to additions and betterments and $6 million to rolling stock (1944 Annual Report, P-20C, p. 9; reprinting in the record of the annual reports was dispensed with by order).

THE $10,100,000 RESERVE FUND TO PAY THE TAXES.

Throughout 1943 respondent made accruals in excess of $7 million to meet the expected 1943 tax liability, and for the first four months of 1944 it made accruals in an amount exceeding $3 million (R. 614, 1818-1824).

When Polk advised respondent in December 1943 that petitioner's loss could and should be used in the 1943 returns, he recommended that respondent's accruals for 1943 taxes be placed in a special reserve until the taxes were finally determined (R. 601-3). By order of the bankruptcy court on March 3, 1944, $7,100,000 was designated "Reserve Fund for Contingent Tax Liabilities" and invested in U. S. Treasury securities to be used to pay any federal taxes found to be due for 1943 (R. 616).

In March 1945, three months after it was out of the hands of the Trustees, respondent established a further reserve of $3 million against federal taxes, which was also invested in government securities (R. 616).

These reserves, aggregating $10,100,000, were still intact in respondent's hands at the time of the trial (R. 616). Since the tax settlement with the government, respondent has carried them as a contingent reserve to meet any judgment in the present action (R. 517, 518).

D. Summary Recapitulation of Basic and Incontrovertible Facts.

1. Petitioner sustained a loss of $75 million when its stock in respondent became worthless.

2. It ceased to have any economic interest in respondent on March 15, 1943.

3. Respondent thereafter used petitioner's loss to discharge respondent's tax liability of $17 million.

4. Respondent conceived the plan of using petitioner's loss and carried it into execution by directing the action of petitioner's president, who was also an officer of respondent and in its exclusive pay.

5. Respondent's tax saving resulted from the conjunction of two elements. First, it had to obtain petitioner's joinder in consolidated returns. In addition, it had to use the loss. The loss was petitioner's loss.

E. Decisions of the Two Courts Below.

The trial court found the facts in favor of petitioner but rendered judgment for respondent. The basis of its decision was its belief that it was "puzzling, if not downright amazing" that respondent could avail itself of petitioner's loss (R. 267); that respondent's tax "escape" was "erroneous and unjust" (R. 271), and that if the court "had the power, I would not hesitate to set aside the tax settlement" and "order these taxes paid to the United States" (R. 270). In short, its theory was the view that the tax savings ought not to have been allowed by the Treasury, that a wrongdoing or species of fraud had been worked on the government.

The trial court's second but minor ground was that petitioner was somehow seeking to go behind the reorganiza-

tion proceedings, which had denied petitioner any interest in respondent's properties.

Not the least of the peculiar consequences of the trial court's conclusion was that it left the proceeds with the party whom the court found to be the wrongdoer. The dissenting opinion of Judge Fee in the Court of Appeals clearly stated the situation (R. 2239-41):

> "The Trial Court gives two reasons for decision against plaintiff: * * * Neither has any validity.
>
> "The major portion of the opinion of the Trial Court is devoted to the proposition that the 'tax escape' was a fraud upon the government, and therefore the proceeds were given to the defendant, an active wrongdoer. * * * The majority of this Court, as the opinion shows, does not rely upon it.
>
> "A second subsidiary theory was also advanced below with little emphasis. * * * This reason is as unstable as the first."

The Court of Appeals swept aside the trial court's legal theories as erroneous. It stated of the major theory, "We do not share this view" (R. 2227-2228, fn. 12). Nevertheless, by a 2 to 1 decision, it decided against petitioner and affirmed the judgment on a legal theory all its own.

Its basic reasoning is as follows: If respondent controlled petitioner, it had a fiduciary obligation to deal with it fairly (R. 2223). But it did not violate this duty in filing the consolidated returns or in the failure of the common officers to request and obtain an agreement for compensation for use of petitioner's tax rights, or in respondent's failure to give petitioner an opportunity to appoint independent officers who could have made such an agreement.

These acts were not unfair, said the court, because petitioner was under a duty to file such returns; it could not have demanded an agreement of compensation for doing so, all because petitioner was bound to give to respondent the benefit of its loss (R. 2232-2234).

The opinion sums up: "Equity will not permit a recovery as a substitute for a bargain which would have been unfair," i.e., no bargain for any compensation would have been fair (R. 2235). In short, it was petitioner's duty to give up its sole asset to respondent for nothing.

The majority opinion thus announced a new principle of law, viz.:

That wherever the tax laws permit two corporations to join in consolidated federal tax returns, and one has a loss and the other has income, the former must join with the latter and permit its loss to be used for the latter's benefit, without payment, consideration or compensation.

And since respondent was no longer a subsidiary of petitioner,[19] the principle as applied went further, namely:

A former parent is under a duty to join in a consolidated return and permit its loss to be used to satisfy the former subsidiary's tax, without consideration or compensation, even though it has no economic interest in the latter and can derive no benefit therefrom.

This was tantamount to holding that the income corporation can sue in equity for a mandatory injunction to compel the loss corporation to join and confer the benefit of its loss, gratis.

[19] As the opinion itself states, "when the returns and the claim for refund were filed, affiliation no longer existed" (R. 2230-1).

SPECIFICATIONS OF ERROR

The United States Court of Appeals for the Ninth Circuit erred:

1. In holding that wherever the federal tax laws permit two corporations to join in consolidated federal income and excess profits tax returns, and one has a loss and the other has income, the former must join with the latter and permit its loss to be used for the latter's benefit, without consideration or compensation.

2. In holding that a former parent corporation is under a duty to join in consolidated income and excess profits tax returns and to permit its losses to be used to satisfy the former subsidiary's tax liabilities, without consideration or compensation, even though it has no economic interest in the latter and can derive no benefit therefrom, and particularly, that it must do so to permit the former subsidiary to utilize the very loss sustained by the former parent by reason of losing its stock interest in the former subsidiary.

3. In holding that after a parent corporation has had its equity in another corporation wiped out by reorganization in bankruptcy and has thus been left with a huge loss, the former bankrupt may then use the loss for its own financial advantage.

4. In holding to be irrelevant the facts that respondent dominated and controlled petitioner, that petitioner's officers were employees and officers of the respondent deriving their livelihood from it, and that by reason of such domination and control respondent was a fiduciary to petitioner and was enabled to and did appropriate, seize and use petitioner's tax rights for respondent's own enrichment without petitioner's consent.

5. In affirming the judgment of the District Court which denied any relief to petitioner, and in failing to hold that petitioner is entitled to an accounting from respondent and to a decree directing payment of an equitable portion of the respondent's tax savings for the years 1942, 1943 and the first four months of 1944, amounting to $17,201,739.

6. In failing to direct entry of judgment that petitioner have and recover from respondent the full amount of said tax savings.

7. By exceeding its appellate office in making findings of fact *ab initio* to affirm the judgment of the District Court upon a legal theory different from that on which the District Court acted, the theory of the Court of Appeals being unsupported by and inconsistent with the facts found by the District court.

8. In holding that a litigant (here petitioner) has no right to petition for a rehearing in banc or to have such petition considered and acted upon by all the members of the court, and in holding that a Court of Appeals has no power to grant such a rehearing after decision by a panel in the absence of approval of a majority of the panel.

SUMMARY OF THE ARGUMENT

I. Respondent has been enriched by $17 million by appropriating petitioner's tax rights to extinguish its own federal tax liabilities.

Assertions that a judgment for petitioner will in effect give it an interest in respondent denied by the reorganization plan, and thus circumvent the plan, and that it will give petitioner an interest in respondent's earnings accrued while in the bankruptcy trustees' possession, are fallacious.

Petitioner's claim does not circumvent the plan because the plan contemplated and required that respondent pay its taxes and did not contemplate that it would appropriate a stranger's (petitioner's) property to satisfy them. A judgment for petitioner will not take earnings respondent is entitled to keep but moneys which it would have paid into the Treasury if it had not appropriated and used petitioner's loss; respondent will be deprived of nothing it would possess if it had filed its own separate income tax returns and paid its taxes.

The benefit to respondent from taking and using petitioner's loss to discharge its taxes, and the applicable legal principles, are exactly the same as if respondent had taken currency from petitioner and used it for the same purpose. What petitioner prays is compensation for property belonging to it which respondent took after the plan of reorganization was consummated and which did not even exist until after that consummation. The consummation of the plan created the factual situation which made the later tax savings possible. Drastic as it was, and because it was drastic, the plan left petitioner with a $75 million loss possessing value for tax utilization. Having impoverished petitioner by taking ownership of respondent as the plan contemplated, respondent's new owners have gone beyond the plan, by taking from petitioner, an economic stranger, all it had left in order to enrich themselves further.

The plan was promulgated by the I.C.C. in 1939 before the tax savings were even conceived. Indeed the statute which made them possible was not enacted until October 1942. Both the plan and the revesting order required respondent to pay its federal taxes; it expressly assumed the

obligation; and it emerged from the reorganization with more than ample funds to do so, in a financial state vastly better than the plan envisaged, and with cash reserves set aside for the purpose. But thereafter it discharged its obligation by seizing and using what belonged to petitioner.

II. Petitioner is entitled to recover under principles of unjust enrichment, which require restitution. A person is enriched where he has received a benefit from use of what belongs to another. Saving one from loss or expense confers a benefit. Tax savings constitute enrichment subject to the principles of unjust enrichment. An enrichment is unjust if retention by the enriched party of the benefit would be unjust. Respondent's retention is unjust for two major reasons.

III. The first major reason is that retention would be inconsistent with the rationale of consolidated returns and the purpose of Congress in allowing them.

The rationale is that a group of affiliated corporations is an economic entity and, unless the group as a whole shows a profit, those who conduct the business, the parent's owners, have realized no gain. For this reason the common owner's right to set off the gains in one corporation against the losses in another is recognized, with the purpose and effect to benefit the ultimate owners of the business entity, i.e., the parent's stockholders. The object is to ameliorate the losses.

Two principles are evident: The tax savings should go (a) to the ultimate owner of the economic entity, the parent, and (b) to the party suffering the loss to ameliorate it. These two principles coincide here because the loss used to produce the tax savings was the former parent's loss. The

two principles also coincide wherever the economic unity continues. Where the unity has been severed so that the benefit of the tax remission granted by Congress cannot reach the parent through its stock ownership, the parent should be allowed to recover directly in order that the remission may be applied against the loss.

Consolidated reporting has been justified by Congress and the courts on the ground that "no ultimate advantage under the tax laws really results" and that "no improper benefits are obtained from the privilege," for Congress did not intend the privilege [to] be enjoyed solely for "tax reducing purposes." If the former subsidiary, after severance of the economic unity—the very event producing the parent's loss, is permitted to retain the tax savings without making restitution to the parent to ameliorate its loss, both equities underlying the principles of consolidated income tax reporting are defeated, an ultimate advantage under the tax laws has resulted, improper benefits have been obtained, and only a tax reducing purpose has been served: New owners of the former subsidiary will reap a sheer windfall from the misfortune of the old and the income tax laws will be subverted into a tool to enrich strangers.

IV. The second major reason why retention of the enrichment would be unjust is that respondent was able to appropriate petitioner's loss and right of use because it dominated petitioner and occupied a fiduciary relation to it.

One is entitled to recover for a benefit conferred unless he intended to make a gift. There was no gift here; respondent simply took petitioner's asset. Petitioner's directors lacked power to make a gift, duality of representation pre-

cluded any corporate intent to make one, and petitioner's directors knew nothing of the use of its loss.

After this Court's decision of March 15, 1943, everyone having to do with petitioner's affairs was under the highest obligation to see that such rights as were left to it and to its stockholders were not dissipated, violated or neglected, and those representing it and respondent, in dual capacity, were under the rigid duty not to permit petitioner's rights to be used for the benefit of respondent without an accounting. Desiring to use petitioner's tax rights, respondent should have openly disclosed to petitioner the utility of those rights and the legal and economic consequences of their use and should have requested petitioner's consent and given it the opportunity to obtain independent representation to permit a consensual arrangement. Respondent did not do so but sought to deprive petitioner of the opportunity to protect for itself the value of its corporate asset.

Respondent was a fiduciary to petitioner because it took over the conduct of petitioner's tax affairs and assumed to deal with petitioner's properties and rights in a manner designed to benefit itself; to this end it used petitioner's officers who were respondent's employees paid by it; and it took it upon itself to act as petitioner's agent and while so acting used petitioner's rights. By reason of petitioner's moribund condition and its loss of control over respondent, coupled with the latter's reinvigorated condition and the fact that petitioner's officers and most of its directors were mere employees of respondent from which they received their livelihood, the former subsidiary was the fiduciary to the former principal, for what makes one corporation a fiduciary of another are the elements of domination and the existence of control and management.

A fiduciary may not avail himself of any advantage or facility that the position gives him. He must account to the beneficiary for the full benefit derived from the use of any property or rights of the beneficiary, from the fact of the relationship or from the opportunities or facilities it affords.

V. The arguments advanced against recovery are without merit.

1. The basic holding of the Court of Appeals is that petitioner was under the duty to join in consolidated returns and to confer upon respondent, gratis, the benefit of its tax credit. No such duty can be found in the tax laws or regulations, which make clear that the parent is free to make its own decision about filing consolidated returns on the basis of its own interest. This is particularly true where the economic unity has been severed.

The court below by judicial fiat has made mandatory what Congress left optional. No duty of petitioner to give its tax rights away can be derived from any principle of equity. Creditors of a reorganized company, after supplanting the former shareholders, have no right to appropriate still other property of the former shareholders.

2. Underlying the basic decision below is the further holding that respondent had a right to expropriate petitioner's loss because petitioner was so unfortunate as to be left destitute, with no taxable income, and could therefore not itself achieve tax advantages by use of its loss, while respondent had use for it. But petitioner's rights to recover rest on benefits conferred and are not confined to detriment sustained. Property, assets or rights cannot be taken from one without compensation merely because he cannot use them profitably himself. Their protection from seizure or

trespass does not depend upon what use or benefit the owner can make of them. The contrary rule reflects itself in every field of law, in suits for the use of land, in unjust enrichment cases where recovery is measured by benefits conferred, not detriment sustained, in every case of a fiduciary's profiting from the relationship where he must account for the profit though the beneficiary suffered no loss and could not have made the gain, in patent and condemnation cases, and in a variety of other situations.

The utility of the loss to respondent itself gave and measured the value to petitioner.

3. Respondent asserts that a loss is "negative", may therefore not be called "property" or an asset or placed in any traditional category of common law liability: therefore it cannot furnish the basis of a right and a remedy. Terminology, such as "property," is not the source of rights; the reverse is true. The loss had a positive value, because it had a valuable use and was actually used by respondent to save $17 million. The tax savings did not spring automatically from the tax law; the law merely permitted the savings provided respondent could introduce itself into consolidated returns with petitioner and offset its loss against respondent's income.

4. The decision below was based in large part on the so-called practice of the parties in filing consolidated returns in earlier years. But alleged past practice is irrelevant. (1) It ignores the severance of the economic unity; it ignores the fact that while petitioner was respondent's owner before this Court's approval of the reorganization plan in March 1943, thereafter the parties became total strangers to each other and respondent was no longer in any real sense the same

party that had filed consolidated returns with petitioner in prior years but a total economic stranger. (2) Prior to October 1942 the tax laws did not permit the use here made of a loss like this and therefore there was no prior practice on the use of such loss. (3) There was no past practice about giving away a sole asset. (4) The evidence does not support the alleged past practice. And (5) past practice can be relevant only to the construction of a contract, but here there was no contract, and what was done prior to the severance of the economic unity is no evidence of a contractual consent to what was done thereafter in circumstances utterly different. The District Court considered the alleged past practice to be irrelevant.

5. Petitioner's rights do not depend on whether a prior agreement between it and respondent would have been possible. But such an agreement would have been perfectly legal.

6. There is no merit to the trial court's theory that petitioner should be denied recovery because respondent defrauded the government. The tax savings, having resulted from a final settlement with the Treasury, must be accepted as a starting point in the case. And if a wrong was perpetrated, respondent was the wrongdoer and should not have been rewarded by being allowed to retain the enrichment. A fiduciary cannot refuse to account for gains arising from his own wrongdoing.

7. Respondent asserted in its brief in opposition to certiorari that petitioner's claims, even if valid, were cut off by failure to present them to the bankruptcy court. But petitioner's claims arose after the revesting of the railroad properties in respondent in December 1944. Not only

were the claim for refund of 1942 taxes and the 1944 tax returns filed thereafter, but none of the tax savings arose until settlement was made with the Treasury in 1947, and they resulted only from the acts of the respondent, after bankruptcy was over, in adopting the returns and, in petitioner's name, prevailing upon the tax authorities to accept them.

Furthermore, respondent in writing assumed all obligations and liabilities incurred by the trustees and so assumed the liability to petitioner if it had theretofore arisen. The assumption was required by order of the bankruptcy court made pursuant to the settled practice and principle that the purpose of bankruptcy proceedings is to discharge or readjust debts existing at their inception and not to destroy claims arising from acts of the court's officers during the proceedings.

VI. The Court of Appeals said that it would deny recovery even though respondent did dominate and control petitioner, although concurrently it denied the fact of such domination and control. This denial was but a conclusion based on the irrelevant alleged past practice of filing consolidated returns. The trial court found the fact of domination and control and resulting appropriation, both formally and informally, and made clear that it would have formally made further findings except that the issue was immaterial to the legal theories on which it decided the case.

The record not only supports but requires this finding by the trial court of domination and control. If there were any basis for a conclusion that the trial court had not found the fact and that a contrary finding is possible, the cause would have to be remanded to the District Court for find-

ings. A Court of Appeals may not affirm a judgment on a legal theory different from that on which the trial court acted, when the new theory is based upon a fact not found or contrary to one found by the trial court. The Court of Appeals exceeds its appellate office by making findings *ab initio*.

VII. The Court of Appeals erred in denying petitioner the right to petition for a rehearing in banc.

VIII. Since the undisputed facts and the trial court's findings of fact require judgment for petitioner, further proceedings following reversal are unnecessary, and the cause should be remanded with directions to enter judgment for petitioner. The amount of recovery should be the tax savings, because (1) this will ameliorate petitioner's loss, thus serving the purpose of consolidated tax reporting, while retention of any part by respondent would be a sheer windfall, and (2) the principles respecting abuse of the fiduciary relationship so require. By failure of complete disclosure and by unilateral seizure of petitioner's rights, respondent denied petitioner the right to determine for itself the value of its asset. The "price of denial" is that respondent must now account.

ARGUMENT

I.

The Relief Sought by Petitioner Does Not Circumvent Respondent's Bankruptcy Reorganization or Permit Petitioner to Share in the Equity Which the Reorganization Plan Denied It.

From the outset respondent has urged that petitioner is here endeavoring to circumvent the reorganization plan by

seeking to share in the equity which the reorganization plan denied it.[20]

This argument ignores completely the basis of petitioner's claims. Petitioner seeks to compel respondent to account for the unjust enrichment resulting from respondent's appropriating and using petitioner's tax rights to satisfy respondent's federal tax liability. Judge Fee, dissenting in the Court of Appeals, commented (R. 2251): "The error of the lower court was in assuming that plaintiff is seeking an interest in defendant corporation instead of compensation for property taken by defendant which belonged to plaintiff."

If the subject matter of this suit were a bag of gold coin belonging to petitioner which was appropriated by respondent to pay its taxes, no court would hesitate to hold it accountable to petitioner. That the subject matter is a $75 million loss sustained by petitioner, which respondent used to discharge its tax liability, may present a unique factual situation but it does not involve unusual legal principles.

Petitioner's claim is not remotely in derogation of the reorganization plan. In asking that the benefit of the tax savings be adjudged to belong to it, petitioner does not remotely seek to undo the plan, but accepts its consequences in full. The consummation of that plan was not the end, but only the threshold, of this case.

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[20]The District Court said that the suit was "a circuitous way of obtaining something in the nature of equity or value for its ownership, rejected in the reorganization plan" (R. 272), and that "to make any award in this cause, under the assumed authority of equity principles, would be in effect to modify the administrative and judicial judgments in the reorganization proceeding" (R. 274).

The tax savings arose *after* the plan was fully consummated. It was the *fulfillment* of the plan—the very fact of its full and complete consummation—that created the factual situation which made the *later* tax savings possible. The plan was drastic. It wiped out the entire stock ownership of the old stockholder. In *Bondholders, Inc. v. Powell*, 342 U.S. 921 (Jan. 28, 1952) and again in *Chemical Bank & Trust Co. v. Group of Institutional Investors*, 343 U.S. 982 (June 9, 1952), Mr. Justice Frankfurter noted that due to erroneous estimates of future earning power, valuable equities were forfeited in a series of railway reorganizations of which the first was respondent's, *Ecker v. Western Pacific Railroad Corporation*, 318 U.S. 448. Although petitioner's stock in respondent was declared worthless in the *Ecker* case, respondent's taxable earned income in 1942, 1943 and the first quarter of 1944 was $32 million.

Nevertheless no complaint is made by petitioner of this deprivation of its stock ownership and no relief against it is sought in the present suit. But the consummation of the plan, having stripped petitioner of that ownership, left it with something in its place—a huge loss and a right to utilize it for tax purposes.

It was then that respondent went beyond the plan and seized what petitioner had left—its loss and right—to increase respondent's surplus by an additional $17 million.

This was no part of the plan. Indeed, the plan could not have commanded petitioner to give its tax rights to the bankrupt, even had it purported to do so (*Callaway v. Benton*, 336 U.S. 132).

The tax savings here involved had no bearing on the type of reorganization. They were unexpected—in the words of respondent's counsel, "fortuitous." The 1942 amendment

to the Revenue Act which for the first time permitted the use of the stock loss to offset ordinary income and thus made possible the saving here was not enacted until long after the plan was promulgated (see p. 8, supra).

The plan contemplated that the reorganized respondent should pay its income taxes. It explicitly stated (233 I.C.C. at 455) that

> "Notwithstanding any other provisions of this modified order, the reorganized company shall assume the liability for, and shall pay in full in due course, any and all taxes due to the United States from the debtor or the debtor's trustees for any taxable period prior to the date of the confirmation of the plan * * *."

The "revesting order" of November 27, 1944, by which the properties were restored to respondent and freed of bankruptcy administration, provided (para. 9) that respondent must

> "assume liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945 * * *." (R. 36 at 49)

In consideration of the transfer to it by the Trustees of all assets in their hands, respondent executed an "Agreement of Assumption" on December 14, 1944, effective December 29, 1944, in the form authorized by the revesting order (R. 1711). Thereby it specifically agreed to

> "assume the liability for, and pay in due course, any and all taxes lawfully due to the United States from the debtor or the debtor's Trustees for any taxable period prior to January 1, 1945 * * *." (R. 1716)

Respondent thus assumed the liability to pay the federal taxes. And it proceeded to make provision to do so. It paid the taxes for 1942, it made monthly accruals to pay them for 1943 and 1944, and it set aside reserves of $10,100,000 for that purpose. As late as August 1944, the trustees reported to the bankruptcy court that, after the deduction of the $7,100,000 reserve fund for 1943 taxes, the 1943 earnings were so large as to leave $8,929,844 available for dividends on the common stock, in addition to more than $11,500,000 required to carry out the provisions of the plan (R. 1195, 2179, 2188).

Like its competitors, the Southern Pacific and the Santa Fe, respondent was expected to pay its taxes on its war-swollen profits. This tax liability, which it was bound by the plan to pay and for which it had made cash provision, it discharged—not with the cash which it had set aside, and which it still had available for the purpose and which it yet has, but by the subsequent appropriation and use of petitioner's tax credits, which the Treasury accepted in August 1947.

Petitioner's rights are based on principles of law which became operative by reason of that *subsequent* appropriation and use.

Here the plan of reorganization had been prepared, approved and affirmed by this Court before the notion of saving taxes by use of petitioner's loss was even conceived. Even after its subsequent conception in 1943, it remained a "mere speculation of a possibility" until respondent first decided, in January 1944, to make use of the loss. In the meanwhile the plan was approved by the creditors and confirmed by the bankruptcy court, and thus had al-

ready become effective to fix the rights and legitimate expectations of respondent, its creditors and security holders.

The plan did not contemplate that the reorganized respondent would emerge from bankruptcy with any surplus at all. But it emerged with an unappropriated earned surplus of nearly $30 million.[21] The capital structure fixed by the plan was devised by the Interstate Commerce Commission so that the reorganized Company would be able to pay a dividend of $3.00 per share per annum out of the income it could reasonably expect to earn. But in 1943 the company earned $27.99 per share of common stock, after setting aside the $7,100,000 tax reserve, or $50.24 before setting aside the reserve, and in 1942 it earned $20.28 per share (R. 2179 at 2189, 2190, par. 11f and 12).

During the trusteeship $30 millions of operating revenues were used for additions and betterments, and another $6 millions of operating revenues were used to replace old equipment (p. 35, supra). After all this, the remaining income from the effective date of this plan until December 31, 1943 was sufficient to meet all bond interest and to make all payments into the capital fund and sinking fund required by the plan, and still leave $20,658,938 (R. 1196).

Enjoying all the benefits of the drastic features of the plan, respondent, its new stockholders, and those investing in its securities, as well as the court, all expected it to pay its taxes. The statements issued by respondent to the public disclosed the contingent tax liability and the existence of $10,100,000 of reserves in government bonds set aside to meet it. No one supposed—no one would have had a right

[21] 1945 Annual Report, P 20D, page 15.

to suppose—that respondent would escape this liability by appropriating what belonged to another.

A judgment for petitioner will take from respondent nothing that it would have had if it had filed separate income tax returns and paid its taxes in cash. On the other hand, if respondent has judgment, its new owners will not only have taken ownership from petitioner (as the plan contemplated), thereby inflicting a $75 million loss, but they will also have taken from petitioner, now an economic stranger already impoverished for respondent's benefit, tax credits resulting from that loss to enrich their position by an additional $17 million, something never contemplated by the plan.

The trial court argued that petitioner is seeking to share in respondent's earnings and that this Court's affirmance of the reorganization plan denied it that right by divesting it of stock ownership (R. 273).

But suppose that respondent had discharged its tax liabilities with cash taken from petitioner. Or suppose that the rolling stock used by respondent had been owned by petitioner and leased to respondent, and respondent then seized it outright. A plan of reorganization holding, as this plan did, that petitioner's stock ownership was worthless would cut off its right as a stockholder, but it would not transfer to respondent the rolling stock, and it could not if it would (*Callaway v. Benton*, 336 U.S. 132). If, then, respondent took the rolling stock, would it be exonerated from duty to pay for it? It could be said, no doubt, that if respondent repaid the cash taken or paid for the rolling stock, it would do so out of its "earnings." But the statement would be a mere play on words.

The judicial divestiture of petitioner's ownership of respondent does not render the latter immune from the duty, otherwise existing, to account for the value of other rights of petitioner which it seized after the consummation of the plan of reorganization—rights which were not in existence until after the plan was consummated—to the further enrichment of respondent and its new owners.

II.

Petitioner Is Entitled to Recover Under Principles of Unjust Enrichment

Fundamentally, petitioner is entitled to recover on the principles of unjust enrichment. It is in the law of quasi-contract that law and equity continue to maintain that capacity to do justice in new situations for which the Anglo-American system of jurisprudence is deservedly famous.[22]

As stated of this case in 65 Harvard Law Review at 1257, "If, as has been suggested, the Court should not have found that [petitioner] had a duty to file consolidated returns, then principles of restitution for unjust enrichment should have governed the decision."

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[22] 1 Williston on Contracts (Rev. ed.), p. 9, states:

> "* * * quasi-contractual obligations are imposed by the law for the purpose of bringing about justice without reference to the intention of the parties * * *."

and

> "As the law may impose any obligations that justice requires, the only limit in the last analysis to the category of quasi contracts is that the obligation in question more closely resembles those created by contract than those created by tort."

And cf. *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 292, 119 Pac. 82: "It has always been the pride of courts of equity that they will so mould and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication." And cf. *Addison v. Holly Hill Co.*, 322 U.S. 607 at 620.

A. THE BASIC PRINCIPLE.

The applicable principle is set forth in the *Restatement of Restitution,* Section 1:

> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

The meaning of this rule is amplified by the Comment that follows:

> "a. A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust (see Comment c). A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money. Ordinarily, the measure of restitution is the amount of enrichment received (see Comment d), but as stated in Comment e, if the loss suffered differs from the amount of benefit received, the measure of restitution may be more or less than the loss suffered or more or less than the enrichment."

Comment b states:

> "What constitutes a benefit. A person confers a benefit upon another if he * * * in any way adds to the other's security or advantage. *He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word 'benefit,' therefore, denotes any form of advantage.* The advantage for which a person ordinarily must pay is pecuniary advantage * * *."

It is self-evident that respondent has been enriched. The discharge of its tax liability, by the use of petitioner's loss and credits, was the conferring of a benefit upon respondent

and its enrichment, just as much as if it had taken dollars from the petitioner and with those dollars discharged its tax liability.

B. THE SHREVEPORT BANK CASES:—THE DUTY OF RESTITUTION APPLIES WHERE THE ENRICHMENT CONSISTS OF TAX SAVINGS.

The duty to make restitution applies just as much where the enrichment consists of tax savings as where it consists of some other kind of benefit. As said in 65 Harvard Law Review 1257, "a tax saving may constitute enrichment."

In *Connolly v. Commercial National Bank in Shreveport*, 189 F.2d 608 (5 Cir.), *Commercial Nat. Bank in Shreveport v. Connolly*, 176 F.2d 1004 (5 Cir.), and *Commercial Nat. Bank in Shreveport v. Parsons*, 144 F.2d 231, 145 F.2d 491 (5 Cir.), cer. den. 323 U.S. 796, one corporation was ordered to account to another for tax savings resulting from the use of the latter's tax credits. Numerous other issues were involved in the suit, but on the issue that is relevant here the facts are as follows:

The Commercial National Bank *of* Shreveport [the old bank], being in financial straits, transferred its assets to a new bank, Commercial National Bank *in* Shreveport [the new bank], and the latter assumed its liabilities. Later a receiver for the old bank was appointed and, still later, sued the new bank for an accounting.

The State of Louisiana, in which the banks were located, imposes a tax on the capital stock of national banks, assessable against the bank. In determining the assessable value of the stock, the Louisiana law provides that the assessed value of real estate owned by the bank is deductible from what would otherwise be the value of the stock.

Over a period of 5 years the new bank, in determining the tax value of its capital stock, deducted the value of the real estate of the old bank, which had been transferred to the new bank and stood in its name, as its own property. As a result it paid in taxes $192,000 less than otherwise would have been exacted.

In *Leslie v. Commercial Nat. Bank in Shreveport*, 28 F. Supp. 927, the District Court found that the property had been transferred by the old bank to the new in pledge and therefore still belonged to the old bank. On this factual basis it held that the new bank must account to the old bank for this tax savings, even though the old bank had suffered no detriment.

The Fifth Circuit agreed with the District Judge on this phase of the case. *Commercial Nat. Bank in Shreveport v. Parsons*, 144 F.2d 231, cer. den. 323 U.S. 796. The court said:

> "* * * appellant had no right to deduct from the assessed value of its own capital stock the value of such real estate as was shown on its published statements, because it was not the owner thereof within the meaning of the statute authorizing such deductions. The credit thus obtained by the new bank was a profit derived from the trust property as effectively as if it had been paid that much in cash."

On remand the new bank sought leave to deny that the assets had been transferred in pledge and to assert that they had been transferred outright. The trial court adhered to its decision relative to the tax savings. *Connolly v. Commercial Nat. Bank in Shreveport*, 72 F. Supp. 961, 963. On a second appeal, the Court of Appeals, in banc, held that most

of the assets had been transferred outright to the new bank, but that some of the assets had not, and that the new bank must account to the old for tax savings resulting from the use of the latter. *Commercial Nat. Bank in Shreveport v. Connolly,* 176 F.2d 1004. On the first appeal there had been one dissent as to the duty to account for the tax savings. On the second appeal the court's opinion was written by the judge who had dissented on the first appeal. Thus the whole court finally concurred that there was a duty to account for tax savings to the party whose rights were used to achieve that saving.

On a third appeal, the Fifth Circuit in banc held that the New Bank must account to the Old Bank for all the tax savings, *Connolly v. Commercial National Bank in Shreveport,* 189 F.2d 608.

C. THE RETENTION OF THE BENEFITS RECEIVED BY RESPONDENT WOULD BE UNJUST FOR TWO MAJOR REASONS.

Respondent has been enriched. If the enrichment was unjust, petitioner is entitled to recover. The enrichment was unjust for two independent major reasons: (1) such retention would be a perversion of the tax laws, and (2) respondent occupied a fiduciary relation to petitioner and violated it in appropriating petitioner's loss to its own use.

We proceed to discuss each of these reasons.

III.

First Major Reason Why Retention of the Enrichment Received by Respondent Would Be Unjust: Such Retention Is Inconsistent with the Rationale of Consolidated Returns and the Purpose of Congress in Allowing Them.

The principle underlying consolidated returns — their rationale — is summarized in II Montgomery's Federal

Taxes, Corporations and Partnerships, 1946-1947 issue, at page 633, where legislative reports and similar material are quoted.[23] The principle is this: A group of affiliated corporations is an economic entity and, unless the group as a whole in the conduct of the business enterprise shows net profits, those who conduct the business—*the owners of the parent*—have realized no gain, despite the legal fiction of separate corporations. As said in *Handy & Harman v. Burnet*, 284 U.S. 136, 140, the purpose is

> "to require taxes to be levied according to the true net income and invested capital resulting from and employed in a single business enterprise, even though it was conducted by means of more than one corporation."

The rationale of consolidated returns "is the recognition of this common owner's right to set off against his gains in the one [corporation] his losses in the other [corporation]." *Duke Power Co. v. Commissioner of Internal Revenue*, 44 F. 2d 543 at 545 (4 Cir.), cer. den. 282 U.S. 903, containing an excellent statement of the history and purpose of consolidated returns and the concept of the economic unity. So also *Alameda Inv. Co. v. McLaughlin*, 28 F.2d 81 (D.C. N.D. Cal.) aff'd 33 F.2d 120 (9 Cir.).

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[23]Consolidated returns were first required, but only for excess profits tax, by Treasury Regulation in 1917. This was validated by the 1921 Act. Consolidated returns were compulsory for both normal and excess profits taxes between 1918 and 1921, inclusive. They were permissive but not mandatory for 1922-1933, inclusive. They were not permitted, except in case of certain railroad corporations, from 1934-1939, inclusive. They were permissive for all corporations with respect to excess profits taxes in 1940 and 1941. In 1942 the Revenue Act, Section 141(a), extended the privilege to all corporations for all years after December 31, 1941, with respect to both normal taxes and excess profits taxes. (For the foregoing history see II Montgomery's Federal Taxes, Corporations and Partnerships, 1946-1947 issue, at p. 632.)

In Appendix Two to this brief we quote some of the legislative history on the subject.

When the law recognizes the group of affiliated corporations as an economic entity and permits the off-setting of the profits of one affiliate against the losses of another, it does so for the purpose and with the effect of benefiting the ultimate owners of the business entity, who are, of course, the stockholders of the parent corporation. The means which the law adopts to benefit these ultimate owners is the amelioration of the loss suffered by the ultimate owners because of losses of any one affiliate; this amelioration is accomplished by permitting the losses to reduce or eliminate, for tax purposes, the profits of other affiliates.

In the present case there are two significant facts: (1) the economic unity between the parent and the subsidiary was severed before the tax saving was claimed or achieved, (2) the saving resulted from the use of the loss which resulted from the severance of that unity. In such a case, if the tax saving is permitted to be retained by the former subsidiary after severance of the economic unity, without making restitution to the parent, particularly where the loss was that of the parent directly, both of the underlying principles of the consolidated return provisions of the income tax law have been defeated: (1) The stockholders of the parent corporation will not obtain the benefit resulting from filing a consolidated return, and (2) in addition, the loss which they suffered—and here suffered directly—will not have been ameliorated.

On the contrary, new owners of the former subsidiary will reap a profit—a sheer windfall—from the misfortune of the old owners. The income tax laws will have been used to

enrich complete strangers to the economic entity for whose protection consolidated returns are permitted. The fact that the retention of the enrichment would defeat the policy of the statute shows the enrichment to have been unjust.

In *Woolford Realty Co. v. Rose*, 286 U.S. 319, this Court (Cardozo, J.) held that the use of consolidated returns did not permit a corporation to deduct from its profits the loss of an affiliate sustained in a year prior to that in which the affiliation began. "The mind rebels against the notion," it said, "that Congress in permitting a consolidated return" was willing to permit a corporation to profit by the loss of one who was a stranger when the loss was sustained.

In the present case we have the converse situation, for here the tax savings were claimed after the economic unity was destroyed, and laws and regulations had come into effect subsequent to *Woolford* which permitted the tax saving in this case. But it is just as shocking to one's sense of justice to permit respondent to appropriate for its *own* benefit losses with which it had nothing to do, as it was in the *Woolford* case to contemplate the appropriation by one affiliate of the losses suffered by another in years prior to the affiliation.

If the economic unity had not been severed, the benefits would still inure to petitioner though retained by respondent. But "the mind rebels against the notion" that after the economic unity has been terminated, respondent may appropriate petitioner's tax credit resulting from petitioner's losses without making restitution. In the language of the *Woolford* case, "to such an attempt the reaction of an impartial mind is little short of instinctive." This "instinctive reaction" of which the Court speaks is the equivalent of

the conscience of the chancellor, the "good conscience" with which the law of quasi-contract and unjust enrichment is concerned, and which determines whether an enrichment is just or unjust. The party whose loss made the tax saving possible should receive it as a partial amelioration of its loss, rather than another who was not in good conscience entitled to any tax saving whatever.

In his dissenting opinion below Judge Fee summarized the matter thus (R. 2248):

> "If we look at it realistically, but little question arises. If the plaintiff were still the owner of the stock of defendant, then the allocation of $17,000,000 to the defendant would be reflected in the increased value of its stock. The transfer of the stock left the right untouched. Since increase in value of stock in defendant no longer is of avail to plaintiff, there should be another method of applying the remission to the loss."

In *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 127, the Court said that "After affiliation, as before, the affiliated corporations, although filing consolidated returns, continued to be separate taxable units. The consolidated returns operated only to unite them for the purpose of tax computation and the equitable apportionment between them of the tax thus computed."

Equitable apportionment of the tax involves equitable apportionment of the savings, and what is equitable must be decided in the light of the fact which distinguishes our present case from all others, namely, that the corporations are in fact separate entities, not merely legally, as the *Morgan's* case indicates is true of all affiliates filing consolidated returns, but also economically and factually.

The Report of the Senate Finance Committee on the Revenue Bill of 1928, 70th Congress, 1st session, Senate Report 960, which we quote in part in Appendix Two to this brief, also stated that "Much of the misapprehension about consolidated returns will be removed when it is realized that * * * no ultimate advantage under the tax laws really results." Similarly, in the Report of the Senate Finance Committee on the Revenue Bill of 1932, 72nd Congress, 1st session, Senate Report 665, at page 9, it was said concerning consolidated returns, "No improper benefits are obtained from the privilege."

After quoting these passages, the Board of Tax Appeals in *J. D. & A. B. Spreckels Co.*, 41 B.T.A. 370, 374, 375, answered in the negative the question "whether or not the framers of the statute intended that the privilege of making consolidated returns may be enjoyed in cases where the affiliation does not serve a business purpose, as distinguished from a tax-reducing purpose."

No purpose other than a tax-reducing purpose could have been served in the present case except by applying the tax savings to ameliorate petitioner's loss. Otherwise, an "ultimate advantage under the tax laws" has resulted and "improper benefits are obtained from the privilege": respondent has escaped its taxes because an economic stranger had a huge loss. The District Court was understandably indignant at this result. "If I had the power," it asserted, "I would order these taxes paid to the United States. That would effectively dispose of the cause." (R. 270.)

Yet it left the funds with respondent, the unjustly enriched party responsible for what was done. And the majority opinion below, while disapproving the trial court's reasoning, permits its result to stand.

The consequence is that the revenue laws have been perverted and made absurd, a result wholly inadmissible under rules of statutory interpretation often stated in this Court's decisions, many of which are collected by Judge Learned Hand in *Cabell v. Markham*, 148 F.2d 737 (2 Cir.). A congressional purpose as to who should have the tax savings, apparent from its enactments, should be given effect. Cf. *United States v. Hutcheson*, 312 U.S. 219, 235; *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 351.

THE LAW AND REGULATIONS CONCERNING JOINDER IN CONSOLIDATED RETURNS BY ONE IN RECEIVERSHIP OR BANKRUPTCY.

Section 52 of the Internal Revenue Code provides that when a trustee in bankruptcy is operating the business of a corporation, he shall make the income tax returns for it in the same manner and form as corporations are required to do, and the tax due on the basis of the returns shall be collected in the same manner as if collected from the corporation.

Treasury Regulation 104, Sec. 23.15, subd. (b), provided that if one or more, but not all, of the members of an affiliated group are in bankruptcy, the tax liability of each such member for the period covered by a consolidated return shall not exceed such portion of the consolidated tax liability as the affiliates may agree upon, or, in the absence of such an agreement, an amount equal to its liability "computed as if a separate return had been filed."

In the fall of 1942, while the *Ecker* case was on this Court's docket, Section 23(g)(4) was added to the Internal Revenue Code to permit the loss of a parent corporation resulting from worthlessness of stock of a subsidiary to be

used as an operating loss. But for this amendment petitioner's loss could not have been used to offset respondent's income.

Bankruptcy of a subsidiary usually makes the stock interest of the parent valueless and deprives the parent of control over it. However, under the foregoing provisions, any stock loss of the parent resulting from the bankruptcy can be offset against the income of the subsidiary, the subsidiary being permitted to pay a tax computed "as if a separate return had been filed," thus giving the tax benefit of the parent's loss to the parent.

The several provisions of the law and regulations thus show a legislative intention that a parent whose subsidiary goes into bankruptcy, with resulting loss of the value of the parent's stock, should have the benefit of any tax saving resulting through the filing of consolidated returns and the offsetting of the subsidiary's income by the parent's loss.

Respondent's tax counsel, Polk, testified that this case could not have happened but for the addition to the Internal Revenue Code in 1942 of Section 23(g)(4), and explained its purpose thus (R. 1447):

> "* * * there was a very unfair situation in consolidated return accounting up to that point that section 23(g)(4) was designed to correct. You see, under consolidated returns inter-company transactions are eliminated, and where a parent corporation puts out its cash for a subsidiary company and then the subsidiary company becomes worthless, if you eliminate the worthlessness as an inter-company transaction, there has been, in the usual case, a deprivation of capital, a loss of capital, and no reflection for tax purposes, and that was corrected by the insertion into the Internal Revenue Code of Section 23(g)(4)."

The "unfair situation" of which Polk spoke was that the parent had lost capital but derived no tax benefit from it. The purpose of the 1942 amendment was to correct this unfairness. But to permit the subsidiary to profit, instead of having the tax saving applied to ameliorate the parent's loss, would utterly fail to achieve that purpose.

S.E.C. DECISIONS.

In point is a ruling of the Securities and Exchange Commission, entitled *"In the Matter of Consolidated Electric and Gas Company,"* 15 S.E.C. 161 (1943). That case arose under the Public Utility Holding Company Act of 1935.[24] Section 12 prohibits certain intercorporate transactions between parents and subsidiaries, and the Act requires notice of intended transactions to be filed with the Commission to give it an opportunity to pass upon them. S.E.C. Regulation U-45 prohibits certain donations between parents and subsidiaries with exceptions in the case of consolidated tax returns.

In the particular case Consolidated Electric and Gas Company filed a notice with the Commission that it and its various subsidiaries had entered into a contract whereby it was to be primarily responsible for the payment of the taxes resulting from consolidated returns and each of the subsidiaries should pay as its share an amount representing that percentage of the total consolidated taxes of the group which the tax of the particular company, computed on a separate basis, would bear to the total amount of taxes of all the parties, computed on a separate basis.

[24]Since that Act regulates gas and electric holding companies and does not apply to a railroad corporation, the Act itself is not pertinent, but the problem arising under it and presented to the S.E.C. involved principles applicable here.

A consolidated return was to be filed for 1943, and a tax saving of $2,156,804 would result from the fact that the parent had or would suffer a loss in disposing of its investment in approximately nine subsidiaries. This loss was, for tax purposes, in every respect identical with the loss sustained by petitioner here from the worthlessness of its stock in respondent.

Consolidated Electric desired approval of its determination to alter the agreement so as to permit the remaining subsidiaries to make direct payment to it of amounts equal to those that they would save under the consolidated return by virtue of the capital loss incurred by the parent company.

The Commission approved this proposal, thereby holding that it was equitable that the affiliate securing the benefit of the tax saving resulting from the parent's loss should pay the amount of such saving to the parent which had suffered the loss. The Commission said that

> "To the extent that tax savings may accrue to the parent in connection with such sales, the result is in effect to reduce the amount of loss accruing to Consolidated by virtue of the transaction" (p. 163)

and expressed its conclusion as follows:

> "Under all the circumstances, we believe that it is more realistic to view the tax savings as, in effect, partial offsets to the capital losses otherwise suffered by Consolidated in connection with the sales." (p. 164)

In the *Consolidated* case the affiliation continued. Consequently, as the Commission remarked, the savings eventually would have inured to the parent anyway by virtue of dividend payments, or, if the parent should dispose of its

stockholdings in the subsidiaries, by increasing the value of the stock. The injustice of not having the tax savings transferred immediately to the parent would therefore not have been great. Nevertheless the Commission felt that a direct transfer was appropriate. As shown in 13 S.E.C. at 653, "the announced program of Consolidated is one for the liquidation of the Consolidated system." Thus the economic unity was to be severed, and therefore the S.E.C. recognized the equity that the tax savings resulting from the use of the parent's loss go to it at once. *A fortiori*, in the present case, where the economic unity has been split so that the tax savings cannot inure to the parent by virtue of dividends, the justice of requiring respondent to transfer the tax saving to petitioner to ameliorate its loss, by virtue of which alone the savings was possible, is apparent.

In another matter before the S.E.C. involving the same parent, *In the Matter of Consolidated Electric and Gas Company*, 13 S.E.C. 649, the loss was that of Islands, one of the subsidiaries, instead of the parent. By means of consolidated returns the parent and affiliates other than Islands saved nearly $1,500,000 in taxes by reason of Islands' loss.

The S.E.C. approved an application of the parent to pay to Islands an amount equal to the tax savings of the parent and other affiliates, since (13 S.E.C. at 658)

> "The tax savings * * * has its origin in a loss sustained by Islands and it seems eminently equitable that the cash be applied, as proposed, to the satisfaction of the Series A bonds of Islands, the holders of which have legal recourse against Islands alone."[25]

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[25]Respondent has sought to distinguish this case on the ground that Islands by joining in the consolidated returns would be subject to a future tax and that the arrangement was merely to put it in

Two principles are apparent from these cases: (1) the tax saving should go to the ultimate owner of the economic entity, the parent, and (2) it should go to the party suffering the loss, to ameliorate it. So long as the economic unity continues, these two principles coincide, for no matter which affiliate sustains the loss in the first instance, the parent also sustains it—at once if it is the affiliate, or ultimately if the loss was that of a subsidiary. Thus, in the *Islands* case the parent allocated the tax benefits, resulting from a loss, in a manner best serving its own interests, for by using the tax savings to pay off the subsidiary's bonded debt the parent increased the value of its own equity.

In the present case, too, both equities coincide, the equity that the tax saving should go to the parent and the equity that it should go to the party sustaining the loss, to ameliorate it. Both equities sustain petitioner's right to recover. And both demonstrate that it would be inequitable for the tax savings to go to one that was neither the parent nor the sufferer of the loss.[26]

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the same position as if it had filed a separate return. But this is not the fact, for the S.E.C. found that the amount of the future tax would "be considerably less than the tax savings to be presently effected" (13 S.E.C. at 653). The proposal was that the *whole* of the tax saving should be paid to Islands, and it was this proposal that the S.E.C. approved (13 S.E.C. at 652).

[26]Respondent's briefs below quoted from an S.E.C. release discussing accounting practice, wherein it is said that no part of tax savings is "ordinarily" paid to the loss company. The text of the release shows that the S.E.C. was not directing its remarks to a case, such as this, where the loss is that of the parent itself. Ordinarily losses are those of subsidiaries, since the parent, not being an operating company, can sustain losses only in the unusual case of worthlessness of its security holdings. The S.E.C. was referring to the normal situation of a continuing economic unity, and the alternatives noted were (a) allocation of all the savings to the affiliate having the loss or (b) sharing it. There was no mention whatever of the third course that respondent espouses—that of

PETITIONER'S RIGHT TO RECOVER IS SUPPORTED BY EQUITABLE RULES OF CONTRIBUTION.

Situations often arise where, as respects a third party to whom a duty is owed, two persons are both liable; yet, as between themselves, the burden should be discharged in whole or in part by one of them only, either because of agreement between them or apart from agreement. If one of the parties discharges the obligation, he is entitled to restitution from the other who should have done so. *Restatement of Restitution,* Section 81, Comment thereunder, and the sections following, as well as the "Introductory Note" under Topic 3 at pages 327, et seq.

As stated on page 328 of the Restatement, even if the parties do not have in mind the necessity of such restitution, or do not think of it in detail, a duty will be imposed.

These principles apply to tax situations, including those involved in consolidated returns.

Bankers Trust Co. v. Florida East Coast Car Ferry Co., 92 F.2d 450 (5 Cir.) illustrates that application. That case involved a consolidated return in which the net income of one of the affiliates, "A", was overstated, resulting in an excess tax chargeable to it of $195,000, and the income of another affiliate, "B", was understated. The tax deficiency resulting from the understatement amounted to $99,000. Offsetting the two, there was a net refund of $96,000 resulting from the overstatement.

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retention of all the savings by the affiliate whose taxes are reduced by use of the parent's loss.

The significant lesson to be drawn from the S.E.C. is that when an affiliate's tax savings resulting from the use of another affiliate's loss cannot or may not reach the party suffering the loss through ordinary channels, as by way of dividends or increase of its equity, the benefit of the tax savings should be passed to the party who suffered the loss.

One of the questions in the case was whether A was entitled to recover $99,000 from B.[27] A had overpaid that amount in addition to the $96,000 and would have been entitled to its refund from the tax authorities except for the fact that it was applied to pay the additional tax due from B. In short, A's credit paid B's tax, as a result of the consolidated reporting.

It was held that the affiliate whose income had been overstated was entitled to reimbursement in the amount of $99,000 from the receiver of the affiliate whose income had been understated.

So, in the present case, respondent's tax liability was discharged, not by its paying anything, but by use of a tax credit belonging to the petitioner.

The two affiliates in the *Florida East Coast* case were subsidiaries of a common parent. The one that had received the benefit of the other's tax credits was in the hands of receivers. Were it not for the intervention of the receivership, it would have been a matter of no practical concern whether or not the affiliate receiving the benefit of the other's credits accounted to it, because in either event the common parent would be the ultimate economic beneficiary. It would be irrelevant whether the gain reached the parent through its ownership of the one corporation or of the other, and the ultimate disposition of the benefit would lie in the parent's hands. But the insolvency of the first affiliate, resulting in the receivership, meant that the rights of that

[27] Another question was to whom the refund of $96,000 should go. This presented no problem. The refund went to A, not because A had paid the money but because the refund was due to A's own tax credits; that is, on a separate return basis the $96,000 would never have had to be paid by A.

affiliate's creditors intervened between it and its parent; there was a severance of the economic unity. If the tax benefits were allowed to remain in the hands of the receivers, they would never reach the parent. It thus became important that the incidence of gains and benefits should be placed where it properly belonged. And it was so placed in the *Florida East Coast* case by the judgment rendered.

In the *Florida East Coast* case the severance occurred because of the intervention of the rights of creditors. Here the severance occurred as the result of adjudication in 1943 that petitioner was not entitled to an equity in the reorganized defendant. The principle is the same in both cases.

If a tax liability is justly that of one party, either in whole or in part, and another discharges it, the latter is entitled to recover from the former. *Phillips-Jones Corp. v. Parmley,* 302 U.S. 233; *Wolters v. Henningsan,* 114 Cal. 433, 46 Pac. 277.

In tax cases a right to contribution from other members of an affiliated group may arise from overpayment of one's share. *Koppers Co.,* 11 T.C. 894; *Koppers Co.,* 8 T.C. 886, 891. Although all members of an affiliated group may be severally liable to the government for the whole tax, "as between themselves, each affiliate [is] mutually obligated under principles of general law to pay only its fair share of the common burden." *Koppers Co.,* 8 T.C. at 891.

In the present case, petitioner had no income and its fair share of the tax burden was nothing whatever. Since respondent's tax liability was fully discharged by the use of petitioner's tax credits, petitioner has a right to restitution for the benefit received.

SEVERANCE OF THE ECONOMIC UNITY MAY NOT BE IGNORED.

Respondent has argued that "economic unity" in matters of consolidated returns is a false factor, because a subsidiary may have bonds or non-voting preferred stock outstanding. This flies in the face of the principle upon which consolidated returns are based, namely, that a single business enterprise, though conducted by separate corporations, shall be taxed as a unit. For consolidated returns to be available, the parent must own not only 95% of the voting stock but 95% of all non-voting stock other than preferred stock limited as to dividends (I.R.C., Sec. 141(d)). In short, the parent must own what for practical purposes is the entire equity.

Holdings by others of interests which do not share fully in the equity do not affect the economic unity. If, as respondent argued, tax savings go to pay bondholders or preferred stockholders, then payment of these overriding obligations *pro tanto* lifts the load depressing the equity and correspondingly increases its value to the benefit of the parent. The economic unity continuing, precise mathematical admeasurement of the benefit to the parent is of no consequence. As said in *Estate of John B. Lewis*, 10 T.C. 1080, 1086 (1948):

> "To say that a corporation, as such, can have motives and purposes apart from its stockholders, the collective group of individuals who own it, is to indulge in metaphysical reasoning * * * And to say that what is advantageous to the stockholders * * * is of no advantage to the corporation is utterly unrealistic."

On the other hand, if the overriding load is so great that in fact there is no equity, e.g., if the subsidiary is insolvent,

the economic unity has in effect been severed. Such, for example, was the situation presented in *Bankers Trust Company v. Florida East Coast Car Ferry Co.*, 92 F.2d 450.

IV.

Second Major Reason Why Retention of the Enrichment Received by Respondent Would Be Unjust: Respondent, Occupying a Fiduciary Position to Petitioner, Appropriated Petitioner's Rights to Its Own Use.

March 15, 1943 is a critical date in fixing the relative rights, duties and obligations of the parties. Before then petitioner as the owner of all of respondent's stock and as the hopeful suppliant for the continuance of that ownership after reorganization received the advantage of any benefit that accrued to respondent. After this Court's decision affirming the denial of petitioner's claim to share in the equity of the reorganized company, everyone having to do with petitioner's affairs was under the highest obligation to see that such rights as were left to it and the rights of its stockholders were not dissipated, lost, violated or neglected. From that date those persons who, with propriety, had theretofore acted in dual capacities or as joint officers of petitioner and respondent were now under the highest obligation to see that no act and no inaction of theirs should prejudice the rights of either company against the other.

In view of petitioner's misfortune and its stricken condition, it was the high fiduciary duty of its agents to be diligent to protect its rights, to utilize every opportunity that might retrieve something for its stockholders from the debacle, above all not to permit the use of its rights, including its stock loss, for the benefit of another, without accounting.

Respondent could have openly approached and fully disclosed to petitioner the view of respondent's tax counsel that petitioner's loss could be used in consolidated returns to discharge respondent's taxes; it could then have requested petitioner's cooperation and consent to the filing of consolidated returns and use of the loss. Had this disclosure and request been made, petitioner could have obtained independent officers and counsel and the parties could then have arrived at an equitable agreement apportioning the tax saving. Such an agreement would have been an easy, simple and honorable way to settle the question.

But this was not done. No such agreement was made, *simply and bluntly because respondent took over and managed the entire tax matter for its own benefit by controlling and directing petitioner's officers and agents.*[28]

As 65 Harvard Law Review 1257 says of this case:

> "[Respondent's] enrichment may have been unjust if, having caused [petitioner] to file the consolidated returns, it deprived [petitioner] of the opportunity to bargain for the value of its corporate assets: the right to use its stock loss for tax purposes."

A. PETITIONER NEITHER MADE NOR COULD MAKE A GIFT TO RESPONDENT.

Professor Scott says of quasi-contractual liability:

> "In general one is entitled to recover for benefit conferred unless he intended to make a gift or acted officiously." (2 Scott on Trusts, Sec. 269.3, p. 1520)

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[28] The duality of position of petitioner's representatives—the fact that they were in the employ and pay of respondent—would have made an agreement between the parties impossible unless and until independent representation was obtained. No such agreement would be binding, and petitioner would still have the right to an unfettered determination of its right by the courts. See authorities on duality, discussed at pp. 89-92, infra. But respondent did not even seek an agreement. It simply appropriated petitioner's rights.

How much more so is this true where one does not voluntarily confer the benefit but where it is seized. Petitioner here made no gift of its loss to respondent. The latter simply took it. Even if petitioner's directors had realized what was being done and even if they had had a donative intent, no gift could occur.

In the first place, the duality of position of petitioner's representatives would preclude any claim of an effective corporate intent to make a gift (see authorities on duality at pp. 89-92, infra).

In the second place, petitioner's directors had no power to grant a gratuity, for stockholders' rights cannot be given away. *Brayton v. Welch*, 39 F. Supp. 537; *Greene County Nat. Farm Loan Assn. v. Federal Land Bank, etc.*, 57 F. Supp. 783. Here the real parties in interest are petitioner's stockholders.[29]

As the dissenting opinion of Judge Fee pointed out (R. 2244):

> "* * * It seems to be assumed that the officers of plaintiff could give away the property right to file or refuse to file consolidated returns either voluntarily or acting under the control of defendant or the reorganization trustees. This is strange doctrine. * * * a transfer of all the assets of a corporation * * * cannot be made even by a majority of the stock. Neither officers nor directors, without a vote of the majority, have such power. In this case it is of stellar importance that this right of plaintiff was its sole asset and that, upon appropriation thereof, it became insolvent."

[29]Petitioner's loss being essentially its sole asset, the directors could not even have sold it without the approval of the stockholders. See authorities cited in Judge Fee's opinion (R. 2252, fn. 12, 13, 14, 15).

B. RESPONDENT AND ITS ATTORNEYS WERE FIDUCIARIES TO PETITIONER IN THE CONDUCT OF THE TAX MATTERS.

Where one corporation has been given or takes control over the property or affairs of another, and exercises it in a manner to obtain benefits for itself, it becomes accountable for those benefits, because control by the one over the property or affairs of the other creates a fiduciary duty not to use the control for the fiduciary's profit.

In the *Shreveport Bank* cases that rule was applied where the benefits were tax savings (see p. 58, supra).

Note the mechanics whereby respondent appropriated for its own benefit the tax credits resulting from petitioner's loss:

The operative documents which produced this result were (a) the consolidated tax returns for 1943 and for the first four months of 1944, (b) the claim for refund of the 1942 taxes, and (c) the power of attorney from petitioner to Polk. It was respondent, through its tax counsel, which prepared these documents. With them in hand, it was enabled to eliminate its tax liability and did so. It filed the documents and settled the tax controversy with the government, all in petitioner's name. All of these documents were signed by Curry as petitioner's president. At the time he signed them he was vice president, assistant secretary and assistant treasurer of respondent with his headquarters in its office (until May 1, 1945, when his headquarters were moved to the office of its counsel). He was receiving his sole compensation from respondent and, in the signature of these documents, he was following the directions of Polk, who was its tax counsel and who, although he later solicited and secured a power of attorney from petitioner, testified that he con-

sidered he owed his responsibility to respondent and not to petitioner.

The decision to use petitioner's loss by way of offset to respondent's income was made by respondent through its president, Elsey. That decision was carried into effect by respondent's attorney, Polk, whose directions to execute the documents were obeyed by Curry. Curry was completely subject to the control of respondent and its attorney, Polk, and Curry and Polk considered themselves to be, and they in fact were, the employees of respondent. What they did with respect to the tax returns was in law the act of respondent. Insofar as tax matters were concerned, respondent was in complete control of petitioner.

Respondent was a fiduciary because at its own instance it voluntarily took over the conduct of petitioner's tax affairs and assumed to deal with petitioner's property and rights in a manner designed to benefit itself.

It was a fiduciary because petitioner's officers, whom respondent used to appropriate the petitioner's loss, were respondent's employees and the employees of its tax counsel, and paid by it and them.

It was a fiduciary because it assumed to act as petitioner's agent. While so acting, and by use of its principal's rights, and by taking advantage of its relationship to petitioner, it received the tax benefit.

In *Brooks v. Martin*, 2 Wall. (U.S.) 70, 84, this Court notes the fiduciary character of one who manages a business for another "without consulting him in any way, and with little regard for his * * * interest * * *."

As said by Judge Cardozo in *Meinhard v. Salmon*, 164 N.E. 545, 548, 249 N.Y. 458,

> "Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation. He was much more than a co-adventurer. He was a managing co-adventurer. * * * For him and for those like him the rule of undivided loyalty is relentless and supreme."

As this passage shows, it is enough to create the fiduciary relation that one voluntarily places himself in control of another's affairs.[30] *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 492.

In *Overfield v. Pennroad Corporation*, 42 F. Supp. 586, 48 F. Supp. 1008, a judgment of $22,104,515 was entered in a stockholder's suit in favor of the Pennroad Corporation against the Pennsylvania Railroad and its directors, the liability of the defendants being "based upon their dealings with Pennroad's property and powers in a manner designed to benefit Pennsylvania Railroad." (42 F. Supp. 610)[31]

One becomes another's fiduciary where he assumes to and does take over and manage another's affairs. The law of quasi-contract had its very origin in that situation. Its principles are derived from the Roman law, and one of the principal classes of quasi-contract was where one took over "the management of the affairs of another" or took over

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[30] 3 *Bogert on Trusts* (part 1) p. 80, quoting, states that "A party may voluntarily assume a confidential relation towards another * * *."

[31] The Circuit Court of Appeals later held the claim barred by the statute of limitations but did not question the principles declared by the district court. The same issues were involved in an earlier stockholders' suit which was then revived and settled for $15 million. *Perrine v. Pennroad Corp.*, 47 Atl.2d 479, 29 Del. Ch. 531.

the "management of common property." *Bouvier's Law Dictionary* (Rawle's Revision), Title "Quasi-Contractus." *Sandars Edition of Justinian's Institutes* (7th ed.) p. 385, Liber III, Tit. XXVII states:

> "if I take upon me the management of my neighbor's affairs * * * have things in common with others who are not my partners * * * the mere fact of my so conducting myself imposes on me certain duties which the law will force me to fulfill."

As said in *Commissioner of Internal Revenue v. Owens*, 78 F.2d 768, 773 (10 Cir.):

> "The term fiduciary is derived from the civil law. * * * It connotes the idea of trust or confidence. * * * The relation arises whenever the property of one person is placed in charge of another. McKinley v. Lynch, 58 W. Va. 44, 51 S.E. 4, 9."

In the case cited (*McKinley v. Lynch*) the court quotes from several text writers thus:

> "It is difficult to define the term 'fiduciary relation'; but * * * such a relation arises wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property or pecuniary interest, in the whole or in part, or the bodily custody, of one person, is placed in the charge of another.' "

And again:

> " 'The principles which cover the cases of dealings of persons standing in a fiduciary relation apply * * * generally, to the case of persons who clothe themselves with the character which brings them within the range of principal.' "

A mortgagee or pledgee is not ordinarily a fiduciary to the mortgagor or pledgor, *Restatement of Trusts*, Sec. 9(c)

and (b), pp. 30, 31; 1 *Scott on Trusts*, p. 70, but he is if he has control of the property. *De Martin v. Phelan*, 115 Cal. 538, 543, 47 Pac. 356. Such was the holding in the *Shreveport Bank* cases (see p. 58, supra).

The majority opinion in the Court of Appeals sweeps aside these settled principles by saying that "cases which deal with trustees, agents and partners are not controlling here as there is no contention that the subsidiary was a trustee, agent or partner" (R. 2221). This assertion ignores the fact that petitioner has contended throughout that respondent occupied a fiduciary relation to it, and was its agent and trustee.

Furthermore, "fiducial relationships * * * do not depend upon nomenclature," *Oldland v. Gray*, 179 F.2d 408, 414, cer. den. 339 U.S. 948. The term "fiduciary" is not confined to fixed classified relationships like trusts. It exists wherever confidence is reposed, particularly where there is a disparity of position. 3 *Bogert on Trusts* (part 1), pp. 82, 83. In the words of Judge Cardozo, "Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish." *Meinhard v. Salmon*, 164 N.E. 545, at 548. And see *Bogert*, p. 78.

A striking example is *Reading v. The King* [1948] 2 K.B. 268, affirmed in [1949] 2 K.B. 232 and in *Reading v. The Attorney General*, 1951 Appeal Cases 507 (reviewed in Harvard Law Review, January 1952, p. 502). Reading, a British army sergeant stationed in Cairo, would ride in uniform on trucks carrying contraband. His presence in uniform deterred the Egyptian police from investigating, and he was rewarded by large sums.

The court held that the Crown was entitled to the funds because the facilities provided by it in the shape of the uniform, and the use of the soldier's position in the army, were the reason why the payments were made to him.

It was further held that no fiduciary relationship was necessary to establish the Crown's rights, but, if one were necessary, it was present, for "the term 'fiduciary relation' in this connection is used in a * * * very comprehensive sense," and "in the wide sense in which the term is used in the relevant cases such a relation subsisted in this case as to the user of the uniform and the opportunities and facilities attached to it." ([1949] 2 K.B. at 236 and 238; [1951] Appeals Case 507, at 516)

A Corporation Which Dominates Its Affiliate Is a Fiduciary of It.

The relation between a parent and a subsidiary corporation is fiduciary, if one dominates and controls the other. The fiduciary relationship does not arise from the fact that one is a parent; it is created by the elements of dominance and the exercise of control and management. *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 492; *North American Co. v. S.E.C.*, 327 U.S. 686, 693; 65 *Harvard Law Review* 1257.

Ordinarily, the parent is the fiduciary. But here respondent was petitioner's fiduciary, for it dominated and controlled petitioner's actions and directed them for its own benefit. This respondent was enabled to do because of the moribund condition of petitioner, its loss of control over respondent, resulting from the bankruptcy, respondent's reinvigorated condition, the switch of allegiance of the James Interests to respondent, and the fact that petitioner's

officers and most of its directors were mere employees of respondent and received their livelihood from it.

As said in 65 Harvard Law Review 1257, regarding this suit, "It may be strongly argued, then, that in the unique situation where the usual relationship is reversed, the subsidiary controlling the parent, the fiduciary duty is also reversed." And in *Commercial Nat. Bank in Shreveport v. Parsons*, 144 F.2d 231 at 236, "The dominant officers of the new bank were the directors of the old, and they were doubly bound to treat the latter fairly."

More than once a parent corporation has invoked and received the protection of fiduciary standards against unfair treatment at the hands of a subsidiary; e.g., *Potter v. Sanitary Co. of America*, 194 Atl. 87, 22 Del. Ch. 110; *Bancokentucky Co.'s Receiver v. National Bank etc.*, 137 S.W.2d 357, 281 Ky. 784.

C. AS A FIDUCIARY, RESPONDENT MUST ACCOUNT FOR BENEFITS GAINED.

Once a fiduciary relationship is established, the rights and duties are similar to those existing in the case of a trust. As 4 *Pomeroy on Equity Jurisprudence* (5th ed.) 263 says:

> "Wherever there is a fiduciary relation * * * the dealings of the parties with each other and with the subject-matter of the relation are governed by the same rules which determine the duties of actual trustees towards their cestuis que trustent * * *."[32]

In *Barney v. Saunders*, 16 How. (U.S.) 534, 542, the principle is stated thus:

> "It is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character,

[32]Thus the rule of *Cal. Civ. Code*, Sec. 2235, concerning trustees is said to apply to all fiduciary relationships. *Metropolis etc. Sav. Bank v. Monnier*, 169 Cal. 592, 598, 132 Pac. 833.

deals with the trust estate for his own personal profit, he shall account to the cestui que trust for all the gain which he has made."

In *Young v. Higbee Company*, 324 U.S. 204, a reorganization plan was proposed and confirmed by the District Court over the objection of two preferred stockholders. The two appealed. During the appeal they sold their stock and right of appeal for more than the market value of the stock. Other preferred stockholders sued them to obtain their profit. This Court held for the plaintiffs. The two stockholders, it said, had voluntarily become fiduciaries even though they had filed their objection on their own behalf and not on behalf of the preferred stockholders as a class, because success on the appeal would have redounded to the advantage of all. By appealing the two had assumed a "determining position over the rights of others" (p. 209) and "owed an obligation to them." (p. 210.). The plan of reorganization having been confirmed, the other preferred stockholders had lost nothing to which they were entitled. Yet it was held that the retention of the profit from the sale of their shares by the two stockholders was unjust; it "was not paid for anything they owned" (p. 212). So here, the tax saving now held by respondent was not the result of any tax credits belonging to it.

Pound and Plucknett's "Readings on the History and System of the Common Law" (3rd ed. 1927), at page 629, quoting Maitland's Equity, p. 83, refers to:

> "* * * one grand rule. It is this: that wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as a trustee, he becomes a trustee of the advantage so gained. * * *

"The rule includes persons who are not trustees properly so called, but all those who stand in what is called a fiduciary position. * * *"

This primary principle has been stated by the authorities in much the same language regarding every variety of fiduciary situation. Its gist and substance is this: The fiduciary may not avail himself of any advantage or facility that the position gives him. If he derives any benefit either from the use of any property or rights of the beneficiary or from the fact of the relationship or from the opportunities or facilities it affords, he must account to the beneficiary for the full benefit. All profits and advantages belong to the beneficiary, regardless of whether they spring from performance or from violation of the fiduciary's duty.

The basic reason for this is that the fiduciary owes the duty of highest loyalty to his beneficiary, his personal interests must be utterly subjugated, "he must act with an eye single to the interest" of the beneficiary. And it matters not that the beneficiary has suffered no injury, that the profit was not made at his expense, or that he could not himself have made the gain. It matters not that the fiduciary acts in good faith or bad faith. Any other rule would tempt him to consider his own interest and put him in a position of conflict of selfishness with loyalty. Agreements altering these consequences may be possible, but they must follow "full disclosure of all relevant facts" and "an opportunity to obtain independent advice."

See *Restatement of Agency*, Sec. 387, 388; *Restatement of Trusts*, Sec. 203; 2 *Am. Jur.*, Agency, Sec. 268, p. 215; 3

C.J.S., Agency, Sec. 165, p. 53; 3 *Scott on Trusts*, Sec. 502, p. 2422; 3 *Bogert on Trusts* (Part 1), p. 79.[33]

"These high standards" courts are "not disposed to whittle down," *Fleishhacker v. Blum*, 109 F.2d 543, 547 (9 Cir.), cer. den. 311 U.S. 665.

These fiduciary rules are applied "with particular stringency" to dealings between interlocking corporations. *Mayflower Hotel Stock. P.C. v. Mayflower Hotel Corp.*, 173 F. 2d 416 (D.C. Cir., 1949).

The fiduciary principle has been applied to innumerable varieties of facts, many of which "do not fall readily into any general classification." (3 *Bogert on Trusts* (Part 1) p. 153.) As *Bogert* further says:

> "The ways in which a fiduciary can take a position hostile to the trust and seek a private advantage are without number. In whatever form the disloyalty appears, equity penalizes it with the privilege in the cestui of obtaining a constructive trust of the advantage obtained by the wrongdoing trustee." (p. 156)

Thus the principle has been applied to compel an accounting of tax savings (*Shreveport Bank* cases, p. 58, supra) and of bribes (*Reading v. The King*, p. 83, supra).

The majority opinion of the Court of Appeals dismissed the *Shreveport* cases on the ground that there the "new bank" had the duties of a trustee (R. 2220-1). But no trust in the strict sense was there present. There was a pledge which placed the officers in dual relationships with respect to the old and new banks. *Leslie v. Commercial National*

[33] "Thus where a person who is in a fiduciary or confidential relation to another obtains property from the other by taking advantage of the relation, a constructive trust arises." 3 Scott on Trusts, Sec. 468, p. 2336 and cases cited.

Bank in Shreveport, 28 F. Supp. 927, 933; *Commercial Nat. Bank in Shreveport v. Parsons*, 144 F.2d 231, 233. The words "trust" and "trustees" are found in the *Shreveport* opinions only because the courts recognized with Maitland and Pomeroy that the "grand rule" binding fiduciaries (quoted p. 86, supra) "includes persons who are not trustees properly so-called, but all those who stand in what is called a fiduciary position."

The opinion of the court below concedes that if respondent dominated petitioner, it was a fiduciary (R. 2221). The district court found that there was a preponderance of evidence of such control (R. 272).

D. THE EXISTENCE OF COMMON OFFICERS REQUIRES THE HIGHEST STANDARDS OF CONDUCT IN INTERCORPORATE DEALINGS: DUALITY.

Here we have the case of a subsidiary dominating its former parent and directing its actions for its own benefit. But aside from the fact of domination and control, the existence of common officers in the two companies created a fiduciary relation.

Numerous decisions declare the equitable principles that are brought into operation by duality. For example, *Geddes' v. Anaconda Copper Mining Co.*, 254 U.S. 590; *Chelrob v. Barrett*, 57 N.E. 2d 825, 293 N.Y. 442; *Overfield v. Pennroad Corporation*, 42 F. Supp. 586.[34] These contain such a com-

[34]Others are: *Globe Woolen Co. v. Utica Gas & Electric Co.*, 121 N.E. 378, 224 N.Y. 483 (per Cardozo, J.); *Merger Mines Corporation v. Grismer*, 137 F.2d 335 (9 Cir.), cer. den. 320 U.S. 794; *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 308, 71 Pac. 354; 3 *Fletcher Cyc. Corporations*, Per. ed., Sec. 961, pp. 433, 434; *Eshleman v. Keenan*, 187 Atl. 25, 2 A2d 904, 23 Del. Ch. 234; *Price v. Standard Oil Co.*, 55 N.Y.S.2d 890, a case where a corporation's employees were mere employees (not directors) of another corporation; annotation and cases, 114 A.L.R. 308.

prehensive discussion of the law with a review of the leading cases that no amplification is necessary.

In the *Geddes* case this Court said (p. 599):

> "'The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, * * *. Especially is this true where a common director is dominating in influence or in character. This Court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy.'"

In the *Pennroad* case the directors of the Pennroad Corporation were directors, officers or employees of the Pennsylvania Railroad, with loyalty to the latter. It was held that this was sufficient ground for the recovery from Pennsylvania Railroad of all losses incurred by Pennroad as the result of investments made under the direction of these officers and directors, despite their integrity and good faith.

Chelrob v. Barrett, supra, involved a public utility system comprising three corporations. A owned the voting stock of B which owned the voting stock of C. B sold gas to C at a price fixed by the directors of the two corporations, all of whom had been chosen by A. A majority of the directors of B and of C were also directors, and in some cases paid officers, of A, and some of the directors of A were also directors of B. Judgment was rendered directing additional payment by C to B.

The case is of particular interest because the court noted that so long as B and C earned enough to pay dividends

on the preferred stock, it was not material what price was charged for the gas, since the earnings of either eventually reached the ultimate parent, A, the owner of the common stock. The problem arose only when earnings fell off so that dividends on the preferred stock went into arrears. Thus, in the present case, it would have been unimportant whether the tax savings went to respondent or the petitioner so long as the latter owned the former. The severance of that tie created the problem.

Bernheim v. Louisville Property Co., 214 S.W. 801, 185 Ky. 63, involved common agents and officers of two corporations which had formerly been affiliated but whose interests had been severed. The court remarked on the failure of the individuals occupying dual positions to appreciate that "the severance of 1908 in reality changed the relationship between the two companies."

The principles of duality apply to every variety of situation where the same person or persons represent two or more interests—e.g., agency (cf. *Restatement of Agency*, Sec. 390, 392), trusts (cf. *Restatement of Trusts*, Sec. 170), attorneys at law (cf. *Peyton v. William C. Peyton Corp.*, 7 A.2d 737, 747, 23 Del. Ch. 321; Re *James Estate*, 86 N.Y.S. 2d 78 (1948)).

Both the *Peyton* and the *James* cases, like the present, involved the conduct of Mr. Coulson.

The consequences here of duality are: (1) equity requires respondent to account to petitioner; (2) respondent must account for the benefits received rather than petitioner's detriment; (3) the duality precludes any contention of gratuity; (4) all issues must be decided in the light of the fiduciary duties resting upon respondent, the actor; and

(5) every detail of the transaction is opened to the scrutiny of the court.

Respondent argued below that the presence of duality was not significant because some of it had its origin at a time prior to the bankruptcy proceeding when petitioner still controlled respondent. The contention is irrelevant, for the conditions extant when the relation was created no longer existed. Duality is a fact, a condition of inconsistent interests, imposing rigorous fiduciary standards of rectitude regardless of how the duality came about. A fiduciary cannot be excused from his duty of fair dealing to his principal because his principal created the relation. Otherwise the agent, the trustee, would usually be free to victimize his principal or beneficiary.

The argument that duality is to be ignored because petitioner "created the duality" is precisely the argument advanced to sustain the actions of Mr. Coulson in the case of *In re James' Estate*, 86 N.Y.S.2d 78. The court set aside certain transactions because of the duality, and it dismissed as of no consequence the fact that the duality was proper in its origin. It said (p. 84):

> "At this point the court makes note that the persons acting in these dual capacities did so by reason of the terms of the will and that no criticism may be made of their occupying the offices to which they were appointed. Such dual functions nonetheless bring into this case legal principles which exact special standards of fiduciary conduct from persons so situated."

The controlling fact was "that there did not exist independence of operation" (p. 90).

E. RESPONDENT MUST ACCOUNT FOR AN ENRICHMENT RESULTING FROM ACTS OF ITS AGENTS WHO WERE FIDUCIARIES OF PETITIONER.

We have shown that respondent was the fiduciary of petitioner and must account for the unjust enrichment resulting from the use of its position. But beyond this, petitioner is entitled to recover because the officers and the tax counsel of respondent were also agents of petitioner, openly assuming to act for it. Respondent's counsel had himself designated as "petitioner's attorney-in-fact" so that he could deal with the Treasury Department and make a settlement in its name. Petitioner's president, who signed the documents, was also respondent's employee and agent. Respondent's enrichment is a direct and immediate consequence of their act; it is an enrichment independent of the volition of petitioner. The fruits of their acts are in respondent's possession. As Judge Cardozo pointed out in *Whiting v. Hudson Trust Company,* 138 N.E. 33, 234 N.Y. 394, where a common trustee of two estates robbed one to replace funds taken from the other and the latter was held to account to the former, "We cannot characterize enrichment so procured as other than unjust."

V.

All Arguments Advanced Against Recovery by Petitioner Are Opposed to Elementary Principles

The arguments advanced against recovery by petitioner have been many and varied. The trial court relied on one set of arguments, the Court of Appeals relied on a wholly different set, disagreeing with the trial court *in toto.* Respondent has advanced still other arguments which both courts ignored.

A. PETITIONER WAS UNDER NO DUTY TO JOIN IN CONSOLIDATED RETURNS OR TO CONFER UPON RESPONDENT THE BENEFITS OF ITS TAX CREDITS.

The Court of Appeals based its decision on the view that petitioner was under the duty to join in consolidated returns and to confer upon respondent, gratis, the benefit of its tax credit. It therefore held irrelevant the fact that respondent took over and managed petitioner's tax affairs without consultation with petitioner or consideration of its rights.

There is no basis for the premise. As stated in 65 Harvard Law Review 1257, commenting on this case:

> "The ground relied on by the Court of Appeals was that * * * [respondent] could have violated no duty to act fairly since [petitioner] was under a duty to file the consolidated returns anyway. The court's argument that [petitioner] had such a duty, however, is not convincing. The Internal Revenue Code imposes no such obligation."

No Such Duty Can Be Found in the Tax Laws or Regulations.

No duty such as the Court of Appeals assumed can be found in federal tax laws or regulations. The tax laws in effect during the period in question make clear:

1. Only the parent corporation may file consolidated returns (Treas. Reg. 104, Sec. 23.16a).

2. There was no duty to file consolidated returns (Reg. 104, Sec. 23.11a; II Montgomery's Federal Taxes, Corporations and Partnerships, 1946-7, pp. 649-650).

3. A parent is under no duty to a subsidiary to file consolidated returns and is free to make its own decision on the basis of its own interest. *Duke Power Co. v. Comm.*, 44 F.2d 543, 545 (4 Cir.).

4. Similarly, a subsidiary is free to refuse to join, *Geo. A. Fuller Co. v. Comm.*, 92 F.2d 72 (2 Cir.); *Trinity Building Corp.*, 40 B.T.A. 1315, although such a refusal is not likely since the subsidiary is ordinarily controlled by the parent.

Therefore, insofar as tax law is concerned, petitioner was free, in each of the years in question, to file a separate return (although its tax counsel, who were counsel for respondent, failed to so advise it, p. 27, supra). The principle and its rationale are declared in *Duke Power Co. v. Commissioner of Internal Revenue*, 44 F.2d 543, 545 (4 Cir.), cer. den. 282 U.S. 903, where it was held that a subsidiary had no right to the benefits of a consolidated return where the parent chose to file a separate return. The court there said:

> "It [the law] assumed that if there was that degree of affiliation which the law required, there was a dominant control, and *it gave to that dominant control the right to make the choice.* The argument, therefore, that this construction of the law prevents one of the group from making its election, and forces it by the conduct of its associates or its parent to a definite course against its own interest, is untenable for the reason that such an argument destroys the entire premise on which the optional provision is based. *A corporation is owned by its shareholders, who are the ultimate source of power controlling its corporate action.* If its stockholders decide that its best interests require filing by it of a separate tax return, no provision of the law denies it this privilege, but in that event the effect of its action is to deprive its associates of the benefits, if there are any, of a consolidated return, and imposes upon each the duty of filing a like

> form of return, but *if all the corporations affiliated be owned by the same interests, and that of course is the presumption on which the right is made to rest, it is fair to assume that they will act harmoniously and for the interest of the common owner,* and it is the recognition of this common owner's right to set off against his gains in the one his losses in the other that induced the permitted consolidated return." (P. 545)

Since this is true when the economic unity exists, patently the parent owes no duty to a former subsidiary to join in consolidated returns for the latter's benefit, after the economic unity has been severed, merely because continuance of technical affiliation makes such returns permissible. In this case the economic unity was severed before the tax returns were filed. In the words of the trial court during the trial (R. 1380), the parties were "free agents to agree with one another to file this type of return"; that is, to agree or to refuse to agree.[35]

The Bankruptcy Court Could Not Have Compelled Petitioner to Give Its Loss to Respondent.

Certain it is that the bankruptcy court could not have ordered petitioner to join in consolidated returns and to give respondent the benefit of its loss. Not only was respondent already out of bankruptcy when the 1944 return and the claim for refund were filed, but, quite apart from

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[35] Yet, oddly, when it decided the case, the trial court observed in its opinion that "there is some merit to defendant's contention that a firm obligation rested upon plaintiff to conform and cooperate" to give defendant the benefit of its loss (R. 275). But the opinion contained no suggestion of any reasons to support this view, and elsewhere the opinion asserts that the tax savings were "amazing and undeserved" (R. 276). It is impossible to reconcile the two statements. How could one be under an obligation to give another an "amazing and undeserved" benefit?

that fact, the bankruptcy court would have been without jurisdiction to make any such order. *Callaway v. Benton*, 336 U.S. 132.[36] Nor did it do so.

No Such Duty Can Be Found in Any Principle of Law or Equity.

The holding of the Court of Appeals that petitioner was under an obligation to join in consolidated returns with respondent for the latter's benefit can only mean that respondent by an independent suit in equity against petitioner could have compelled it to join in such a return gratuitously.

Thus by judicial fiat the court below makes mandatory what Congress and the Treasury left optional. Wherever consolidated returns may be filed with a resulting tax deduction to anyone, this decision decrees that they must be.

The rule so created not only confers on one corporation a right to use another's assets, but it does so free of any requirement of just compensation.

No principle supports such a right. Rather, as Judge Fee stated (R. 2242):

> "plaintiff had a property right to file or refuse to file consolidated returns, which could neither be given away without consideration nor cut off judicially without due process."

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[36]Under Section 77 (the railroad reorganization section) a bankruptcy court's *in personam* jurisdiction is confined to the debtor, here respondent. It has no jurisdiction over disputes with others not involving property in the debtor's possession. *Bankruptcy Act*, Sec. 77(a); Title 11 *U.S.C.*, Sec. 205(a); *Thompson v. Terminal Shares*, 104 F.2d 1 (8 Cir.), cer. den. 308 U.S. 559. In *Callaway v. Benton*, it was held that a bankruptcy court had no jurisdiction to compel another to transfer rights to the trustees or to enter into a contract with them.

As he further stated (R. 2243):

> "Since, under the [tax] law, all corporations concerned must consent to the filing of consolidated returns, it is clear, contrary to the statement in the majority opinion, that plaintiff had no duty requiring it to file these returns. Plaintiff had a legal right to refuse to file."

Petitioner Assumed Burdens in Filing Consolidated Returns.

There are many factors besides offset of losses which bear on the question whether it is advantageous to join in consolidated returns (cf. II Montgomery, Federal Taxes on Corporations, 1942-1943, pp. 492, 493-5). Burdens as well as advantages flow from such action. Thus each company joining in the return becomes liable for the full amount of taxes owed by the group (Treas. Reg. 104, Sec. 23.15(a); T.R. 110, Sec. 33.15(a)), and is subjected to requirements affecting its future tax situation. For example, by virtue of elimination of intercompany transactions, the basis at which property is held may be affected (T.R. 104, Sec. 23.38; T.R. 110, Sec. 33.38). In certain circumstances such returns must be filed in a later year (T.R. 104, Sec. 23.11(a); T.R. 110, Sec. 33.11(a)), although "future developments may make the filing of separate returns for future years more advantageous" (II Montgomery, p. 492). Here one consequence of petitioner's joining in the consolidated returns was to make it liable for any taxes payable by respondent. All this demonstrates how indefensible it is to hold that an independent company has any duty to assume such a liability and such possible disadvantages simply to benefit another company which wants to use its loss.

Petitioner Was Not a Fiduciary for Respondent. The Reverse Was True.

To extend its rule of mandatory filing of consolidated returns to a situation where the parent-subsidiary relationship has been severed, the court below stated that a tax return is an historical document, that a fiduciary's duties with respect to matters arising during the fiduciary relationship continues through the period of winding up, and that the fiduciary who performs an act of winding up may not exact payment (R. 2234-5):[37]

But petitioner was not respondent's liquidating agent nor its fiduciary. On the contrary, as we have just seen, respondent was a fiduciary to petitioner (p. 79, supra). By controlling petitioner's president so as to file the tax returns, respondent assumed a "determining position over the rights" of petitioner and thereby "owed an obligation to it." *Young v. The Higbee Co.*, 324 U.S. 204, 209, 210. What makes one a fiduciary for another are the elements of dominance and the exercise of control and management. *Southern Pacific Company v. Bogert*, 250 U.S. 483 at 492; *North American Co. v. S.E.C.*, 327 U.S. 686 at 693; 65 *Harvard Law Review* 1257.

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[37]The authorities cited in the opinion are not pertinent. They are *California Corporations Code*, Sec. 15030; *Uniform Partnership Act*, Sec. 30; 3 *Scott on Trusts*, Sec. 344; 16 *Fletcher, Corporations* (Perm. ed.) Sec. 8174; *Trice v. Comstock*, 121 Fed. 620. The first two provide that, on dissolution, a partnership is not terminated but continues until winding up is complete. The third states that a trustee's duties and powers do not cease until the trust is wound up. Fletcher on Corporations notes that in many jurisdictions by statute corporate directors upon dissolution continue as trustees for liquidation. In *Trice v. Comstock*, it was held that an agent was accountable to his former principal for a profit made after the termination of the agency, in buying land as a result of information and advantages acquired because of his agency and while agent.

The majority opinion itself noted that after 1935 respondent "was no longer controlled by Corporation but by the trustees appointed by the bankruptcy court" (R. 2223) and that after adoption of the Plan of Reorganization "affiliation no longer existed" (R. 2231). The plan cut off all possibility of a return of control, management, or financial interest. The loss arose from the plan. The prior association could not impose the duty on petitioner to make a free grant to respondent of the only asset which the reorganization left petitioner, i.e., the tax utility of its loss.

The Court of Appeals deduced a duty to join in consolidated returns and to give the benefit of its loss from a fiduciary relationship of petitioner to respondent. From what did it deduce that relationship? Merely from an assumed duty to join in consolidated returns. This is reasoning in a circle.

Common Officers May Not Sacrifice the Rights and Assets of One Corporation for the Benefit of the Other.

The court below justified its holding that petitioner was bound to join in consolidated returns for respondent's benefit by stating that "the dual officers owed fiduciary duties to both corporations to promote the interests of both and to obtain for each what it was entitled to under the tax laws" (R. 2232, 2233). No doubt common officers owe a duty to each corporation to protect its rights and further its interests. But it does not follow that in promoting the interests of one corporation, its officers may use the rights and assets of another of which they are also officers, without compensation.

If the common officers and attorneys were bound to inform respondent that it could save taxes if it could get

petitioner to join in returns, they were equally bound to tell petitioner that its loss could be used to save respondent taxes and that petitioner was under no duty to join in a consolidated return to permit this to be done. They could not expropriate the utility of the loss.

Conflict with the Second and Fourth Circuits and Tax Court.

To justify its conclusion, the court below asserts the converse that, if the loss were respondent's and the income petitioner's, the latter could have compelled respondent to confer upon it the benefit of the loss by joining in consolidated returns (R. 2223). If sound, this would mean that petitioner could have gone into the bankruptcy court, which had jurisdiction over respondent, and obtained an order compelling the bankruptcy trustees to join in consolidated returns and to confer upon petitioner the benefit of the trustees' losses, without any compensation whatever. Had petitioner applied for such an order in such a situation, the trustees obviously would have insisted that the loss and the right not to join in the returns were assets upon which it was their duty to realize for the benefit of creditors, and the bankruptcy court would have inquired what compensation petitioner offered.

The assumption by the court below that respondent would have had to join with petitioner is in conflict with the Second and Fourth Circuits and the Board of Tax Appeals which have held that a corporation, including one in bankruptcy, is free to join or not to join in consolidated returns as it sees fit.

In *George A. Fuller Co. v. Commissioner*, 92 F.2d 72 (2 Cir.) and *Trinity Building Corporation of New York*, 40

B.T.A. 1315, the Commissioner was upheld in refusing to accept consolidated returns filed by a parent and several subsidiaries, because the trustees of a bankrupt subsidiary had refused to join. *Duke Power Co. v. Commissioner*, 44 F.2d 543 (4 Cir.), cer. den. 282 U.S. 903, reached the same conclusion as to such returns filed by two subsidiaries where the parent refused to join. The taxpayers were thus unable even to utilize the losses of those who did join.

No Duty Such as the Court of Appeals Postulates Can Be Extracted from the Rights of Respondent's Pre-Reorganization Creditors.

In support of the alleged duty of petitioner to give its tax rights away, respondent has argued, and the majority opinion below seems to accept the argument, that respondent's pre-reorganization creditors were not paid in full and that creditors have an absolute priority over stockholders. But the conclusion sought to be drawn is a sheer *non sequitur*. The creditors did receive absolute priority. Petitioner, the stockholder, did have its equity completely wiped out as well as its creditor's claim for $7,750,000 of advances. The old creditors became the owners of all of the bonds and all of the stock of the reorganized company.

By reason of swollen war time traffic, those former creditors received benefits, advantages and equities vastly beyond the expectations of the plan of reorganization (see pp. 53-55, supra).

Creditors of a reorganized company, after wholly supplanting the former shareholders, as they did here, no matter under what sanction of law, have no right to appropriate still other property of the former shareholders. The reorganized respondent certainly could not have with impunity seized $17 million cash of petitioner to pay its taxes,

merely because the pre-reorganization creditors had not been paid in full.[38]

Respondent's argument is merely another facet of the contention that petitioner is seeking something in the nature of equity or value for its former stock ownership. As we have shown, the contention is unsound (p. 49, supra). Petitioner has accepted in full the consequences of the plan of reorganization. The plan wiped out the entire stock ownership of the old stockholder. But its consummation, having stripped petitioner of that ownership, left it with something in its place—its stock loss, which had a tax utility. It was then that respondent went beyond the plan and appropriated what petitioner had left.

The Alleged Duty Is Incontrovertibly Refuted by Considering the Situation of a Corporation Having Income.

If petitioner had earned $75 million in other enterprises in 1942, 1943 and 1944, its stock loss would have eliminated its tax on that income, and no one would have the temerity to suggest that it could have been compelled to give the benefit of its loss to respondent. If a prosperous corporation, e.g., Standard Oil Company, rather than petitioner had owned respondent's stock, no one would claim that it had to join in the consolidated returns and confer on respondent, gratis, the tax utility of its loss, since Standard could use

[38]Petitioner was controlled, prior to respondent's bankruptcy, by the James Interests who owned 61% of its common stock (but only 8.8% of its preferred stock) (Chart, P 1). These were the controlling human agents responsible for what occurred. As the result of respondent's reorganization, the James Interests became the controlling power in respondent. If petitioner's suit is defeated, the effect will be that the James Interests, the common stockholders in petitioner, will profit from the tax utility of petitioner's loss in preference to petitioner's preferred stockholders.

the loss to discharge its own taxes. The very suggestion shows the absurdity of the contention that petitioner was under a duty to do so.

As Judge Fee stated in his dissenting opinion below (R. 2251):

> "An incontrovertible proof of the proposition that plaintiff had no duty to apply the loss for the benefit of defendant may be cited. If plaintiff had sold a gold mine for a profit of over $75,000,000.00, its loss on the stock of the subsidiary could have been applied to offset any taxes against plaintiff. In that event, the trustees in reorganization would have been required to pay taxes against the operating company. Once used, the power of applying the loss would be functus officii, and plaintiff would have received the entire benefit."

The fact is so self-evident that in its briefs below respondent felt obliged to say that "if during the critical years the plaintiff had * * * taxable income * * * plaintiff would have a different case."[39]

B. PETITIONER'S RIGHT RESTS ON BENEFITS CONFERRED AND IS NOT CONFINED TO DETRIMENT SUSTAINED. ONE'S PROPERTY OR RIGHTS CANNOT BE APPROPRIATED MERELY BECAUSE THE OWNER CANNOT USE THEM PROFITABLY HIMSELF.

Thus the argument has reduced itself to the contention that unless petitioner could have used its loss to its own

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[39]Petitioner owned 50% of the stock of the Denver & Rio Grande Western Ry. Co., which was wiped out by a plan of reorganization of that railroad at about the same time as its holdings in respondent were similarly treated (p. 7, supra). If petitioner's Denver & Rio Grande stock had not been wiped out, and instead it had income on that stock, it could have used its Western Pacific loss to save taxes thereon. Certainly no right sprang up in respondent to appropriate the tax utility of that loss because petitioner also sustained a loss of its Denver & Rio Grande stock.

advantage, it could be compelled to give it away. Respondent has urged that petitioner lost nothing because it had no use for its tax loss, that therefore it has no cause of action, or that if it has a cause of action, the recovery would be limited to the amount of petitioner's damage, which was nil.

The court below supported its position by this fallacious reasoning. It based its judgment on the fact that petitioner was so unfortunate as to be left destitute with no taxable income and therefore had lesser rights than if it were prosperous.

Referring to the fact that respondent dominated petitioner and directed its officers so as to appropriate its rights to respondent's advantage, the court asserted that respondent "did not abuse its supposed dominant position because the officers and directors common to both corporations did not sacrifice Corporation's [petitioner's] interests to those of its subsidiary" (R. 2232). The reason given for this assertion is that petitioner "had no income" and so "there was no possible way for it to achieve any tax advantage to offset the loss," whereas "its affiliate [respondent] did have use for the loss" (R. 2232). "Under this state of facts these officers had the positive duty to make use of the loss as they did" (R. 2233), that is, to give it to the respondent, who used it to save the taxes it otherwise must pay.

No authority was cited for this conclusion; nor does any exist. It is merely an assertion that a corporation which dominates another may appropriate its tax credits without compensation simply because it can profitably use them while the dominated corporation cannot.

Many a person may have use for another's property or rights, but it has never heretofore been held that he may

therefore appropriate such rights or property without compensation. A man's right to protection of his assets from seizure or trespass by another does not depend on what use or profit he himself could make of them. The contrary rule has reflected itself in a multitude of instances and in numerous branches of the law.

Suits for the Use of Land.

United States v. Bernard, 202 Fed. 728 (9 Cir.) declares the fact that land has not been injured and "that a plaintiff in an action for continued trespass would have made no use of the land which the defendant has wrongfully used to his advantage and profit will not prevent the plaintiff from recovering the actual value of that which has been so used and acquired by defendant" (p. 731).

In Unjust Enrichment Cases Recovery Is Measured by Benefit Received.

A plaintiff's rights in an unjust enrichment case are measured by the benefits conferred, received or taken — the "enrichment," not the detriment suffered. *Restatement of Restitution,* Section 1, and comment. In the comment it is said:

> "Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result of the remedies given under the rules stated in the Restatement of this Subject is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered. * * * [p. 13]
>
> * * * * * * *
>
> "In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but never-

theless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched." (p. 14)

In *Reading v. The King* [1949] 2 K.B. 232; *Reading v. Attorney General* [1951] Appeal Cases 507, discussed at pp. 83, 84, supra, the Crown was held entitled to bribes received by a soldier although it had sustained no loss and it could not itself have earned the sums involved. The Court of Appeals held that the Crown could recover "whether or not [it] had suffered any detriment in fact"; and that the defendant "cannot be heard to say that * * * the plaintiff suffered no loss. The plaintiff, whether actually harmed or scatheless, is conclusively presumed not only to have been damnified but to have been damnified to an extent measured by the amount" of defendant's enrichment. The House of Lords repeated that "the fact that the Crown * * * has lost no profits or suffered no damage is, of course, immaterial and the principle so well known that it is unnecessary to cite the cases illustrating and supporting it. It is the receipt and possession of the money that matters, not the loss or prejudice to the master" ([1951] A.C. at 516).

A striking application of these rules of unjust enrichment will be found in the *Kentucky Cave* case, *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028, 265 Ky. 418 (1936). There Edwards had discovered a cave the entrance to which was on his land. By years of advertising and exploitation he spread the fame of the cave, improved it, built a hotel near its mouth, and eventually secured a stream of tourists whose entrance fees yielded him a good profit. Without his efforts the cave would have remained useless.

After the cave became profitable, a neighbor sued on the ground that approximately ⅓ of the length of the cave underlay his land and recovered judgment requiring an accounting of ⅓ of the net proceeds received from exhibiting the cave over a period of 7 years, plus interest.

The Supreme Court of Kentucky affirmed the judgment although it recognized (1) that plaintiff merely had a hole in the ground which he himself could not use because it was so far beneath the surface that it could not be entered except through the natural mouth on defendant's property; (2) that the cave was therefore of no practical use to the plaintiff; (3) that for the same reason there was no one in the world other than defendant himself upon whom the plaintiff might confer a right of beneficial use of the portion of the cafe under his property; (4) that consequently plaintiff's portion of the cave had no utility to him, it had no sales or rental value, and plaintiff had not been ousted of the physical occupation or use of his property because he could not and did not occupy it; (5) that the property had not in any way been injured by the use to which defendant had put it, and (6) that plaintiff had suffered no loss or detriment.

The court stated that, as the case was *sui generis*, it was left to fundamental principles and analogies. It reasoned (1) that plaintiff had something (a definite segment of the cave) and therefore was possessed of a right which it was the policy of the law to protect; (2) that the action was in equity for an accounting; and (3) that the "measure of recovery in this case must be the benefits, or net profits, received by the appellants from the use of the property of appellees," by way of analogy to the rule of Section 136 of the Restatement of Restitution.

Respondent has tried to distinguish this case as one of trespass. But the court refused to treat it so, for the reason that, had it done so, there could be no recovery for lack of "damage"; the property had not been injured, and there was no rental value since plaintiff had no access to the cave, could not use it, and there was no ouster of possession (96 S.W.2d 1028, 1030-1032).

Moreover, that case cannot be so distinguished because here respondent's use of petitioner's rights was not consensual. Long before petitioner's loss was allowed as a deduction by the government in 1947, respondent had been put on notice of petitioner's claims by the filing of the suit and by the letter of May 5, 1947 (p. 25, supra). Nevertheless, respondent persisted in using petitioner's loss in defiance of its claim.

Bearing in mind that respondent simply appropriated petitioner's tax credits without discussion and without any consideration of its rights, Section 136 of the *Restatement*, relating to benefits tortiously acquired, is also applicable. In the comment under that section, it is said:

> "In some cases, however, no harm is done and in these cases if the sole remedy were by an action of tort the wrongdoer would be allowed to profit at little or no expense. * * * The usual method of seeking restitution is by a bill in equity with a request for an accounting for any profits which have been received * * *." (p. 553)

Even where a defendant has not acted in a manner considered to be tortious he may have to account under the principles of quasi-contract. *Restatement of Restitution*,

Ch. 6. The law on the subject is not static or confined to ancient categories.[40]

Where a Fiduciary Profits from the Relationship.

Similarly, where a fiduciary gains a profit from the fiduciary relationship, it belongs to the beneficiary, regardless of whether the latter could have made it independently.[41]

It is elementary, as said in 3 *C.J.S.*, Sec. 165, page 54, that the application of the fiduciary rules discussed at pages 85-89, supra,

> "is not affected by the fact that the principal did not suffer any injury by reason of the agent's dealings * * * ."

Or, as said in 3 *Scott on Trusts*, Sec. 502, page 2422:

> "It is immaterial that the profit was not made at the expense of the beneficiary or principal * * *."

To the same effect are 2 *Scott*, p. 1098 and 54 *Am. Jur.* 249.

In *Young v. The Higbee Co.*, 324 U.S. 204 (discussed p. 86, supra), plaintiffs recovered defendants' gains, although plaintiffs had lost nothing and had not been damaged.

In *Fleishhacker v. Blum*, 109 F.2d 543 (9 Cir.), cer. den. 311 U.S. 665, it was held that the bank in whose behalf a stockholder's bill had been brought was entitled to re-

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[40] As said in the *Restatement*, at page 493:

"The situations dealt with in this Chapter do not exhaust all those in which restitution can conceivably be granted for benefits lawfully acquired. They represent situations which have arisen, and indicate the type of situations in which restitution should be granted."

[41] *Restatement of Restitution*, at page 15, states:

"So also, where a person in a fiduciary relation to another makes a profit in connection with transactions conducted by him as fiduciary, he is ordinarily accountable to his beneficiary for the profit, although the beneficiary suffered no loss."

cover certain profits "even though the bank has suffered no damage."

The *Shreveport Bank* cases discussed at pages 58-60, supra, make clear that the fact that one has a tax credit or advantage which he cannot use does not give another the right to use it to his advantage without accounting for its benefit. There the Old Bank, not being engaged in business, would have had no tax to pay and therefore had no way to use its property. Yet, as there said: "The fact that the Old Bank suffered no loss * * * makes no difference." *Leslie v. Commercial Nat. Bank of Shreveport*, 28 F. Supp. 927 at 933. In the first appeal in that case the dissenting judge commented: "The transaction left the old bank no worse off. It was not injured in the least by the transaction * * *." 144 F.2d at 245. Yet, on the second appeal the same judge wrote the opinion of the court affirming the right of the old bank to recover such of the tax savings as were attributable to that class of property which it held belonged to the old bank.

S.E.C. Case.

In the *Consolidated Electric-Islands* case, discussed at page 70, supra, losses of Islands, one of the affiliates, resulted in a tax saving to the affiliated system. The S.E.C. recognized that "none of this saving can be realized directly by Islands since it does not have the taxable net income against which to offset such losses" (13 S.E.C. at 652). While it was noted that the use of the loss for tax purposes might, in a future contingency, result in a tax liability to Islands, it was also noted that "any tax liability resulting to Islands * * * will be considerably less than

the tax savings to be presently effected." Nevertheless, it was held proper that the whole of the tax savings should be paid to Islands by the other affiliates which achieved the savings by use of Islands' loss in consolidated tax returns.

The Utility to Respondent Gave Value to Petitioner.

The law recognizes that there are cases where "the nature of the material * * * involved is such that no value attaches thereto aside from the use thereof, and that once such material is used the value therein is gone," *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 667, 221 Pac.2d 73. The value to him who has consumed the material by using it then measures the recovery.

65 Harvard Law Review at 1257 comments:

> "[petitioner's] stock loss was an asset having value * * * even though [respondent] was the sole market and [petitioner] could utilize the stock loss in no other way."

In *Truncale v. Universal Pictures Co.*, 76 F. Supp. 465, directors of a corporation held options to buy its shares at a fixed price. Under tax law and regulations, if such an option were exercised at a time when the market price exceeds the option price, the excess was taxable income, but the corporation might deduct the excess in computing its own tax. In order to secure a closing agreement from the Commissioner of Internal Revenue that the excess, in the event the options should thereafter be exercised, would not constitute taxable income to the directors, the latter caused the corporation to agree with the Commissioner that in computing its own income it would not deduct the excess. Closing agreements to this effect were executed, and the options were then exercised.

As a consequence, the corporation paid more taxes than it should have, and the tax liabilities of the directors were diminished. However, the losses suffered by the corporation were much less than the gains enjoyed by the directors, since each director had his own outside income and the amount of his tax savings was affected by his own tax bracket.

A stockholder's derivative action was brought against the directors to compel them to account to the corporation not merely for the amount of the losses suffered by it, but for the entire tax savings of the directors. Defendants moved for a summary judgment on the ground of the statute of limitations. This turned on whether recovery was limited to the loss suffered by the corporation or extended to the entire gain enjoyed by the defendant. The court (Rifkind, J.) held the latter. Remarking that the situation was unique, it said (p. 469):

> "* * * where a corporation has the freedom to do an act or to refrain, the doing of the act, enabling others to derive benefits in excess of the losses suffered by the corporation, has a 'sale' value of which the ceiling is the amount of such benefits; * * *."

Petitioner's rights here are far stronger than that of the corporation in *Truncale's* case. There the corporation had nothing to contribute, and possessed nothing, other than the power to refuse to enter into the closing agreement. Here petitioner possessed not only the power to decline to enter into consolidated returns, but by entering into such returns it contributed something that belonged to itself, to wit, its own loss.

Respondent has tried to distinguish the *Truncale* case as a mere example of the rule that corporate directors are not allowed to profit at the expense of their corporation. But the court stated that it had to decide the case on more fundamental principles, because it did not fall within the class of cases where a corporate officer has taken for himself what could have been a corporate advantage or opportunity (76 F. Supp. at 468, 469). The plaintiff was held entitled to all of defendant's gain because "the corporation has been deprived of its freedom of action" even though the corporation could not itself have obtained all of such gain (p. 469).

That Only One Person May Have a Use for Property Does Not Give Him the Right to Appropriate It.

Closely related to respondent's argument that petitioner was not damaged, is its argument that there was no general market for petitioner's loss, since it could be used to offset income of someone other than petitioner only in a consolidated return and therefore could be availed of only by respondent.

The fact that a particular asset or right has a limited utility or "market," or that only one person can use it, does not destroy its value or give that party the right to appropriate it.

Thus in the *Shreveport Bank* cases, supra, only the new bank was able to make use of the tax credit. In *Truncale v. Universal Pictures Co.*, supra, no one but the directors were able to make use of their corporation's situation. In the absence of utilization by them the corporation could not have realized the benefits which they received. In the *Ken-*

tucky Cave case, in all the world only the defendant could make use of plaintiff's part of the "hole in the ground" (see pp. 107-109, supra).

Cases of Eminent Domain.

For example, the government may be the only possible buyer of a given property and unless it sees fit to buy, the owner may have no way to utilize the property or to realize upon it. But that fact does not destroy its value. In *James v. Campbell,* 104 U.S. 356, 358, the court noted that "Many inventions relate to subjects which can only be properly used by the government, such as explosive shells, rams, and submarine batteries to be attached to armed vessels," but observed that the government could not use such patented inventions or the patents without paying just compensation.

In the field of eminent domain generally, the fact that property has no general market and that therefore there is no market value does not eliminate its value. As said in *Boom Co. v. Patterson,* 98 U.S. 403 at 408:

> "Property is not to be * * * regarded as valueless because he [the owner] is unable to put it to any use. Others may be able to use it * * * Its capability of being thus made available gives it a market value which can be readily estimated."

As said in *San Diego Land etc. Co. v. Neale,* 78 Cal. 63, 68, 20 Pac. 372,

> "But it is certain that a corporation could not for that reason appropriate it for nothing."

In the Field of Patents and Literary Property.

In the patent field many an invention consists of an improvement or addition to a machine or process on which

another owns the patents, and it has no utility except as part of that machine or process, so that no one except the owner of the machine or process can make economic use of it. Yet the latter cannot appropriate the new invention without paying for it. As said in *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251, 265, if "a wrongdoer has incorporated the subject of a plaintiff's patent or trademark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product," not only must he pay but he may have to account for all his profits. Cf. *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U.S. 604.

"There are times when heed must be given to value for use, if reparation is to be adequate," *Sinclair Refining Co. v. Jenkins*, 289 U.S. 689, 699.

The same principles are applied to literary property. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 368, et seq.; *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653; 221 Pac. 2d 73.

C. RESPONDENT'S CLAIMS THAT IT COMMITTED NO WRONG AND THAT PETITIONER HAD NO PROPERTY RIGHT ARE NOT VALID.

Respondent has contended that a "loss" is a "negative" factor and is not "property" and therefore petitioner has no rights.

Petitioner not only had the loss, it had the right to make use of the loss for tax purposes and the right to permit or withhold consent to its use in consolidated returns. This loss was not a negative factor because the tax laws made it of positive value. The tax laws provided that this loss could be used in certain circumstances to pay taxes. Therefore this loss had a value. It acquired value in precisely the same

way that anything acquires value, to wit, because it had a valuable use. (See quotation from *Boom Co. v. Patterson*, 98 U.S. 403, 408 at p. 115, supra). The loss was actually used in this case to discharge a tax liability of $17 million.

The realization of a loss has tax values. It gives rise, for example, to the right in certain circumstances to distribute tax-free dividends, to receive tax-free revenues in the future, and, with carryovers and carrybacks, it represents the right to earn a roughly equivalent amount tax-free income in the future and to recover taxes already paid. No one enjoys sustaining a loss, but no corporation which has sustained one would agree to be treated as if it had not. The tax laws attach new consequences to both income and loss: income becomes a source of liability to pay taxes, a loss furnishes the basis of obtaining a benefit and thus is a thing of value or an asset.

Respondent's Tax Saving Did Not Result Automatically from the Tax Law; It Required the Use of Petitioner's Loss in Consolidated Returns.

Respondent has argued, and the court below has asserted, that the saving of taxes arose from the fact that the taxpayer had a legal right to take the deductions allowed by law. But the savings did not arise automatically from the tax law. The only reason why the law did not require respondent to pay taxes was that it appropriated and used petitioner's loss and rights to satisfy its tax liability. Respondent could not have utilized those rights unless it could cause petitioner to file consolidated returns with it. The permission given by the tax statutes to file consolidated returns did not itself save taxes. It gave to petitioner's loss a valuable use, which petitioner was legally free not to donate

to respondent. Petitioner could have refused to join in and file consolidated returns, but it was made to act under respondent's control and domination and at its direction.

Petitioner Had a "Property" Right.

Respondent has argued that petitioner's loss, its right of use, or its right to withhold consent to the use of a consolidated return whereby the loss could be utilized, cannot be denominated "property" and therefore petitioner has no right of recovery. But terminology, such as "property," is not the source of legal or equitable rights. The reverse is true: in the long history of Anglo-American law the recognition that a right exists and is entitled to legal protection has been the starting point of recognition of new kinds of property rights.

In *United States v. Willow River Co.*, 324 U.S. 499, a plaintiff claimed a right to recover by denominating something as "property." The court said (at p. 502): "We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered."

As stated by Chief Justice Shaw (in *Boston and Lowell Railroad Corporation v. Salem and Lowell Railroad Co.*, et al., 2 Gray (68 Mass.) 1, 35 (1854)), the term "property"

> "is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments."

As was said in *Johnston v. 20th Century-Fox Film Corp.*, 82 C.A.2d 796, 817, 18 P.2d 474,

> "As society has developed there has been a corresponding evolution in the development of property

rights. Matters considered as near revolutionary a few years ago are now accepted as facts. Legal history shows a continual recognition of new interests and a gradual willingness to protect interests in intangible things. (Warren & Brandeis, 4 Harv. L. Rev. 193; 4 Ford. L. Rev. 307; 45 Yale L. J. 520)."

The famous article of Mr. Louis Brandeis (later r. Justice Brandeis) and Mr. Samuel Warren just referred to, which first appeared in 4 Harvard Law Review in 1890, entitled "The Right to Privacy," contains a masterly discussion of the subject. (See particularly pp. 193 to 195, and p. 212.) In *Matarese v. Moore-McCormack Lines*, 158 F.2d 631 (2 Cir.), defendant made use of an idea of the plaintiff. The idea was not only an intangible, it was unpatentable. Thus plaintiff had, in a technical sense, no "property right." But defendant was compelled to account for the savings it achieved in the cost of doing longshore work resulting from the use of the idea.

Regardless of Terminology, Petitioner Should Recover.

Whatever it may be denominated or however it may be characterized, the loss here was petitioner's; it carried with it the right of use in certain situations to achieve tax savings, and that right belonged to petitioner. Respondent appropriated that right and thereby achieved a benefit for which it should now account.

The principles on which petitioner is entitled to recover are not novel; they are fundamental. All that is novel is the factual situation. But equity is not powerless to cope with unusual facts.

Respondent has argued that petitioner's claim cannot be subsumed under any of the traditional headings of common-law liability. Respondent divides the field into categories, such as contract, common-law tort, or common-law status such as guardian and ward, and argues that the claim does not meet the definition of any one of these categories and therefore cannot exist or be enforced.

This type of argument has been repeatedly and unsuccessfully made for centuries. Had it been successful the development of the law would have ceased long ago. No doubt when equity was first asked to enforce a trust, the claim was made that the cestui que trust had no property right, for the full title was in the trustee—an argument which was promptly met by the creation of a right *in personam* to obtain restitution from the trustee.

Likewise the mortgagee claimed that he had full title to the mortgaged property, as indeed he had, and the law recognized no "property right" in the mortgagor; but this did not prevent courts of chancery from enforcing an equity of redemption, in order that justice might be done.

So when relief was sought against unfair competition and other injuries to the good will of a business, it was said that "good will" was not a right referable to any specific property and was therefore not entitled to legal protection. In a narrow sense this was true, for judges could not define good will any more definitely than "the expectation that the old customers would come to the old shop." Neither trespass nor conversion would lie but relief was given against the appropriation of what equitably belonged to the claimant.

D. RESPONDENT MAY NOT RETAIN THE ENRICHMENT BY REFUSAL TO RECOGNIZE THE SEVERANCE OF THE ECONOMIC UNITY AND BY INVOKING ALLEGED "PAST PRACTICE."

The respondent has rested heavily on a so-called past practice of petitioner and respondent to file consolidated returns in earlier years. This indeed is a principal buttress of the majority opinion of the Court of Appeals. That practice is without significance for the following reasons:

First: The relationship of petitioner and respondent was completely changed by this Court's approval in 1943 of the I.C.C.'s Plan of Reorganization. Prior to that time petitioner was respondent's owner. Thereafter they were total strangers to each other. A practice once followed between husband and wife is not pertinent to what should be done between divorced spouses. As Judge Fee pointed out, dissenting (R. 2248):

> "It is said, although there are no findings, that the history of prior consolidated returns is controlling. Of course, it cannot probably [properly] be shown how plaintiff heretofore dealt with a consolidated return after there has been a divorce from a subsidiary."

The trial court itself had said (R. 1377):

> "I just don't see the point of what any affiliated company has done in the past as a matter of practice in these returns, because they have all been decisions that have been made by the parent company, and when the parent company decided that it was proper to file affiliated returns, it filed them * * *. What we have in this case is not concerned with that."

Respondent's own insistence that the "pre-reorganization The Western Pacific Railroad Company" and the "reorganized The Western Pacific Railroad Company" are

different entities (see p. 33, supra) answers the argument about past practice. While respondent is the same corporate entity before and after reorganization, the capital stock was owned by different people after the reorganization than before (p. 34, supra).

So long as the economic unity between the parties continued, a decision to file consolidated returns was that of the parent; the profits, gains or benefits of the subsidiary, or its losses or detriments, flowed to petitioner's stockholders sooner or later, since it was the owner of the economic unity. It was a matter of indifference where the benefits or detriments happened to fall in the first instance or whether a subsidiary accounted to the parent for any tax savings resulting from the use of the parent's tax credits or, instead, those savings inured to the parent through its ownership.

This Court's decision and the order of confirmation severed the economic unity. After March 15, 1943, respondent was no longer in any real sense the same party which had filed consolidated returns with petitioner in the years prior to 1942. Consequently, "past practice" is irrelevant.

Second: "Past practice" is also irrelevant because there was no practice whatever in prior years that has any relation to the facts of this case. The loss used to produce the tax savings was the loss of the parent's stock in the subsidiary. Yet (1) it was not until the amendment to the tax law in October, 1942 that this kind of loss could be utilized at all in the premises (see p. 8, supra). And (2) use of that loss to eliminate the former subsidiary's tax was "paradoxical" (see p. 19, supra); although the loss was the result of the severing of the economic unity, the sub-

sidiary was enabled to use it by reason of the tax concept of consolidated returns which has its rationale in the existence of that unity.

Since the tax law did not permit such a loss to offset operating income until October 1942, there could be no prior practice on use of such a loss.

Third: Petitioner's loss with its utility for tax-saving was its sole asset. There was no past practice about giving away a sole asset.

Fourth: In the years 1936-1941, inclusive, neither petitioner nor respondent had taxable income, both had losses, and on a separate return basis neither would have had to pay a tax (R. 2040; R. 2041). What happened in those years could have no bearing on the only practice that could conceivably be relevant—whether a subsidiary had in the past accounted to the parent for tax savings resulting from use of the parent's credit.

In the years 1930-1935, while the parent had some net income, the respondent had losses, so that the subsidiary was not saved from taxes by the parent's tax credits (R. 2040, 2041).

The years prior to 1930 are too remote. Prior to 1922 consolidated returns were mandatory under the tax laws, so that a different question would have been involved. From 1923 through 1929, in only two instances (1925 and 1928) did the parent's loss result in tax savings to defendant subsidiary and then for only slightly more than $20,000 (R. 2041), of which petitioner received the benefit as owner of the enterprise.

In still earlier years a subsidiary group did account to the parent for the savings. In the years 1918-1924 the

Utah Fuel group was a subsidiary of petitioner. In 1923, for example, Utah Fuel's tax on a separate basis would have been $131,744.72. By use of the parent's loss in consolidated returns, the tax for the whole group was only $71,268. Utah Fuel paid this sum to the government, and $60,475 to petitioner. Thus it paid the full $131,744. There were similar occurrences in the other years. These facts are demonstrable from defendant's Exhibit 40, pp. 2, 3, 6, 13.

Fifth: The only respect in which past practice could conceivably be relevant would be in the construction of a contract entered into by parties with each other. But in this case there was no such contract. Respondent simply took over and carried through the tax matters without agreement. What was done prior to the critical event of the severance of the economic unity cannot evidence a contractual consent to what was thereafter done in circumstances utterly different, involving a kind of loss which never before could have been the subject of tax deductions. It cannot possibly be deemed an authorization from petitioner's board of directors to give away its sole asset to strangers.

E. RESPONDENT MAY NOT RETAIN THE ENRICHMENT ON THE THEORY THAT PETITIONER COULD NOT HAVE MADE AN AGREEMENT WITH IT ABOUT ALLOCATION OF THE TAX SAVINGS.

The respondent, the trial court, and the majority opinion of the Court of Appeals have each asserted that petitioner and respondent could not legally have made an agreement with each other for allocation of the tax savings. Each assigned a different reason.

Thus the trial court said: "In the final analysis, plaintiff's hope to succeed here depends upon whether it could have

lawfully acquired these unpaid tax moneys by voluntary agreement between the directorates of the two companies. In my opinion, it could not" (R. 274). The reason then assigned for this conclusion was that such agreement would "nullify the reorganization plan." We have shown there is no merit in that reasoning (p. 49, supra). In denying the right to have made any agreement, the majority opinion of the Court of Appeals rests on the quite different ground that petitioner was under an absolute duty to confer the use of its loss on respondent, gratis. We have already answered that argument (p. 94, supra).[42]

Respondent's ground was still a third one—that it would be against the public policy of the tax laws. Thus in its brief in opposition to the petition for certiorari it deprecates "the sort of bargaining about tax losses which is demanded here." It would be, indeed, a convenient form of morality and public policy that would permit respondent to appropriate petitioner's tax credits but which simultaneously would prohibit it from accounting for the benefits.

In fact, petitioner's rights do not depend on whether an agreement could have been made prior to the realization of the tax saving. In quasi-contract the obligation does not arise from consent but, in the absence of consent, from natural equity. *Matarese v. Moore-McCormack Lines*, 158

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[42]The court's opinion also repeatedly uses the word "tribute" to describe petitioner's desire to realize the value of its asset. But it is not duress or coercion for one to say that he will do what he has a right to do. *Marshall v. Packard Bell Co.*, 106 C.A.2d 770, 774, 236 Pac.2d 201. Nor is it a case of demanding tribute for one to refuse to confer a benefit on another except for compensation where he has a right to refuse to confer it. *Sekulow v. 11th & F St. Valet*, 162 F.2d 19 (D.C. Cir.); 5 *Williston on Contracts* (Rev. ed.), Sec. 1606; *French v. Shoemaker*, 14 Wall. 314, 334.

F.2d 631 (2 Cir.). Story's Equity Jurisprudence (14th ed.) points out (vol. 3, p. 303) that the question is not whether money has been received by a party of which he could not have compelled the payment but whether he can now with a safe conscience retain it. In *Reading v. The King* [1949] 2 K.B. 232, aff'd *Reading v. Attorney General* [1951] Appeal Cas. 507, discussed pp. 83, 84, supra, no valid prior contract to share bribes would have been possible. In the *Shreveport Bank* cases, discussed pp. 58-60, supra, no valid contract would have been possible between the Old Bank and the New Bank to report the former's property as the latter's in order to save taxes. And a fiduciary must account to his beneficiary for his gains even though made in an illegal enterprise with respect to which no agreement would be permissible (see discussion, pp. 129, 130, infra). In *Koppers Co.*, 8 Tax Court 886, it is noted that where one pays taxes which another ought to pay, "the right of contribution is not founded upon contract."

Moreover, an agreement between parties to a consolidated return concerning allocation of taxes or advantages is perfectly proper and not unusual. The propriety of such an agreement has always been recognized by the income tax law and regulations. Former revenue acts provided that the taxes under a consolidated return were to be assessed to the respective corporations in such proportions as they might agree upon and prescribed no other basis unless the parties failed to agree.[43] Under the present law the matter is left to Treasury regulations (*Internal Revenue Code*, Sec. 141, Subd. b). These regulations recognize such agreements so

[43] Act of 1921, Sec. 240(b), 42 Stat. 260; Act of 1924, Sec. 240(b), 43 Stat. 288; Act of 1926, Sec. 240(b), 44 Stat. 825.

long as they do not lessen the liability of any affiliate to the Treasury, the whole tax being assessable against any one of the corporations joining in the return (Reg. 104, Sec. 23.15(a)). Sec. 23.15(d) recognizes an agreement even though it limits liability of any one corporation to the Treasury, if that affiliate is in bankruptcy.

The propriety of voluntary agreements between parties is further shown by *Truncale v. Universal Pictures Co.*, 76 F. Supp. 465, discussed at pages 112-114, supra, by the two cases before the Securities and Exchange Commission involving the *Consolidated Electric* system, discussed at pages 68-70, supra, and by an order entered on July 29, 1947, in the United States District Court for the Eastern District of Missouri in railroad reorganization proceedings entitled "*In the Matter of Missouri Pacific Railroad Company, Debtor,*" No. 6935 (unreported). There a parent railroad owned all the stock and bonds of a group of affiliated railroads, known as the "Gulf Coast Lines." It also owned all the stock of another company, the International. All of these companies were debtors in the same bankruptcy proceedings and were operated by the one trustee. Separate tax returns for 1946 would result in no tax for the International but in a liability of over $2,500,000 for the Gulf Lines, but under a consolidated return International's loss would reduce the tax liability of the others by over $2,000,000.

Since all the parties were operated by the same trustee, an agreement by him in his capacity of trustee for one of the group with himself as trustee for the others required approval of his court (because of duality). For that reason he applied to the court to approve an arrangement whereby a consolidated return would be filed and the Gulf Lines

would pay to International about $1,860,000 of their resulting tax savings in consideration of International's joining with them in the return. The court approved the arrangement. The basis of the allocation in that case is not relevant, because it was reached by mutual agreement, but the case is relevant as showing the propriety of an agreement on the subject.

F. RESPONDENT MAY NOT RETAIN THE ENRICHMENT ON THE THEORY THAT THE TREASURY SHOULD NOT HAVE ALLOWED THE USE OF PETITIONER'S LOSS TO OFFSET RESPONDENT'S INCOME.

The theory stated in the caption was the major ground of the trial court's judgment. It was not advanced by respondent, for obvious reasons, and it was rejected by the Court of Appeals. We therefore discuss it but summarily.

Whether the tax savings should have been allowed by the Treasury was not an issue in this case. The case starts with the fact that there were tax savings. Their existence is part of the factual context of this litigation. The issue is: As between petitioner and respondent, who is entitled to them?

The tax question whether the loss was usable to reduce taxes had been determined by the proper administrative officials, and the tax settlement had become final before the judgment in the District Court (see p. 26, *supra*). The tax laws authorize the Commissioner to enter into compromises. And as said by the Attorney General (31 Op. Atty. Gen. 459), it is *his* power to do so "where, in *his* judgment, such compromises were for the interests of the United States." The Bureau of Internal Revenue was the instrumentality selected by Congress for the purpose. *Bull v. United States*, 295 U.S. 247, 259.

A determination by the instrumentality chosen by Congress is not lightly to be questioned, even in case of a direct

attack. *U. S. v. Pierce Auto Lines*, 327 U.S. 515, 535; *In re Epstein*, 4 F.2d 529, 530 (6 Cir.). Where an attack is collateral, arising merely because the results of the administrative determination are involved as one of the facts of the case, that determination is not to be questioned. Cf. *In re Kaufman's Estate*, 10 N.Y.S. 2d 616; *In re Mayer's Estate*, 22 N.Y.S. 2d 468. In the present case there was not even a collateral attack.

But even were the tax deduction improper, that could be no reason to deny relief to petitioner. To do so would permit the wrongdoer to profit from its own wrong, as Judge Fee pointed out below (see p. 37, supra).

If the trial court had in mind the principle that a court will not intervene between joint wrongdoers, that doctrine has no application. The tax matter was handled in its entirety by respondent and its counsel, and petitioner was not a participant in the handling of the tax returns and the settlement. During the settlement of the findings the trial court stated that "There is no question about that" (see p. 30, supra).

It is a settled rule of equity that if one person uses property or rights of another to make a profit, particularly if he is a fiduciary, the other person—owner or beneficiary—is entitled to the profits even though they have emanated from an illegal or improper enterprise in which the property or rights were embarked. The fiduciary cannot escape accounting on the plea of illegality of the enterprise. Thus in *Barney v. Saunders, et al.*, 16 How. (U.S.) 534, this Court reversed a judgment that refused to compel trustees to account for usurious interest received. It said:

> "They cannot be allowed to aver that the profits ... made on the trust fund should be put in their own

> pockets, because they were unlawful gains, for fear that the conscience of the cestui que trust should be defiled by participation in them. To indulge trustees in such an obliquity of conscience, would be holding out immunity for misconduct and an inducement to speculate with the trust funds, and put them in peril." (p. 543)

And see *Daniel v. Daniel,* 116 Wash. 82, 198 Pac. 728.

In the *Shreveport Bank* case, discussed at pages 58-60, supra, the new bank used as tax deductions for state tax purposes certain property belonging to the old bank. In achieving its tax deductions the new bank made false reports to the state, i.e., it reported that the property was its own. Its tax savings thus rested on a false statement of fact. Had the truth been reported, the state would not have allowed the deductions, as the district court stated (28 F. Supp. 927, 933). Nevertheless, the court upheld the old bank's right to recover.

In *Reading v. The King* [1949] 2 K.B. 232, *Reading v. Attorney General,* 1951 Appeals Cas. 507, discussed at pages 83, 84, 107, supra, the Crown was held entitled to moneys received by an army sergeant as bribes for assisting in violations of the law of Egypt. The profits resulted from an illegal enterprise, and the Crown itself could not have engaged in that enterprise. The court held that fact no bar to the Crown's rights, and no reason to let the wrongdoer keep the enrichment.

This is in accord with what Mr. Justice Story said in 3 Story's Equity Jurisprudence (14th Ed.) Sec. 1663, p. 303:

> "One of the most common cases in which a Court of Equity acts upon the ground of implied trusts in in-

vitum is where a party has received money which he cannot conscientiously withhold from another party. * * * And therefore whenever any interest arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now, with a safe conscience, ex aequo et bono retain it."

G. PETITIONER IS NOT BARRED BY NON-PRESENTATION OF ITS CLAIMS TO THE BANKRUPTCY COURT.

In its brief in opposition to the petition for certiorari, respondent contended that petitioner's claims were cut off, though valid, because not presented to the bankruptcy court in respondent's reorganization proceedings. This defense was strenuously urged in both courts below and it was adopted by neither, but it was pointed out by Judge Fee in his dissent in the Court of Appeals as without merit.

Petitioner's Claims Arose After the Revesting of the Railroad Properties in Respondent.

Liabilities and obligations arising from use of another's property or rights by a post-reorganization company may be enforced without impairment by reason of the reorganization proceedings. *Seaboard Air Line R. Co. v. Savannah Union Station Co.*, 181 F.2d 267 (5 Cir.).

As said in *Texas and Pacific Railway Company v. Johnson*, 151 U.S. 81 at 103:

"* * * we are aware of no principle which would justify us in holding that a court, under the circumstances which existed here, could part with its jurisdiction over property by the complete surrender thereof to its owner, and at the same time constructively retain jurisdiction over such property so as in

that respect to bind those who would otherwise be unaffected by its orders."

Here the reorganization court did not even purport to reserve jurisdiction to supervise claims arising after the revesting.[44]

As said by Judge Fee below,

> "It is inconceivable that a decree of reorganization prevents the company, when released from tutelage, from entering into engagements and incurring liabilities. Otherwise, the reorganization would be perpetual. See *In re Portland Electric Power Co.*, 97 F. Supp. 857, 873." (R. 2252, fn. 10)

Petitioner's claims arose after the reorganization. The properties revested in respondent on December 31, 1944, and the trustees then surrendered control of operations to it (R. 2215). The claim for refund of 1942 taxes, as well as the 1944 tax return, was filed thereafter (R. 2217). The trustees had nothing to do with either. Respondent argues that the income to which the returns pertained accrued while the railroad was being operated by the trustees. But respondent assumed the obligation to pay the taxes on that income by the "Assumption Agreement" required of it under the "revesting order" (see p. 52, supra). The liability thereafter remaining was respondent's, not the trustees'. It was the reorganized respondent, not the trustees, who then utilized petitioner's loss and rights to avoid paying taxes and to discharge that liability.

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[44]Nor could it. As said in *Reese v. Beacon Hotel Corporation*, 149 F.2d 610 at 611: "* * * reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court." Here the plan was formulated, approved and confirmed before anything was done that eventually led to the tax savings. Cf. *Callaway v. Benton*, 336 U.S. 132.

As respects the 1943 taxes, as well as those just mentioned, a claim for an accounting of the tax savings could not accrue before there were tax savings, i.e., before August, 1947, when the Treasury accepted the returns pursuant to a settlement wholly negotiated and effected by respondent after it emerged from the reorganization, as the District Court found (R. 262, 468). And it accrued when respondent refused to account. The failure to account was the wrongdoing.

Among the assets which the trustees turned over to respondent in December 1944 were $7,100,000 in government bonds, earmarked as a reserve for the payment of 1943 taxes. The tax savings resulted from the subsequent acts of the respondent in adopting the returns as filed, and in the name of petitioner prevailing upon the tax authorities to accept them. For example, respondent's Annual Report for 1944, issued in May, 1945 (5 months after it was out of reorganization), refers to the reserves as maintained to protect respondent in the event of a "ruling adverse to the company's contention that it was not liable for any Federal income or excess profits taxes for the calendar year 1943 and the first four months of 1944" (R. 514). Note that mention is here made of the respondent Company, not of the trustees.[45]

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[45]The 1943 returns had been filed, not in the name of the trustees, but in the name of respondent as an affiliate of petitioner, and the returns were signed, not by the trustees but by Mr. Elsey as respondent's president. (See in P 4A the "Return of Information and Authorization and Consent of Subsidiary Corporation Included in a Consolidated Income Tax Return.")

The Plan of Reorganization itself contemplated that, vis-a-vis the creditors who were to become the stockholders of the reorganized Company, the income after January 1, 1939 was to be treated as if the reorganized Company had come into ownership and possession of the properties on January 1, 1939 (R. 2183, para. 7).

As respondent's witness, Mr. Polk, testified, "this was a doubtful item and it was not until the Bureau had finally allowed the settlement that I knew that we had the benefit of it" and "* * * any action [about tax savings] was premature until the liability to the government was determined. You cannot calculate any savings until you know * * * the liability under the returns as filed" (R. 1459, 1460).

The Bureau's field examiner concluded in May, 1946, that the deduction should be disallowed.[46] Tax counsel then took the matter up with the Internal Revenue Agent in Charge. In order to do this, he had to procure a power of attorney from petitioner, through Mr. Curry (R. 1424). Obtaining and utilizing the power of attorney was an act of the respondent, not of the trustees.

After an adverse decision by the Agent, the matter was taken to the office of the Commissioner of Internal Revenue in Washington and there settled in 1947 (R. 1426, et seq.). None of this involved any acts of the trustees.

In 1947 and before the tax settlement was made, respondent was advised in writing by petitioner that it expected an accounting of the tax savings, if respondent succeeded in having the government accept the returns as filed (p. 25, supra). Respondent had its choice then whether to seek to have those returns accepted or not. The tax savings were the result of its action at that time.

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[46]The government's audit of the returns did not even become active until the latter part of 1945 (R. 1419), the field examiner did not complete his work of examining the returns until May 1946 (R. 1423), and the audit was not completed by April 1947 (R. 1788).

Respondent Assumed All Liability for Petitioner's Claims.

Even if it could be said that the liability was created in part when the trustees filed the consolidated returns for 1943, respondent assumed that liability by the Assumption Agreement. As Judge Fee said (R. 2253, fn. 18), "defendant cannot escape under any theory since it is under bond to pay all claims against the trustees."

The bankruptcy court decreed no bar of claims except such as may be found in the "revesting order" of November 27, 1944 (R. 36). Paragraph 11 of that order fixed the date of the consummation of the plan as December 29, 1944, and provided that "the said Railroad Company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, except as herein provided" (R. 51, 52).

This was no bar to the present claim, for two reasons. First, the bar relates to "its" debts, i.e., those of the railroad company existing at the time reorganization proceedings commenced in 1935, not to claims arising from the trustees' acts. Second, the revesting order expressly excepted from its bar certain obligations. In paragraph 8 it "authorized and directed" defendant "to execute and deliver

* * *

> "(a) agreement providing for the assumption of certain obligations, liabilities, contracts, agreements and leases of the debtor and the debtor's Trustees, substantially in the form attached to this order as 'Exhibit D', the form and provisions of which are hereby approved;". (R. 45, 46).

An Assumption Agreement was then executed by respondent in December, 1944. Therein defendant agreed to

"2. *Assume* any and all outstanding current liabilities and obligations incurred by said Trustees * * * and *generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business,* including liabilities and obligations hereafter arising up to midnight December 31, 1944." (R. 1711, 1713)

By order of May 21, 1945, approving the trustees' final report, the bankruptcy court found in paragraph 4 that by the Assumption Agreement the "Debtor Company assumed and agreed to perform all contracts, leases, agreements, liabilities and obligations of the Trustees remaining in effect on December 31, 1944" (R. 1987, 1988).

On November 15, 1948, Mr. Coulson submitted his bill to respondent for $300,000 for tax services rendered in part to the trustees in connection with the subject matter of this suit (R. 1749), and he was paid. No one asserted that that claim was barred by non-presentation to the bankruptcy court.

Moreover, claims arising from the trustees' acts could not be barred for failure of presentation without giving notice. Any attempt to do so would violate due process. *In re Central R. Co. of New Jersey,* 136 F.2d 633 (3 Cir.), cer. den. 320 U.S. 805; *In re Glenn-Colusa Irrigation District,* 62 F. Supp. 651 (N.D. Cal.). "Notice is a very essential feature of the Bankruptcy Act if the rights of creditors are to be limited or curtailed," *Investment Building v. Finance Co. of America,* 105 F.2d 345 at 347 (3 Cir.). And see *Texas & Pacific Railway v. Johnson,* 151 U.S. 81 at 103.

No notice was given to claimants to present any claims arising from the trustees' operations, as distinguished from claims existing against the debtor at the time proceedings were instituted in 1935. Nor did the court make any order directing that such notice be given. No such order was made because no bar was intended. The absence of such an order and of notice confirms that the Assumption Agreement was intended to be as broad and as complete as its language indicates.[47]

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[47]The purpose of bankruptcy and reorganization proceedings is to discharge or readjust debts existing at the commencement of the proceedings, not to destroy claims arising from acts of the court's officers. Proceedings under the railroad reorganization provisions of the Bankruptcy Act (formerly Section 77, now 11 U.S.C., Sec. 205, 49 Stat. 911) are essentially enlarged receivership proceedings. 5 Collier on Bankruptcy (14th ed.) p. 467. The provisions of the act "carr[y] with [them] the application to railroad reorganizations of decisions and authorities applicable to receiverships." 5 Collier 493.

The practice in railroad receiverships was well settled when Section 77 was enacted. When the assets of the debtor were sold, the purchaser was required to assume all liabilities arising from the receiver's acts, although the receiver himself was personally discharged. Cf. *Hanlon v. Smith*, 175 Fed. 192; 1 *Clark on Receivers* (2d ed.) Sec. 494, at p. 677. When the assets were returned to the debtor, enriched or bettered by the receiver's acts or operations, the party receiving them was held liable for the claims arising out of the receiver's acts even though the claims were not presented to the receivership court within a time fixed by it. Cf. discussion in *Bartlett v. Cicero Light, Heat & Power Co.*, 52 N.E. 339 at 341, 342; 177 Ill. 68; also 1 *Clark on Receivers* (2d ed.) p. 1008.

Leading cases are *Texas & Pacific Railway Company v. Johnson*, 151 U.S. 81, and *Texas & Pacific Railway Company v. Bloom*, 164 U.S. 636, where this Court emphasized that two purposes are to be served when a receivership is to be closed: (1) the receiver should be protected; but (2) all just claims arising from his conduct should be also protected. These purposes were there attained by construing a bar order as cutting off the receiver's personal liability and precluding subsequent recourse in the receivership proceedings but as not precluding recourse in any other competent

VI.

Respondent May Not Retain the Enrichment by Denying That It Dominated and Controlled Petitioner's Officers. To the Extent That the Court of Appeals Proceeded on the Premise of Lack of Such Domination and Control, It Exceeded Its Appellate Office.

As we have seen, the majority opinion in the Court of Appeals held that petitioner may not recover although respondent appropriated its rights by dominating and controlling it. But concurrently the majority asserted that petitioner, not respondent, filed the tax returns and that respondent did not dominate and use petitioner's officers.

The trial court repeatedly found, both formally and informally, that respondent did dominate petitioner and used petitioner's name to avail itself of the tax credits. Its views were expressed more than once on this issue (see pages 27-

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forum against the party receiving the assets, despite lack of filing of the claims in the receivership court.

At the instant of time when any plan of railroad reorganization is being consummated there are four possible claims of liability that may be in existence, viz.: (1) liability of the debtor itself for its own debts and liabilities, i.e., the debts existing at the commencement of reorganization proceedings; (2) liability of the property and assets of the debtor in the hands of the trustees to pay claims of stockholders as such and to pay claims of creditors of the debtor existing at the onset to the bankruptcy; (3) personal liability of the trustees arising from their operations; and (4) liability of the property and assets to pay obligations arising from the trustees' operations.

11 *U.S.C.*, Sec. 205(f) provides for discharge of the first three classes of liabilities on transfer by the trustees of the properties formerly held by them at consummation of the plan of reorganization. But, consistent with previous equity principles, no provision is made for freeing the property from liability created by the trustees' operations. Furthermore, the Act (11 U.S.C., Sec. 205(c)(7)) makes provision for requiring claims existing against the debtor to be presented in order to determine who may participate in any proposed plan of reorganization. But it has no reference to claims which may subsequently arise from operations of the trustees, particularly such as arise after the plan has not only been formulated and adopted but also put into effect, as here.

31, supra, where they are set out in some detail). And there can be no question that the record required these findings (see statement of facts at pp. 10-27, supra). We shall not repeat our statement of the facts other than to show that the assertion in the majority opinion of the Court of Appeals is not a statement of fact but a conclusion based on irrelevancies.

A. THE ASSERTION THAT THERE WAS NO DOMINATION AND CONTROL HAS NO SUPPORT IN THE RECORD; IT CANNOT BE SUBSTANTIATED AND IS SIMPLY A CONCLUSION BASED ON IRRELEVANCIES.

The assertion in the majority opinion is actually a conclusion based on the alleged past practice of filing consolidated returns and a statement that the returns were prepared under the supervision of petitioner's president and independent tax counsel, and that everyone acted in the open (R. 2226).

Thus the court asserted that what was done was "in accordance with past practice of the group and under the supervision of the Corporation's president, as in former years" (R. 2226). We have shown that "past practice" is irrelevant (pp. 121-124, supra). Premised on this alleged "past practice," the opinion states that petitioner's officers, by which it can only mean Curry, acted in conformity with petitioner's "policy and directions" (R. 2229). But the undisputed facts, and they were so found in the trial court, are as follows:

Curry signed the various papers without consulting petitioner's Board of Directors and without being advised that the corporation was free not to sign. The Board did not know that petitioner's loss was being used in consolidated returns to offset respondent's income. It did not even know

that the loss could be used for tax purposes. (See pp. 14, 27, supra)

When the majority opinion states that the consolidated returns were filed by petitioner, it can mean no more than that petitioner's figurehead president, Curry, a clerk in respondent's employ, signed them in its name on the instruction of respondent's counsel, Polk, who prepared them. "Tax matters were wholly Greek to me" Curry testified (R. 808). Resting on the irrelevant past practice, the majority opinion further states that in prior years Curry had "supervised preparation of consolidated returns." But even then he had supervision only in the sense that he was office manager; he had no understanding of the returns (R. 807-809).

The majority opinion remarks (R. 2225) that Mr. Polk wrote a letter in May 1943 to Curry stating the possibility of using petitioner's loss. The letter was addressed to Curry as vice president of respondent, not as an officer of petitioner (R. 588, 589). Nor did it advise that the loss could be used. It merely "commented rather than suggested * * * since it is paradoxical" (R. 591). Not until December 1943 did respondent's tax counsel decide in his own mind that tax law would permit use of the loss (R. 1448, 1484). He did not then or ever advise petitioner. Instead he came to San Francisco to advise respondent, and the decision to use the loss by filing a consolidated return in petitioner's name was made by respondent's president, Elsey (R. 1448, 1268).

Respondent's counsel then wrote it an opinion concerning the use of the loss (R. 606). No copy went to petitioner or to Curry (R. 665). The various papers were then prepared under the direction of respondent's tax counsel, Polk. Curry

had no part in their preparation. He signed on counsel's direction (R. 663, 667, 1418, 1442).

The majority opinion asserts that the use of the loss was not concealed, and that "everybody knew that consolidated returns were being filed" (R. 2226).[48] While directors knew of the filing of consolidated returns, they did not know of the use of the loss (see p. 14, supra). That use was never revealed to petitioner's governing body, its board. The fact that a trespasser does not conceal his trespass does not absolve him. There must be consent by the party on whose property the trespass is made. Consent requires revelation, knowledge and agreement.

The majority opinion further bases its conclusion on the statement (R. 2226) that the filing of consolidated returns and the use of petitioner's loss "was under the guidance of independent tax experts" (R. 2226). The adjective "independent" has no meaning in the facts of this case. These experts were Mr. Polk and his partners in the law firm of Whitman, Ransom, Coulson & Goetz, who had long been and were the attorneys for the James Interests. They became the tax attorneys of respondent a week following this Court's decision approving the reorganization plan. They were compensated solely by respondent and were paid $300,000 for their services in advising and directing the filing of consolidated returns and the use of petitioner's loss. They were also reimbursed for the moneys they had paid Curry following the closing of the New York office when he and petitioner's files were removed to the office of Polk and Coulson. Polk's recognition of his status as attorney for

[48] For this statement the court cites a remark of the trial court made about half way through the trial, not a finding.

respondent, working solely in its interests, is shown by his testimony why he had ignored petitioner in carrying on the settlement negotiations with the Treasury; Polk testified "My responsibility was to them [respondent] and not the corporation [petitioner]" (R. 1431). How his firm could be "independent" it is difficult to conceive.[49]

B. THE COURT BELOW MADE FINDINGS AB INITIO TO AFFIRM THE JUDGMENT UPON A LEGAL THEORY DIFFERENT FROM THAT ON WHICH THE TRIAL COURT ACTED, AND THESE FINDINGS WERE CONTRARY TO WHAT THE TRIAL COURT MADE CLEAR IT WOULD HAVE FOUND, HAD IT CONSIDERED THE ISSUES MATERIAL, AS WELL AS CONTRARY TO THOSE ACTUALLY MADE.

Two things are clear: (1) The trial court found that respondent dominated petitioner and used the latter's officers. (2) That is the only possible deduction from the facts found and from the record. Even if this were not true, then, as pointed out in 65 Harvard Law Review at 1258, commenting on this case, the moment "the issue of control [is] determinative of whether there could be recovery * * *, it would seem necessary for the court to have remanded to the district court for findings on that issue."

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[49] For these facts, see pages 15-17, 21-26, supra. The majority opinion remarks further that the employment of the "independent tax experts" was upon the suggestion of petitioner's general counsel, Mr. Nicodemus. At that time Mr. Nicodemus was also an attorney for respondent (R. 1032), and his suggestion was that respondent employ tax counsel, not that petitioner do so (R. 544). Even if Mr. Nicodemus thereafter knew of the use of the loss, a corporation loses none of its properties or rights because it has an attorney who is also attorney for the party who appropriates them. In fact, Mr. Nicodemus testified that he did not know of the use of petitioner's loss until December 1945 or early 1946 (R. 1072-1073), long after the last return. If the issue of his knowledge were relevant, a finding thereon can only be made by the trial court. Without having heard the witness, an appellate court cannot find against his testimony. The trial court stated that the issue was "incompetent, irrelevant and immaterial." (R. 1076).

This is not a case where an appellate court has reversed a judgment because it believes the findings to be "clearly erroneous." What occurred here is, so far as we can find, unprecedented. Here an appellate court, sweeping aside a trial court's legal theories as unsound, has affirmed on a theory presupporting a set of facts contrary to what that court has found either formally or informally by stating that it would have so found had it deemed them material, after hearing the witnesses and presiding over a living trial.

Nor is this a case where an appellate court, in affirming a judgment on a legal theory different from that of the lower tribunal, does so on the basis of facts found below. Here the legal theory is new and rests on facts found *ab initio* by the the appellate court.

The majority opinion says (R. 2235):

> "The record is barren of evidence to support the contention that Corporation was dominated by the subsidiary, or that there was a breach of any duty owed to Corporation. As the trial court stated, 'The so-called "duality of control" much discussed and emphasized, is not important.'"

A casual reading of this extraordinary statement would suggest that the trial court had found absence of domination. But what the trial court said in its opinion, which it adopted as its findings, was this (R. 272):

> "Whether there was, or was not, 'duality of control' respecting the directorates of the two companies, appears to me to be not too important. *True, there is a preponderance of the evidence in favor of the plaintiff's contention of 'duality of control.'*"

And by "duality of control" it said that it meant

> "that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant." (R. 264)

The trial court declined to make a formal finding on any facts not material to the two legal theories on which it based its decision.[50] It concluded that "there is little factual dispute pertinent to the issue decided," i.e., pertinent to its legal theories (R. 276), and that "The so-called 'duality of control,' much discussed and emphasized, is not important in resolving the tendered issue," i.e., the issue deemed by it to be important (R. 274).

But, while declining to amplify its findings formally, the trial court, after hearing all the witnesses and performing the function which the law assigns to a trial court, made clear that, had it believed the issue material, it would formally find in accordance with petitioner's claim, i.e., that respondent controlled petitioner and by means of that control caused it to file the consolidated returns for respondent's benefit. On the settlement of the findings it said that "there is no question about that" (see p. 30, supra). The importance which this Court attaches to a trial court's ability to see the witnesses face to face is shown by *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (April 28, 1952).

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[50] Contrary to an assertion in the majority opinion below, the trial court gave permission to counsel to submit findings only if they were limited to the issues relevant to its theories (R. 276).

The Court of Appeals held that the trial court erred in what it considered the "essential equitable considerations" and in its two legal theories, and therefore that its findings did not support its judgment.

Judge Fee's dissenting opinion clearly states the situation presented by that holding (R. 2241):

> "Thus the two grounds advanced [by the Trial Court] to sustain the judgment fail. The cause should be reversed for failure to state adequate findings to support the judgment. Findings must be made in the Trial Court. Appellate courts have no such right or function. The majority opinion attempts to accomplish justification of the result below by drawing inferences, deductions and conclusions from evidence which they claim to find in the record. It would be possible for other judges to set up a diametrically opposite set of facts from which a judgment in favor of plaintiff might be based. The very reason that Rule 52 requires findings of fact is illustrated by the majority opinion. For the technical difficulties of finding a basis of fact for this judgment are many. Indeed, *such difficulties are insurmountable.*"

Earlier Judge Fee had said (R. 2239):

> "There are no findings of fact [by the Trial Court] which support the judgment of the Trial Court or the affirmance thereof by a majority of this Court. The cause should be remanded for this reason alone."

Thus Judge Fee has made it clear (1) that on the record it would be impossible to make a finding that would support a judgment for respondent and (2) that the Court of Appeals had no power to do so, that therefore it could not affirm the judgment, but at most could only remand for findings.

C. THE FUNCTION TO FIND FACTS IS IN THE TRIAL COURT, NOT THE COURT OF APPEALS.

Where a trial court fails to find on essential issues, the cause must be remanded.

R.C.P. Rule 52(a) provides that the trial judge "shall find the facts." That rule "was advisedly made mandatory * * *." 5 *Moore's Fed. Prac.* (2d ed.), p. 2657, fn. 21.

Where a finding has been made in the trial court, a Court of Appeals may set it aside where it is "clearly erroneous" and may reverse the judgment in consequence. But when a Court of Appeals does not have the benefit of an initial finding on a material fact by the trial court, it may not itself supply it.

"It is not the function of [an appellate court] to search the record and analyze the evidence in order to supply findings which the trial court failed to make." *Kelley v. Everglades Dist.*, 319 U.S. 415, 421; *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88. A reversal should follow failure to find at all on an issue held to be material. *Interstate Circuit Inc. v. United States*, 304 U.S. 55.

The Courts of Appeals have repeatedly so stated the law.[51]

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[51] E.g., *Waialua Agricultural Co. v. Maneja*, 178 F.2d 603, 607, 608 (9 Cir.): "It is not the function of an appellate court to make findings on its own account." "The absence of findings * * * leaves no pediment on which a judgment can stand"; *Jacuzzi Bros. Inc. v. Berkeley Pump Co.*, 191 F.2d 632, 638 (9 Cir.): ". . . the law does not commit that function to us, but solely the power to reverse if his findings be clearly erroneous"; *Helbush v. Finkle*, 170 F.2d 41, 42 (9 Cir.): Where a determination "would necessitate findings on questions on which the District Court has made no findings * * * such findings should be made by the District Court, not by this Court"; *Paramount Pest Control Service v. Brewer*,

There is an essential difference in the function of an appellate court and a trial court. As stated in oft-cited *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F.2d 554, 559 (D.C. Cir.), an appellate court's function is to compare (1) rulings with the law and (2) findings with the record, not to extract findings from the record itself. When it has no specific finding before it, it has nothing to compare against the record and should reverse. So also *Commissioner v. Kolb*, 100 F.2d 920 (9 Cir.).

The vice of exploring the record to find facts *ab initio* is not only that it involves the appellate court in a new kind of task, but that it deprives the litigant of an opportunity to be heard. No proper machinery exists in an appellate court to settle findings in the first instance.

The Majority Opinion Sets Up a Novel and False Principle Concerning the Power of an Appellate Court.

The majority opinion disposes of the lack of findings to support its theory by saying that "Findings are not a jurisdictional requirement of appeal," and that an appellate court "may waive the defect on the ground that the error is not substantial in the particular case," if it feels able to find the facts itself (R. 2236). It supports this assertion by citing three cases, *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310; *Goodacre v. Panagopoulos*,

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170 F.2d 553, 554 (9 Cir.): "This Court of Appeals has no power *ab initio* to consider" issues on which no findings were made.

So also *Jones v. Waterman SS Corporation*, 155 F.2d 992, 997 (3 Cir.); *Kistler v. Gingels*, 171 F.2d 912 (8 Cir.); *Campbell v. Campbell*, 170 F.2d 809 (D.C. Cir.); *McClure v. O. Henry Tent & Awning Co.*, 184 F.2d 636, 639 (7 Cir.); L. Hand, J. in *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, 126 F.2d 992 (2 Cir.); *Girard Trust Co. v. Windt*, 178 F.2d 359 (2 Cir.); *United States v. Aluminum Co.*, 148 F.2d 416, 433 (2 Cir.); *United States v. Forness*, 125 F.2d 928, 942 (2 Cir.); *Ginsberg v. Royal Ins. Co.*, 179 F.2d 152, 154 (5 Cir.).

110 F.2d 716 (D.C. Cir.), and *Hurwitz v. Hurwitz*, 136 F.2d 796 (D.C. Cir.). This Court nowhere stated in the *Mayo* case that when a case comes up without findings on issues which the appellate court deems material, it may make them *ab initio*. Its opinion contained a statement that findings are intended to benefit appellate courts. That statement is converted by the court below into a declaration that if the appellate court decides to find the facts itself it may dispense with findings by the trial court.

In *Goodacre v. Panagopoulos* and in *Hurwitz v. Hurwitz*, there was no lack of supporting findings but merely informality or irregularity in the mode of expressing them.

VII.

The Court of Appeals Erred in Denying Petitioner the Right to Petition for a Rehearing In Banc

After decision below, petitioner filed a petition for rehearing in banc under 28 U.S.C., Sec. 46(c). Two of the three judges constituting the panel which heard the appeal struck the petition as "being without authority in law" (R. 2259-2260). Judge Fee, dissenting, suggested a "rehearing en banc of all the Circuit Judges" (R. 2262). Petitioner then filed a petition asking leave to reinstate the petition for consideration by the entire court (R. 2263-2282). This the court, in banc, denied, declaring that it "declined altogether to entertain petitions of litigants for such hearings" (R. 2295). Chief Judge Denman dissented (R. 2296 and 2313).

The main ground of the ruling is that once a case has been assigned to a panel of three judges, it is in their jurisdiction, and the remainder of the court has no power

to participate unless two of the three should vote to relinquish the case to the whole court. The other judges, the court said, "may not intrude themselves"; any petition for rehearing "must necessarily be treated as addressed to" the panel and "solely for [its] disposition," and if a majority of the panel denies the petition "that ends the matter" (R. 2294).

This decision, and the practice which it decrees, places the Ninth Circuit in conflict with the statute, with the holdings of this Court, and with the practice of the District of Columbia and Third Circuits.

CONFLICT WITH THE STATUTE.

While recognizing that a Court of Appeals has power to direct a hearing in banc initially, the court below held that the power is lost by an assignment to a panel so that there is no power to grant a *re*hearing in banc. The statute, 28 U.S.C., Sec. 46(c), draws no such distinction. It provides:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing *or rehearing before the court in banc* is ordered by a majority of the circuit judges of the circuit who are in active service."

CONFLICT WITH THE HOLDING OF THIS COURT.

The statute was occasioned by a conflict between the Ninth Circuit, which held that the court could not sit in banc and the Third, which held that it could (*Lang's Estate v. Commissioner*, 97 F.2d 867 (9 Cir. 1938); *Commissioner v. Textile Mills Corporation*, 117 F.2d 62 (3 Cir., 1940)). Upholding the Third, and rejecting the view of the Ninth, this Court held that hearings could be had in banc, *Textile Mills Corporation v. Commissioner*, 314 U.S. 326.

S. 1053 was then introduced in the 77th Congress to give more explicit expression to the procedure approved by this Court. The hearing on the bill shows that it was contemplated that litigants could petition for hearings in banc.[52] While not then enacted, the bill was adopted in substance as Section 46(c) upon revision of the Judicial Code in 1948. It "preserves the interpretation established by the *Textile Mills* case." (Reviser's note.)

Citing that case, this Court in *United States ex rel. Robinson v. Johnston*, 316 U.S. 649 (1942), on certiorari to the Ninth Circuit, remanded the case "for further proceedings, *including leave to petitioner to apply for a hearing before the court en banc.*" Thereby it necessarily construed the statute as giving to the litigant "authority in law" to file a petition for rehearing in banc and to the court power to grant it.

The Ninth Circuit had held in the *Lang* case that a court may not be composed of all the circuit judges of the circuit in active service, when there are more than three, because

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[52] Hearings before the Subcommittee on Judiciary on S. 1053, 77th Congress, 1st session.

"Senator Danaher: * * * On whose motion would the court assemble en banc? * * * Who is going to make a motion that the whole court sit on this case? The counsel in the case?

* * * * * * * *

"Mr. Chandler: The counsel can make a suggestion of course." (p. 16)

Again:

"Senator Danaher: Judge Groner, do you gentlemen of the bench have any thought to give us as to how we are going to let a majority of the circuit judges decide * * * when they are going to convene the court en banc?

"Judge Groner: * * * My own thought in the administration of my own court would be that it would not be done unless counsel requested it, or unless the court of its own motion * * * deemed it advisable * * *." (p. 40)

that view of the law would "lead to grave difficulties of administration," since "then each judge may well have the right and the duty to demand his place in the hearing on each appeal" (97 F.2d at 870).

Since this Court thereafter held, and Congress thereafter declared, that there is power to sit in banc, it would follow that the other judges do have a right, and in a proper case the duty, to sit.

Despite this Court's decision in the *Textile Mills* case in 1941 and in the *Robinson* case in 1942, the Ninth Circuit has remained fixed in its view that a case becomes the exclusive jurisdiction of a particular panel of three judges once it has been assigned to them. While the form of its practice has varied, the substance has remained the same.[53]

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[53] In 1943, in *Crutchfield v. United States*, 142 F.2d 170, the senior circuit judge "refuse[d] to convene the court en banc *even to consider* the question of the jurisdiction of the court en banc to take over a case pending before three judges * * * either on the petition of the litigant or * * * a dissenting judge of the three-judge panel." The language and the italics are that of Judge Denman, the dissenting judge. The ground of the refusal was

> "that once the three judges so assigned by the whole court to consider the case have rendered judgment * * * only the setting aside of the judgment by two or more of the three judges participating in the decision permits a petition for a rehearing en banc." (p. 180)

In 1945, in *Independence Lead Mines Co. v. Kingsbury*, 175 F.2d 983, two judges in a panel of three denied a petition for rehearing in banc over Chief Judge Denman's dissent that two judges had no power "to act on a petition addressed to seven judges." In 1950, in *Kronberg v. Halé*, 181 F.2d 767, and in three later cases where the panel consisted of but one circuit judge and two district judges (*Freuhauf Trailer Co. v. Myers*, 181 F.2d 1008; *Northwestern Mutual Life Insurance Co. of Milwaukee v. Gilbert*, 182 F.2d 256, and the order of January 30, 1952 in the present case), the panel struck a petition for rehearing in banc as "being without authority in law." And now, by the most recent decision herein, the court has announced a return to the practice of treating a petition for rehearing in banc as addressed to the panel alone.

CONFLICT WITH OTHER CIRCUITS.

Both the District of Columbia and the Third Circuits entertain and grant petitions for rehearing in banc. The practice of the District of Columbia Circuit is shown by a letter of Chief Judge Stephens, and citations therein, quoted in Chief Judge Denman's dissenting opinion (R. 2313), and by this Court's records in *Sawyer, Secretary of Commerce v. Dollar*, No. 247, October term 1951, pp. 52, 61, 62 therein.

THE RIGHT TO PETITION FOR A REHEARING IN BANC COMPORTS WITH REASON AND PRINCIPLE.

Commenting on *Independence Lead Mines Co. v. Kingsbury* (supra, footnote 53), 63 Harvard Law Review 1449 said that

> "since the three judges here could not under § 46 have ordered a rehearing, their action in considering the petition seems singular" (p. 1451)

and

> "* * * fuller development of the rules governing the procedure by which the hearings are granted or denied seems both necessary and practicable. * * * perhaps formal petition of counsel, as in the instant case, is the most suitable method for initiating a hearing *en banc* in a particular case. * * * The petition should, it seems, be entitled to such consideration that denial of the petition results only when a majority of the individual judges are unwilling to grant it." (p. 1450)

After the decision below, Circuit Judge Pope expressed the view, similar to that of Chief Judge Denman's but contrary to that of the rest of the court, that the full court has power to grant a rehearing in banc but, contrary to

Chief Judge Denman, that a litigant is not entitled to petition for such action.[54]

A litigant must have the right to request a court to exercise a power which it possesses and to grant the kind of relief which the law empowers it to grant. Since hearings in banc can be ordered by a majority of the active circuit judges and only by them, a litigant must be entitled to have his request presented to them all for consideration and action. Two judges ought not to have the power to prevent the other five from even being apprised of the request. If two district judges are on a panel, they ought not to be able to prevent the circuit judges, alone qualified to pass on the question, from acting. The question is not, as stated below, whether a court may "be compelled on the petition of a losing party" to sit in banc (R. 2294), but whether the litigant may request the judges to do so, if they think it warranted in the particular cause.

THE RIGHT TO PETITION COMPORTS WITH FAIR AND EFFICIENT JUDICIAL ADMINISTRATION.

The court below also held that to entertain petitions for rehearing in banc would burden the court with overwork and thus nullify the object of the statute in permitting three judge panels (R. 2295). This same reasoning was stated by the same court in 1938 in the *Lang* case (97 F.2d at 870).

Without depreciating the apprehension of overwork, we submit that it should not lead to a total denial of the right of petition.[55] In many cases no petitions for rehearing are

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[54] *Bradley Mining Co. v. Boice*, 198 F.2d 790 (9 Cir. Aug. 27, 1952). This was stated to be Judge Pope's interpretation of what the court had held in the present case. We submit that it misconstrues that holding.

[55] Neither the District of Columbia nor the Third Circuit finds that recognition of the litigant's right produces an intolerable burden.

filed, and in still fewer are requests made for a rehearing in banc. Such a petition was here filed only because of the unusual combination of factors noted by Judge Fee in requesting the court to grant a rehearing in banc (R. 2262). Overwork may be a proper factor to consider in deciding whether to grant a petition in a particular cause. But the law, whose art is discrimination, should be able to discriminate between the few cases where such a rehearing is warranted and the many where it is not.

The device of having an appellate court sit in divisions is but the equivalent of having a number of coordinate intermediate appellate courts answerable to another superior to them. The propriety and necessity of permitting a petition to the whole court, where it sits in divisions, or to the higher court, is obvious, and the practice is widespread.

Unless petitions for rehearing in banc are recognized, most circuits will contain not one but a multiplicity of Courts of Appeals with almost an infinity of opportunity for conflict between the views of the different panels. Seven judges can be constituted into 35 different panels of three. With District Judges sitting on the court, as here, there is the possibility of even more panels. If there is to be an opportunity to review their decisions, there must be a right to petition for rehearing in banc unless the burden is to fall on this Court in its certiorari jurisdiction.[56]

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[56]It has been argued that a judge should not be required to read long records in cases in which he has not sat in the original hearing. But a reading of a whole record should not ordinarily be necessary to pass on a petition for rehearing in banc, any more than to pass on a petition for certiorari, since the question presented is not the final decision but merely the desirability of consideration by the court, which should turn on the kind of issues presented, not the evidence.

A more extensive discussion of the error of the court below in denying petitioner the right to petition for rehearing in banc, and of the authorities bearing thereon, may be found in our petition for certiorari (at pages 7, 8, 27-30) and in our "Reply Brief in Support of Petition for Certiorari" (at pages 1, 2 and 14-23).

VIII.

Judgment Should Be Directed for Petitioner for the Full Amount of the Tax Savings

For the reasons stated in the preceding pages, we submit, the decision of the Court of Appeals should be reversed. And there is no reason why the cause should be remanded to the District Court for further trial or findings. On the undisputed facts and the findings already made by the District Court, overwhelmingly supported—indeed required—by the record, the cause should be remanded with directions to enter judgment for the petitioner for the amount of the unjust enrichment which the courts below found to be $17,201,739 (p. 4, supra).

Petitioner is entitled to the full amount of the unjust enrichment and not merely part thereof, for two reasons:

First: As shown in Part III of this brief, the purpose and rationale of the tax laws in permitting consolidated returns so require. Recovery by petitioner of the entire amount would be only an amelioration of the loss that made the savings possible, while retention by respondent of any part would be a sheer windfall.

Second: The principles discussed in Part IV also establish petitioner's rights to the entire enrichment. In view of respondent's seizure and appropriation of petitioner's

rights, its stubborn refusal to recognize that it was a fiduciary for petitioner, its callous disregard of petitioner's equities and the rights of petitioner's shareholders, a court of equity should not be called upon now to determine how the parties might have allocated the tax savings if respondent had respected petitioner's rights, had advised it of what was proposed to be done and of the legal and economic consequences,[57] and had given petitioner the opportunity to make a bargain. The opportunity was denied, and "the price of denial" should be that respondent now account for all the benefits. *Meinhard v. Salmon,* 164 N.E. 545, 547, 249 N.Y. 458 (Cardozo, C. J.).

CONCLUSION

We respectfully submit that the judgment of the Court of Appeals should be reversed with direction to remand to the District Court for entry of judgment in favor of petitioners and against respondents.

Dated: San Francisco, California, November 20, 1952.

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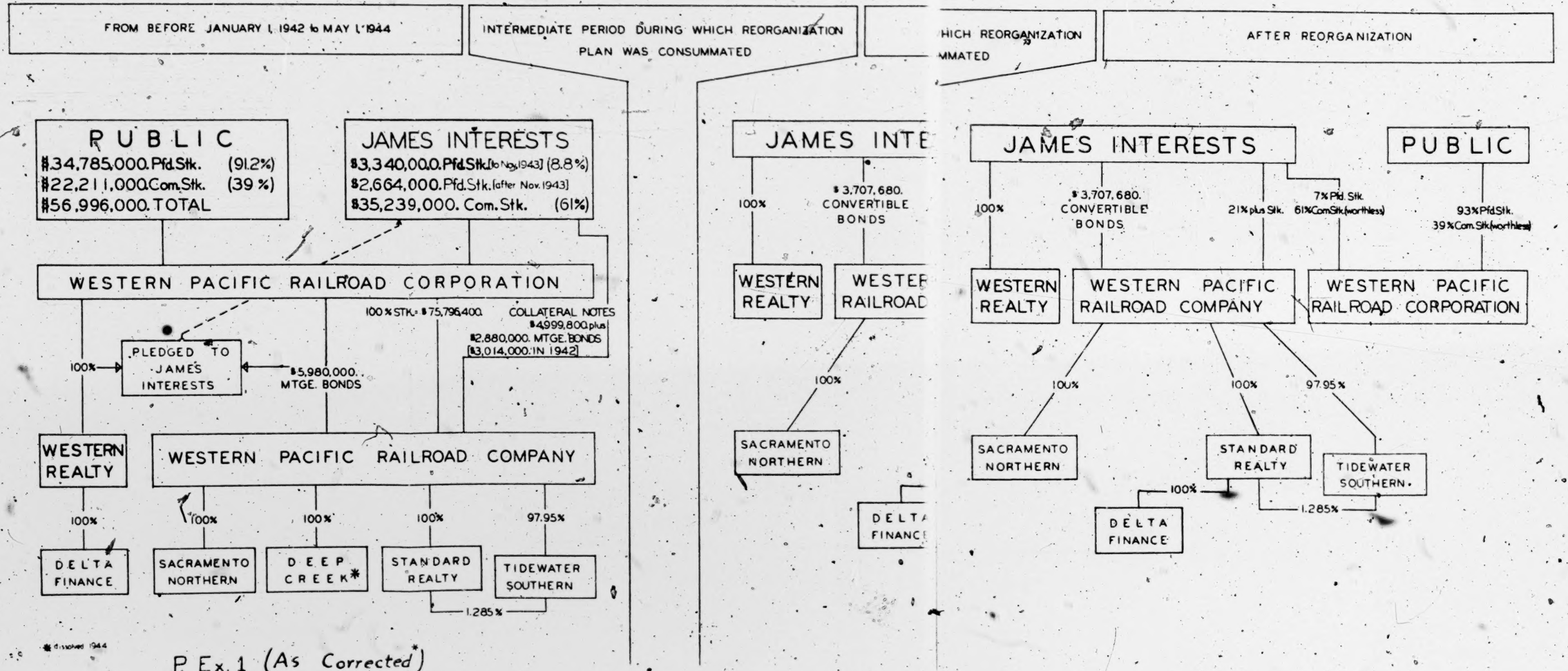
[57] "If dual interests are to be served, the disclosure * * * must lay bare the truth, without ambiguity or reservation, in all its stark significance." *Wendt v. Fischer,* 154 N.E. 303, 304, 243 N.Y. 439 (Cardozo, J.).

(Appendices follow)

for tax purposes the net result of its sales department, the net profit or loss on its manufacturing activities, the net profit or loss on its investments, or the net profit or loss on each and every one of its agencies. Such a requirement would be so absurd as to appear on its face ridiculous, and it is only necessary to state the case of a single corporation to demonstrate its absurdity. It is no more absurd, however, when applied to the different departments of a single corporation than it is when applied to the subsidiary corporation of a single unit. For instance, if a single corporation has a manufacturing department and a sales department, and we regard it as absurd to separate them for tax-accounting purposes, it is equally absurd when dealing with two subsidiary corporations, one of which does the manufacturing and the other one of which does the selling, to claim that theoretically they are two separate entities, when as a matter of fact, they are both engaged in a common, inseparable enterprise."

CORPORATE RELATIONSHIPS



P. Ex. 1 (As Corrected)

* P. Ex. 1 inadvertently showed Delta Finance as dissolved in 1944, whereas it was dissolved in 1944, whereas it was Deep Creek that was dissolved.

APPENDIX ONE

STATUTES INVOLVED

1. Internal Revenue Code, Section 141.

"(a) *Privilege to file consolidated income and excess-profits-tax returns.* An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making consolidated income and excess-profits-tax returns for the taxable year in lieu of separate returns. The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. The making of a consolidated income-tax return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated returns shall include the income of such corporation for such part of the year as it is a member of the affiliated group. * * *

"(b) *Regulations.* The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making consolidated income- and excess-profits tax returns and of each corporation in the group, both during and after the period of affiliation,

may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income- and excess-profits-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. * * *

"(c) *Computation and payment of tax.* In any case in which consolidated income-tax and excess-profits-tax returns are made or are required to be made, the taxes shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under subsection (b) prescribed prior to the last day prescribed by law for the filing of such returns; except that the tax imposed under section 15 or section 204 shall be increased by 2 per centum of the consolidated corporation surtax net income of the affiliated group of includible corporations. * * *

"(d) *Definition of 'affiliated group'.* As used in this section, an 'affiliated group' means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

"(1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

"(2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of at least one of the other includible corporations.

"As used in this subsection, the term 'stock' does not include nonvoting stock which is limited and preferred as to dividends.

* * * * * * * * *"

2. Internal Revenue Code, Section 730.

Relating to excess-profits tax, this is similar to Section 141.

3. Internal Revenue Code, Section 23.

"*Deductions from gross income.* In computing net income there shall be allowed as deductions:

* * * * * * *

"(g)(2) *Securities becoming worthless.* If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.

* * * * * * *

"(4) *Stock in affiliated corporations.* For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purposes of this paragraph a corporation shall be deemed to be affiliated with the taxpayer only if:

"(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and * * *"

4. Internal Revenue Code, Section 52.

"* * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make

returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control."

5. Title 28 U.S.C., Section 46(c).

"Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

6. R.C.P., Rule 52(a).

"In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

7. Treasury Regulation 104.

"Sec. 23.1. *Privilege of Making Consolidated Returns.*

"(a) Sections 141 and 152, as amended, give to the corporations of an affiliated group the privilege of making a consolidated return for the taxable year in lieu of separate returns. This privilege is given, however, for taxable years beginning after December 31, 1941, upon the condition that all corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to these regulations, and any amendments thereof duly prescribed prior to the last day prescribed by law for the filing of the return; and the making

of the consolidated return is considered as such consent. * * *"

Sec. 23.15(b): *Liability of a Corporation in Bankruptcy or Receivership.*

"If, at the time of filing a consolidated return, one or more, but not all, of the members of the affiliated group are in bankruptcy under the laws of the United States or in receivership in any court of the United States or of any State, Territory, or the District of Columbia, then the liability under paragraph (a) of each such member of the group with respect to the period covered by such return shall not exceed such portion of the consolidated tax liability for such period as the several corporations included in the consolidated return may, subject to the approval of the Commissioner, agree upon, or, in the absence of such an agreement, an amount equal to its liability for such year computed as if a separate return had been filed."

Sec. 23.16(a): *Scope of Agency of Common Parent Corporation.*

"Except as provided in paragraphs (b) and (c) of this section—

"The common parent corporation shall be for all purposes, in respect of the tax for the taxable year for which a consolidated return is made or is required, the sole agent, duly authorized to act in its own name in all matters relating to such tax, for each corporation which during any part of such year was a member of the affiliated group. The corporations, other than the common parent, shall not have authority to act for or to represent themselves in any such matter. * * *"

8. Treasury Regulation 110.

Relating to excess profits tax, this is similar to T. R. 104.

APPENDIX TWO

In the Report of the Senate Finance Committee (70th Congress, 1st Session, Senate Report 960), the following appears (p. 8):

"* * * The permission to file consolidated returns by affiliated corporations merely recognizes the business entity as distinguished from the legal corporate entity of the business enterprise. Unless the affiliated group as a whole in the conduct of its business enterprise shows net profits, the individuals conducting the business have realized no gain. The failure to recognize the entire business enterprise means drawing technical legal distinctions, as contrasted with the recognition of actual facts. The mere fact that by legal fiction several corporations owned by the same stockholders are separate entities should not obscure the fact that they are in reality one and the same business owned by the same individuals and operated as a unit. To refuse to recognize this situation and to require for tax purposes the breaking up of a single business into its constituent parts is just as unreasonable as to require a single corporation to report separately for tax purposes the gains from its sales department, from its manufacturing activities, from its investments, and from each and every one of its agencies. It would be just as unreasonable to demand that an individual engaged in two or more businesses treat each business separately for tax purposes. Much of the misapprehension about consolidated returns will be removed when it is realized that it is only when the corporations are really but one corporation that the permission to file consolidated returns is given, and that no ultimate advantage under

the tax laws really results. The present law permits the filing of consolidated returns only where one corporation owning at least 95 per cent of the stock of both corporations is owned by the same interest. The provision embodies the business man's conception of a practical state of facts."

Vol. 69, Congressional Record, p. 653, contains the following discussion:

"Mr. Tilson. * * * Let us remember that the provisions of the bill are applicable only where corporations are, in effect, but one corporation, 95 per cent ownership being required. In most cases there is an ownership of 100 per cent. The interests are the same.

"The ability to pay must be governed by the net income of the entire group. Computing the income of each separate corporation is but the basing of an income tax upon paper profits. Our income tax law should be based as nearly as possible upon income actually realized.

"Group organization of corporations, all owned ultimately by the same stockholders, has been developed by modern business for perfectly legitimate reasons, among them being separate accounting for the various parts of an enterprise and the desirability and frequently the necessity, of creating an independent corporation for the purpose of carrying on a particular part of the business, both at home and abroad. The mere fact that by a legal fiction these are separate entities should not obscure the fact that they are in reality one and the same business, owned by the same individuals, and run as a unit. To refuse to recognize this fact and to compel for tax purposes the breaking up of a single business into its constituent parts is just as unreasonable as to require a single corporation to report

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuP. BAYARD, RECEIVER,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY AND DELTA FINANCE CO., LTD.,

Respondents

PETITIONER'S REPLY BRIEF

Respondent presents several affirmative arguments why, even though petitioner's claim be good on the merits, respondent may nevertheless defeat it. Before answering these arguments, we first point out the fallacies of respondents' contentions on the merits.

I

PETITIONER IS ENTITLED TO RECOVER ON THE MERITS

Respondent's case may be summarized in two contentions:

1. There is a "general rule", applicable here, that where consolidated returns are filed, a "loss" company is not

entitled to any consideration or compensation from the "gain" companies whose taxes are reduced by the offset of the loss (Br. 42).

2. Petitioner was under a duty to join in consolidated returns and give its loss to respondent (Br. 65).

No court decision supporting either contention is cited.

While respondent also argues that it was not a fiduciary of petitioner and did not cause petitioner's officers to file the consolidated returns (notwithstanding the trial court's finding to the contrary), it asserts that these facts are irrelevant; and it bluntly stands on the proposition that, even though it was a fiduciary, it is under no duty to account, for "petitioners have no claim, whatever the conduct of the parties may have been" (Br. 24).

A. Respondent Ignores the Basic and Unique Fact of This Case, the Severance of the Economic Unity

Respondent's arguments, particularly those about a "general rule", are permeated by its refusal to recognize the unique fact of this case, namely, that this Court's affirmance of the I.C.C. plan severed the economic unity, and that when the returns were filed petitioner had no economic interest whatever in respondent.[1]

This case does not fall in the customary pattern of corporate affiliation. Here the loss which respondent used

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[The symbol "O.B." refers to petitioner's opening brief. "Br." refers to respondent's brief.]

[1] Respondent's answer to the unique fact of the case is no more than a denial that there was a severance of the economic unity, plus a mere assertion that the fact is without significance (Br. 59-62). It contends that confirmation of the Plan "severed nothing" (Br. 59) because the "affiliation" continued to April 1944. But that continued "affiliation" was technical only. As for its argument that "'economic unity' in matters of consolidated returns is a false factor" (Br. 60), we refer to O. B. 75 where we anticipated it.

to satisfy its tax liability was its former parent's loss of ownership of the respondent itself.

The "paradox" was recognized by respondent's tax counsel, who were the first to describe it, in their letter which first suggested the possibility of using the loss, where they said, "This is commented on rather than suggested as of certain value, since it is paradoxical to compute a loss upon the operating company's stock which, through the medium of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless." (R. 591; O.B. 19). The unique situation was recognized by the trial court, which was moved in its opinion to characterize the tax savings as "amazing and undeserved" (R. 276). How could there be a duty to give respondent an "amazing and undeserved" benefit?

This failure to recognize the severance of the economic unity and the paradoxical nature of the result vitiates respondent's argument based on "past practice" of the parties. It also vitiates its argument founded on alleged practice of "the business community" (Br. 41). If such a practice exists, it relates to a continuing economic unity where the parent benefits by whatever benefits any affiliate. The argument was repeatedly advanced at the trial, but the elaborate evidence offered by respondent to support it was excluded by the trial court, which said (R. 1379):

> "The question would never arise under the general business practice, because I do not think you would ever have any litigation. Absent the kind of situation that you have here between companies that were free agents to agree with one another to file this type of return. Here you have a situation where a third party, a new party, is getting the benefit of this tax situation. * * * the problem that is presented by it is entirely different from what might happen in the ordinary business relationship of parent and subsidiary

companies, where you have not the interposition of reorganization proceedings and all that they entail."[2]

This case involves no general question of how losses and savings should be shared between affiliated corporations. It involves the loss to the parent of its ownership in its subsidiary, thus bringing about a severance of the economic unity then and there so that the parent can no longer achieve the benefits of the tax savings through its continued ownership, and where, in the words of Judge Fee, there must be another method of applying the tax remission to the loss that gives rise to it (R. 2248).

Respondent's same basic fallacy vitiates its assertions about the alleged "precedents" (Br. 43-49), including its references to an investigation by the Federal Trade Commission in the late 1920's of utility holding companies, the enactment 8 years later of the Public Utility Holding Company Act of 1935, and Rule U-45 issued thereunder by the Securities and Exchange Commission.

In our opening brief we anticipated respondent's discussion of Rule U-45 of the S.E.C. and of the S.E.C. accounting release. There is a significant lesson to be drawn from the action of the S.E.C. under its rule, but it is the reverse of what respondent contends. When an affiliate's tax savings resulting from the use of another affiliate's loss could not or might not reach the party suffering the loss through ordinary channels, as by way of dividends or increase of its equity, the S.E.C. has considered it equitable that the benefit of the tax savings be passed directly to the party who suffered the loss. (See discussion in O.B., pp. 68-71)

The Federal Trade Commission investigation related to gas and electric holding companies and practices prevail-

[2] This is not the only instance where respondent's brief makes assertions on the basis of evidence offered by it but excluded by the trial court. Other instances appear at Br. 19, 88 and 89.

ing within groups in which there was a continuing economic entity. What concerned the F.T.C., so far as anything here involved is concerned, was the abuse of accounting practices as the result of which amounts paid as or in lieu of federal taxes were added to operating expenses to increase rates which then redounded to the benefit of the continuing parent.[3]

Respondent asserts that Treasury rulings "assume and provide" for a pro rata allocation of the tax "without tax saving payments" (Br. 46). Nothing could be farther from the fact, and the provisions of the various revenue acts which it cites are the very ones we referred to as recognizing the propriety of agreements between affiliates respecting apportionment (O.B. 126). For instance, Treasury Regulation 104, Sec. 23.15(b), which covers the liability of a corporation in bankruptcy, provides that "the liability * * * of each such member of the group * * * shall not exceed such portion of the consolidated tax liability for such period as the several corporations included in the consolidated return may, subject to the approval of the Commissioner, *agree upon* * * *".

For the protection of the Treasury the regulations list certain circumstances wherein intra-group agreements are not recognized for certain purposes.[4] The very specifica-

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[3] The Commission felt that the "amounts paid as federal income tax should be deducted from the net income on which the tax was calculated" and not treated as an expense of operation (Br., App., p. 8, 3rd paragraph), and it condemned certain accounting procedures because they resulted in "an inaccurate recording of the true cost of operations of the electric and gas operating companies" (Br., App., p. 7, end of 1st paragraph). All this is irrelevant to the present case.

[4] For certain purposes it is necessary to determine earnings and profits available for dividends, and to this end taxes chargeable to each affiliate must be determined. For this calculation the Treasury requires the consolidated tax to be apportioned in a certain manner.

Respondent refers to the regulation that, if a parent has reduced its own tax by use of a subsidiary's loss, the base at which the parent holds

POSITIONS HELD BY OFFICERS, DIRECTORS AND COUNSEL OF THE W.P.R.R. CORPORATION WITH W.P.R.R. COMPANY AND TRUSTEES, THEIR COMPENSATION AND SOURCE THEREOF DURING THE PERIOD JUNE 1, 1943 TO OCT. 10, 1946.

CORPORATION	COMPANY and TRUSTEES
WHITMAN, RANSOM, (ROBT. E. COULSON	**COULSON & GOETZ & JAMES K. POLK)**
TAX COUNSEL	TAX COUNSEL DIRECTOR (Coulson) from 12-28-44 COUNSEL for REORGANIZATION COM. MEMBER REORGANIZATION COM. (Coulson) to 3-28-46
SCHUMACHER	
DIRECTOR	CH. EXECUTIVE COM. to 12-28-44 DIRECTOR to 12-28-44 TRUSTEE to 12-31-44
CURRY	
PRESIDENT TREASURER DIRECTOR	DIRECTOR & EXEC. COM. to 11-20-44 VICE PRESIDENT & ASST. SECT. & ASST. TREASURER to 4-30-45
VALOUCH	
VICE PRESIDENT & SECRETARY & DIRECTOR from 5-1-45 Secretary to Curry	Secretary to Schumacher & Curry ASSISTANT SECRETARY 12-4-44 to 4-30-45
SHEEHAN	
DIRECTOR 2-15-44 to 10-10-46	SWITCHBOARD OPERATOR & RECEPTIONIST to 5-1-45
WIENKEN	
SECRETARY to 5-1-45 DIRECTOR to 4-25-46	STENOGRAPHER to 5-1-45
PIERCE & GREER (NICODEMUS & CAMPBELL)	
GENERAL COUNSEL DIRECTOR (Campbell) to 5-1-45	COUNSEL to 12-31-45
OSBORN	
DIRECTOR	DIRECTOR & EXEC. COM. to 11-20-44
WOOD	
DIRECTOR	
HATTON	
DIRECTOR	

TOTAL OF $149,325

PENSION from 5-1-45

$15,000 PER YEAR

From 5-1-45 $3000 PER YEAR

PENSION from 5-1-45

TO 5-1-45 $11,700. PER YEAR

From 5-1-45 $3000 PER YEAR

Between $2640 & $2860. PER YEAR to 5-1-45

Between $1980 & $2344. PER YEAR

Between $2880 & $3212. PER YEAR

TOTAL OF $19,625.

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P. Ex. 2A.

tion of these instances and purposes shows that for all other purposes the relations of the parties are left to be adjusted by agreement or, in the absence of an agreement, by appropriate principles of equity.

Nowhere does respondent show any practice or cite any case where the loss was that of the parent's stock interest in the subsidiary. The reason is obvious: in the first place, the use of such a loss was first authorized in October 1942; in the second place, this case is "paradoxical".[5]

B. There Is No Support for Respondent's Assertion That Petitioner Was Under a Duty to Join in Consolidated Returns and Give Its Loss to Respondent Gratis

The tax law, the statute and the regulations, impose no such duty, and all the decided cases make clear that a parent corporation is free to join or not to join in consolidated returns as its own interests dictate (O.B. 94-96). *Duke Power Co.* v. *Comm.*, 44 Fed. 2d 543, cer. den. 282 U.S. 903; *George A. Fuller Co.* v. *Comm.*, 92 Fed. 2d 72 (2 Cir.); *Trinity Building Corporation of New York*, 40 B.T.A. 1315; 65 *Harvard Law Review* 1257:

On what basis, then, does respondent rest the alleged duty? It lists five supposed reasons (Br. 65). Every one would be present if the parent had also gone into bankruptcy or receivership in another court, as in fact it later did, in 1949, in the Delaware Chancery Court (O. B. 4). Yet its

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the subsidiary's stock for determining capital gains or losses must be reduced accordingly. This recognizes the obvious fact that the parent has reduced its investment in the subsidiary by taking advantage of the loss. There is no provision for reduction of the base where a subsidiary takes advantage of a parent's loss, which is the present case. The regulation shows the Treasury's view of the rationale of consolidated returns to be exactly as we contend, namely, that the parent is the ultimate economic owner of the enterprise and the ultimate beneficiary of tax savings.

[5] Respondent, referring to the Interstate Commerce Commission, admits that the I.C.C. has never ruled on the treatment of consolidated returns, but asserts that it has "rejected tax savings claims" (Br. 48). The two cases cited are not remotely in point. Neither involved the use of one person's losses or tax credits to reduce taxes of another.

receiver could not have been compelled to join in the returns. The *Fuller* and *Trinity* cases are directly in point. We proceed to consider each of the five reasons:

1. That in the past the parties have joined in consolidated returns. This argument about "past practice" is vitiated by the fallacy that pervades respondent's whole case, failure to recognize that when the returns were filed petitioner and respondent were economic strangers and respondent had new owners (See O. B, p. 121-124).

2. That in prior years there had accumulated credits and carry-overs resulting from the trustees' operations, which would be lost to it unless consolidated returns should be filed. But such alleged credits and carry-overs were not in fact used in the consolidated returns when filed, and petitioner's loss was the sole offset to respondent's income. In any event, the argument has no bearing on the alleged duty of petitioner to give its loss to respondent or on the duty of respondent to pay for the benefits arising from its use of petitioner's loss.

3. That petitioner "had no income and no use for its loss". We have shown that this argument is without merit. One cannot take another's rights or property, merely because the latter cannot use them himself (O.B. 104-116). Moreover, by joining in consolidated returns, one assumes large burdens, including personal liability for all taxes of the group (see O.B. 98). Here, respondent's tax counsel himself felt doubtful that there would be no tax liability until the settlement in 1947 (R. 1459-60). Yet, entertaining this doubt, respondent imposed a potentially large liability on petitioner. These facts negative any duty to join in returns irrespective of whether one has income or not.

4. That petitioner "as parent was under fiduciary duties to its insolvent subsidiary's creditors". Respondent sum-

marizes this argument by saying that there was "an obligation on the Corporation as parent to exercise its management powers in the best interest of the group" (Br. 32). But petitioner had no management powers; it had none since the onset of the bankruptcy in 1935; there was no longer a "group"; petitioner was not a fiduciary to respondent. The argument ignores the unique and distinguishing fact of this case. Respondent's old creditors, having taken ownership from petitioner, had no right also to take its last remaining asset. We answered this argument in our opening brief (O.B. 99-101, 102-103).[6]

5. That as "sole stockholder [petitioner] was required by the Bankruptcy Act so to act as to preserve the estate." This is but a rephrasing of the fourth reason. Petitioner had no such duty because it had no control or management, and "preservation" of the bankrupt estate does not require gifts of property to the bankrupt. Respondent asserts that the reorganization court would have required petitioner to sign the returns and give away its loss gratis. The sole reason assigned for this contention is that a bankruptcy court has the powers of a court of equity (Br. 65). But no basis for the duty which equity would be called on to enforce is stated. Moreover, a bankruptcy court has the

[6] Respondent argues (Br. p. 88) that under the plan of reorganization the old creditors were not paid in full. This would be irrelevant, even if true (O.B. 102). But the assertion is dubious in fact. Other than the petitioner itself and one wholly-owned subsidiary, both of whom were completely wiped out, the only creditor who did not receive a 100% equivalent was the A. C. James Co. Respondent argues that the new stock issued to the old creditors has not been worth the values assigned by the Plan, namely, $100 for the preferred and $57 and $62 for the common. Evidence of stock quotations offered by respondent in the trial court was excluded (R. 1579-1583). Respondent asks this court to take judicial notice of the quotations. Were such notice permissible, even were the fact relevant, the fact is that the stock has been above the assigned values. As this brief is being written, the common stock is quoted at $64.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 150

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuP. BAYARD, RECEIVER,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY AND DELTA FINANCE CO., LTD.,

Respondents

PETITIONER'S REPLY BRIEF

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FRANK C. NICODEMUS, JR.,
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powers of a court of equity only within the limits of its bankruptcy jurisdiction. It had no jurisdiction to enter the supposed order (O.B. 96-97). It is ungenerous to the bankruptcy court to suggest that if it had such power, it would exercise it to deprive petitioner of its property without compensation. On the contrary the presumption must be that the bankruptcy court would insist on just treatment for petitioner.

As Judge Fee said below (R. 2241):

> "The reorganization court had power to deny plaintiff participation in the assets of its subsidiary, and, as a result, all but nominal values in the shares in the subsidiary were lost. But plaintiff was not in reorganization itself * * * The reorganization court had no jurisdiction of plaintiff or of these property rights."

He added in a footnote (R. 2252):

> "Callaway *v.* Benton, 336 U.S. 132. The error in this proceeding, therefore, was the failure to reorganize plaintiff also. An illustrative case, where the parent was in reorganization, is reported in a series of opinions as In re Portland Electric Power Co., 97 F. Supp. 857-921. There a consolidated return was filed during the proceedings and the benefits appropriately distributed."[7]

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[7] The controlling case on jurisdiction is *Callaway* v. *Benton*, 336 U.S. 132.

Of this case respondent merely says (Br. 66) that it involved the power of the reorganization court over a stranger to the proceedings, and that petitioner here was a party. But petitioner appeared only to present its views in opposition to the Plan of Reorganization. It thereby submitted itself to the jurisdiction of the bankruptcy court only to assert its claims, as stockholder or creditor for cash advances against the debtor, not to give the court jurisdiction over demands which the debtor might

Respondent argues (Br. 70) that petitioner had no right "to bargain" for the use of its loss because the bargaining power would be employed against the reorganization court and that a refusal to make a gift of the use of its loss would be a threat to the court's jurisdiction. But this overlooks the patent distinction just noted. [8]

Repeatedly respondent argues that, if one group member could bargain, all could do so (e. g. Br. 56, 70). But, save for petitioner, the others were still subsidiaries of respondent or of those who desired to use the loss for respondent's benefit. As to them there was still an economic unity. As subsidiaries of respondent they are presumed to act harmoniously with it and for its interests as parent. That is precisely the assumption the law makes in allowing consolidated returns. *Duke Power Co.* v. *Comm.*, 44 F. 2d 543, cer. den. 282 U. S. 903; *Estate of John B. Lewis*, 10 T. C. 1080. But, as regards petitioner, the situation was radically different: the economic unity was severed. Thus once again respondent's arguments are vitiated by its same basic fallacy. Furthermore, petitioner was giving more than consent to the filing of consolidated returns. It gave the loss, which saved the taxes (See footnote 8 below). Respondent's subsidiaries did not.

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assert against it. In the *Callaway* case the litigant, South Western, had appeared in the reorganization proceedings to ask that its lease be adopted by the reorganized debtor (see 336 U. S. 132 at 134 and 135), and it was also a creditor in the proceedings (p. 146). Yet the Court of Appeals said that those facts gave no jurisdiction to the reorganization court to compel it to convey rights to the debtor. *Benton* v. *Callaway*, 165 F. 2d 877, 882. This court agreed. 336 U. S. at 146.

[8] Respondent also misdescribes the subject-matter of a bargain, by referring to it as mere consent to consolidated returns. But it would be more. The tax savings resulted from the conjunction of two elements, (1) joinder by petitioner in consolidated returns, and (2) the use therein of something belonging to petitioner, to-wit, the loss.

C. Respondent Refuses To Recognize That It Assumed a Fiduciary Relationship to Petitioner and Appropriated Its Loss; That the Benefits Were Not Conferred by Petitioner Either as a Gratuity or by Any Voluntary Act But Were Taken

Respondent contends that retention of the benefits would not be unjust for lack of "some recognized basis—fraud, mistake, duress, undue influence, illegality—for revoking the transfer" to it of petitioner's rights (Br.74). This is not supportable.

Fraud, mistake, and the like are concepts applicable to a voluntary or affirmative act of transfer. Petitioner did not knowingly transfer anything to respondent. The latter simply appropriated a thing of value belonging to petitioner and used it for its own enrichment. The analogies are trespass, conversion and the appropriation by a fiduciary of its cestui's property.

Respondent asserts that "in every windfall situation", wherever one party acquires a windfall, no one else can recover from him (Br. 74). Of course, where A receives an advantage which is unrelated to B, the latter has no right to share in it. There was here no "windfall" in any such sense, for what respondent gained, it gained not as the result of a fortuitous event, but as the direct result of its appropriation of petitioner's rights.[9]

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[9] The cases cited on this point by respondent (Br. 74) do not support it. In *Straube* v. *Bowling Green Gas Co.*, 227 S.W. 2d 666, 360 Mo. 132, plaintiff had paid defendant for gas at the rates fixed by a Public Service Commission and sued for a refund merely because defendant acquired the gas from its own supplier at a legal reduction in the latter's rates. In *Houck* v. *Hubbard Milling Co.*, 167 N. W. 1038, 140 Minn. 186, plaintiff bought wheat from defendant at contract prices and later sued for a refund because defendant had obtained deductions in its own freight rates. The case turned on the construction of the purchase contract. As the court construed that contract, the price at which plaintiff bought wheat was unconnected with defendant's freight rates. *Greek Catholic Congregation* v. *Plummer*, 32 A. 2d 299, 347 Pa. 351, is a case where one

INDEX

Subject Index

	Page
I. Petitioner is entitled to recover on the merits	1
A. Respondent ignores the basic and unique fact of this case, the severance of the economic unity	2
B. There is no support for respondent's assertion that petitioner was under a duty to join in consolidated returns and give its loss to respondent gratis	6
C. Respondent refuses to recognize that it assumed a fiduciary relationship to petitioner and appropriated its loss; that the benefits were not conferred by petitioner either as a gratuity or by any voluntary act but were taken	11
Respondent's statement of facts ignores the trial court's findings	13
II. There is no merit to the technical arguments by which respondent would defeat petitioner's claim though wholly just	17
A. The reorganization proceedings did not bar petitioner's claim	17
The filing of the return using the loss was authorized by the bankruptcy court	21
There is no limitation in the assumption agreement	21
Respondent's fiduciary relation to petitioner prevents a destruction of the claim	22
B. Statute of Limitations, Estoppel, Laches.	23
III. The amount of the tax savings	24
Conclusion	25

The failure to distinguish between a case where a plaintiff voluntarily confers benefits and one where the defendant appropriates them is revealed by the argument that a recovery for unjust enrichment may not exceed plaintiff's loss (Br. 75). Respondent invokes the analogy of the discharge of a debt by a surety, who has become such of his own volition, or other purely voluntary discharge by one of another's debt.[10]

The Restatement of Restitution affirms (Section 153, p. 607) that where A by conduct improper toward B has discharged his debt to a third party by the use of B's property or services, B is entitled to restitution, at his election, either of the value of the property or services so used or of the amount of the debt discharged. The rule is the same where A's conduct as respects B is at fault, although not tortious. Restatement, Section 155.

As we have shown (O.B. 77, 104, et seq.), the controlling principle is that "one is entitled to recover for benefit conferred unless he intended to make a gift or acted officiously."

Respondent denies that there was an appropriation of petitioner's rights and asserts that what was done was "routine" (e.g., Br. 14). It could not be routine in view

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party quitclaims to another whatever interest he might have in a parcel of land and a third party, the owner, sues for the consideration. He then sought to recover the payments received by the main contractor from the owner. In *Vanderbilt University* v. *Williams*, 280 S. W. 689, 152 Tenn. 264, neither plaintiff nor defendant had a right to receive rent from a third party, but the third party paid rent to the defendant and plaintiff sought a share.

[10] If the debt is discharged by money payment of less than the face amount, the person discharging it recovers what he paid, and if the debt is discharged with property instead of money he is entitled to its value. These illustrations cast no light on how to determine the value of what is paid. If what is paid is cash, its value is simple to ascertain. If it is not cash, another question arises. Petitioner's loss had a value equal to the benefit conferred, the full amount of the tax savings.

INDEX OF AUTHORITIES

Table of Cases

	Page
Anderson v. *Calaveras Cent. Min. Co.*, 13 C. A. 2d 338, 57 P. 2d 560	23
Austin v. *Harry E. Jones*, 30 C. A. 2d 362, 86 P. 2d 379	24
Benton v. *Callaway*, 165 F. 2d 877 (5 Cir.)	10
Callaway v. *Benton*, 336 U. S. 132	9, 10
Central Trust Co. of New York v. *Ohio Central R. Co.*, 23 Fed. 306	20
Chicago Deposit Vault Company v. *McNulta*, 153 U. S. 554	19
Comstock v. *Group of Institutional Investors*, 335 U. S. 211	25
Duke Power Co. v. *Commissioner*, 44 Fed. 2d 543, Cer. den. 282 U. S. 903	6, 10
Duryee v. *Erie R. Co.*, 175 F. 2d 58	19
Estate of John B. Lewis, 10 T. C. 1080	10
George A. Fuller Co. v. *Commissioner*, 92 F. 2d 72 (2 Cir.)	6
Greek Catholic Congregation v. *Plummer*, 32 A. 2d 299, 347 Pa. 351	11
Gutensohn v. *Kansas City Southern Railway Co.*, 140 F. 2d 950 (8 Cir.)	19
Haines v. *Buckeye Wheel Co.*, 224 Fed. 289 (6 Cir.)	20
Houck v. *Hubbard Milling Co.*, 167 N. W. 1038, 140 Minn. 186	11
In re Erie Lumber Co., 150 Fed. 817	20
In re Hunter, 151 Fed. 904	20
In re Portland Electric Power Co., 97 F. Supp. 857-921	9
Maguire v. *Hibernia Savings & Loan Society*, 23 Cal. 2d 719, 146 P. 2d 673	19, 23
McArthur v. *Blaisdell*, 159 Cal. 604, 115 Pac. 52	24
Moss v. *Moss*, 20 Cal. 2d 640, 128 Pa. 2d 526	24
Mosser v. *Darrow*, 341 U.S. 267	13, 20
Sherman v. *S. K. D. Oil Company*, 185 Cal. 534, 197 Pac. 799	23
Sherwood & Sherwood v. *Gill & Lutz*, 36 Cal. App. 707, 173 Pac. 171	23

of the basic fact of the severance of the economic unity, the paradoxical nature of what was sought, the fact that it was a newly enacted statute that made it possible and that the right or property taken had a use value of $17 million and was the sole asset of petitioner. "Routine" did not justify respondent's failure to discuss the matter openly with independent representatives of petitioner or advise it of its rights.

It may be that respondent and its officers and attorneys were conscious of no wrong-doing, because they believed, as its brief insists, that petitioner had no rights and was under a duty to join in the returns and to give the use of the loss to respondent gratis. But it was not for respondent to decide these rights or duties unilaterally. It argues that equity does not countenance hard bargains, but taking advantage of its relationship to petitioner and its control of petitioner's president respondent gave petitioner no opportunity to "bargain" at all. It simply elected unilaterally to take everything for itself.

However convinced respondent may have been that it was acting within its rights, it acted at its peril when it made its unilateral decision in its own favor. It was in error as to its rights, and it therefore must account for the full benefit obtained. Cf. *Mosser* v. *Darrow*, 341 U. S. 267.

Respondent's Statement of Facts Ignores the Trial Court's Findings

On the manner in which the tax returns were handled, respondent's statement of facts ignores the findings in major respects. For example, it is asserted that the effective decisions to file consolidated returns, using petitioner's loss, were made by petitioner "when it filed the returns" (Br. pp. 17, 22).

Page

Straube v. *Bowling Green Gas Co.*, 227 S.W. 2d 666, 360 Mo. 132 11
Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134 20
Trinity Building Corporation of New York, 40 B.T.A. 1315 6
Vanderbilt University v. *Williams*, 280 S.W. 689, 152 Tenn. 264 12
Wheeling Valley Coal Corporation v. *Brady*, 158 F. 2d 155 (4 Cir.) 23
Whiting v. *Hudson Trust Co.*, 138 N.E. 33, 234 N.Y. 394 20

Statutes and Regulations

California Code of Civil Procedure:
Section 337(1) 23
Section 343 23
Internal Revenue Code, Section 52 21
Public Utility Holding Company Act of 1935 4
Securities and Exchange Commission Rule U-45 4

Texts

1 Clark on Receivers (2d ed.), p. 527 20
Glenn on Liquidation, section 165, p. 429
65 Harvard Law Review 1257 6
1 Pomeroy, Equity Jurisprudence (5th ed.):
Section 186(a), pp. 267-8 24
Restatement of Restitution:
Section 153, p. 607 12
Section 155 12
Restatement of Trusts:
Section 269 20
2 Scott on Trusts, sections 269 to 269.3 20

But tax counsel, Mr. Polk, testified that "The decisions to file the returns were, of course, made by the company [respondent]" (R. 1450).[11] And, as we have shown (O.B. 28-30) the trial court found that respondent's tax attorneys conceived the idea, decided that they would file the returns, caused them to be filed, and made the settlement with the government (R. 261, 262, 265, 266). The court stated that "there is no question" but that the matter was "conducted by the defendant and its tax counsel, not by the plaintiff" (R. 468), and that "there is a preponderance of evidence in favor of plaintiff's contention" (R. 264, 272) that:

> defendant through its officers and attorneys had controlled * * * plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant"[12]

Respondent's discussion treats petitioner's president, Mr. Curry, as if he were petitioner, or as if his capacity were only that of an officer of petitioner, when in fact he received no compensation at all from it, was in respondent's employ, in its pay, and his principal work was for it.[13]

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[11] So also:

"Q. Who made the decision?

"A. Mr. Elsey, Mr. De Graff [respondent's president and auditor]" (R. 1448).

[12] The court was following the language of the Supplemental Complaint. Respondent asserts (Br. 116) that petitioner "has no standing to exploit the domination theory in view of its express denials of all the interveners' allegations of domination and control." This is without any justification. Subsequent to its answer to the intervener's complaint, petitioner filed a supplemental bill of complaint (R. 208) in which it alleged such domination and control for respondent's benefit and in entire disregard of petitioner's rights. This position was maintained throughout the trial and afterwards. The trial court quoted this allegation and said that it was sustained by a preponderance of the evidence. In the light of this record, respondent's assertion is not only without merit; it is inexplicable.

[13] He was its vice president, assistant secretary and assistant treasurer until April 30, 1945 (P. Ex. 2-A, chart), was in the retainer of its tax counsel until late in 1948, and at all times received a pension from it

The notion is sought to be conveyed that Mr. Curry managed and controlled tax matters for petitioner, when in fact he acted in a clerical capacity, as office manager, and as a "signing" officer who "signed whatever documents they told you to sign" (R. 642). The admitted competence with which he performed these limited functions did not make him into a directing figure, for in all other respects he was a "figurehead" (R. 646-7). During all the years of his connection with tax matters, they were put before him for signing after they were prepared by others over whom he had "supervision" only in the sense that he was office manager, and he had no real understanding of them (R. 807-9).

The truth is disclosed by memoranda passing between Mr. Coulson and Mr. Polk, respondent's tax attorneys. Mr. Coulson wrote:

> "Actually, I happen to know that the only person over at the Corporation office here in New York who has any knowledge of taxes is a girl who is primarily Schumacher's secretary" (R. 539).

Polk replied that "only the lady referred to had any part in the preparation of the return * * * Mr. Curry says they are too impoverished to hire accounting help." (R. 540; and see R. 823, 1403).

Nor is the competence of other officers or directors, much discussed by respondent, relevant. Mr. Schumacher was

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(O.B. 15, 22). Respondent would have it appear that its tax counsel retained Curry as an act of philanthropy to a retired man. Were it so, still the fact that the retainer had its roots in benevolence would not justify taking advantage of the relationship so as to use Curry as a tool to forward respondent's interests at petitioner's expense. Actually Curry was so retained, as respondent's counsel wrote, because "it seems to us essential that we have Mr. Curry available" for tax purposes, to be at tax counsel's "disposal in connection with the consolidated returns", and as soon as the statute of limitations had run against the government's reopening the tax settlement, Curry was given orders to vacate (O.B. 22, 23).

one of respondent's trustees. Mr. Nicodemus and Mr. Campbell, while holding the title of General Counsel for petitioner were at the same time attorneys for respondent and the trustees and received compensation from them but no compensation from petitioner (P. Ex. 2-A, chart). Judge Sloss had been petitioner's attorney on a specific assignment, to oppose the plan of reorganization. He had no other function, was interested in nothing else, knew nothing about the tax matter (R. 1603-5, 1611-14). Messrs. Wood and Osborn never knew until 1946 that petitioner's stock loss was being used in consolidated returns or were aware that it could be so used (O.B. 14). Mr. Nicodemus testified that he had no knowledge of the use of the loss (O.B. 142), but whatever his knowledge may have been it cannot affect petitioner's rights. He was only an attorney for it, and he was also an attorney for respondent. Even if petitioner's officers and directors had known of the use of its loss, had realized the legal and economic consequences, and with that knowledge had attempted to give away its rights, they could not bind it, because it was not represented by independent officers, and because any attempt to give away its rights without the consent of its stockholders would be beyond their powers.

For the same reason respondent's discussion of a casual conversation of Mr. Nicodemus with some attorneys who represented no parties in this case is pointless (Br. 27). The trial court dismissed the subject as irrelevant (R. 1075).[14] In fact, in that conversation Mr. Nicodemus did not have in mind the use of the stock loss (R. 1071).

[14] It said (R. 1075-6):

"I do not see that when this witness learned about any of these things has any relationship to the question that you are presenting here. * * * I would much rather hear your arguments and all the arguments on the important and vital issues of this case than all this stuff about what conversations this witness had with some lawyer on a train going to Washington."

II

THERE IS NO MERIT TO THE TECHNICAL ARGUMENTS BY WHICH RESPONDENT WOULD DEFEAT PETITIONER'S CLAIM THOUGH WHOLLY JUST.

A. The Reorganization Proceedings Did Not Bar Petitioner's Claim.

Respondent asserts that "in the course of [the reorganization] proceedings the court effectually adjudicated that petitioner's claim was invalid and barred its assertion against the reorganized company" (Br. 93) and that it was "disallowed" (Br. 100). These unfortunate statements must have been made inadvertently. There was no adjudication and no disallowance. The claim was not even involved in those proceedings and was never brought to the court's attention.

The tax savings arose from acts occurring in their entirety after the plan of reorganiaztion was approved, consented to, confirmed and consummated. As Judge Fee said below (R. 2251):

> "Since the tax settlement between the Government and the corporation occurred after the decree in reorganization, there could be no res judicata."

Respondent also asserts that the trial court not only held that petitioner's claim was without merit but also that it "was in any event foreclosed by the failure to present it to the bankruptcy court" (Br. 19, 21). This is not so. One of the two reasons why the trial court held against petitioner's claim was its conclusion that it was a "circuitous way of obtaining something in the nature of equity or value for its ownership, rejected in the reorganization plan" (R. 272), a line of reasoning we have shown to be fallacious (O.B. 49-56). But the trial court did not

hold that the claim was barred for failure to present it. That argument, strenuously urged by respondent in both courts below, was adopted by neither.

We have shown (O.B. 131-133) that the contention is not valid for two separate reasons:

1. The claim arose after the revesting of the properties in respondent.

2. Respondent expressly assumed "all liabilities and obligations * * * arising out of the possession, use, or operation of the debtor's properties by said trustees, or their conduct of the debtor's business * * *" (R. 1711, 1713), and the court exempted from its bar order claims so assumed. This was pursuant to the principle that the purpose of reorganization proceedings is to discharge or readjust debts existing at their commencement, and that claims arising from acts of the court's officers are to be protected when proceedings are closed, consistently with discharge of personal liability of the court's officers.

Since the tax returns for 1944 and the claim for refund of 1942 taxes were prepared and filed after the revesting, respondent's arguments have no possible pertinence to them and are probably addressed to the saving of 1943 taxes.

To circumvent the fact that the claim arose after the revesting, respondent argues that "contingent" claims may be presented (Br. 102), and that the reorganization court must "consider and act upon all possible claims which might be asserted against the reorganized company" (Br. 90). But the kind of "contingent" claims that may be presented are such as arise out of contracts of the debtor in existence, or out of its acts occurring, at or before the time the bankruptcy commenced, certainly not claims which arise by reason of an enrichment of the party to whom the assets have been returned, occurring after the bankruptcy,

merely because the enrichment may in some way have its roots in acts of the trustees. What petitioner had, prior to the tax settlement of 1947, was not a contingent claim but merely a right to seek declaratory relief with respect to what would be the rights of the parties in the event that tax savings should arise in the future. *Maguire* v. *Hibernia Savings & Loan Society*, 23 Cal. 2d 719 at 734, 146 Pac. 2d 673. [15]

To escape the consequences of its express assumption of the trustees' liabilities and obligations, respondent argues that the trustees could not incur a liability except by express prior authorization of the Bankruptcy Court. But respondent's citations refer, at best, only to the enforcement of express contracts. [16] Whoever voluntarily chooses to enter into a contract with court officers may be bound to ascertain the scope of their authority, on the principle pertaining generally to agents. That principle does not apply to noncontractual obligations. Where a receiver is authorized to operate a railroad, the receivership

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[15] A suit for declaratory relief against a trustee may be maintained outside the Bankruptcy Court. *Gutensohn* v. *Kansas City Southern Railway Co.*, 140 F. 2d 950 (8 Cir.). *A fortiori*, if a cause of action for coercive relief subsequently arises, a party is not barred from presenting it to a federal court in equity merely because he had not presented a request for declaratory relief to the Bankruptcy Court at a time when he yet had no claim for coercive relief.

Respondent asserts (Br. 90) that reorganization must end all claims, but the cases cited relate to claims existing prior to the reorganization proceedings (e.g. *Dunyee* v. *Erie R. Co.*, 175 F. 2d 58), or where express notice was given to present claims arising from the trustees' acts and there was no provision for assumption.

[16] The principal one, *Chicago Deposit Vault Co.* v. *McNulta*, 153 U. S. 554, does not even go that far. The question was as to the binding effect of an unauthorized long term lease for the portion of the term extending beyond the receivership. The Court commented (p. 563) that the lessor had been fully paid under the lease for the time "that its premises were occupied for the benefit of the trust" and recognized the right in equity of a party supplying something of value to the receiver to be compensated although there had been neither previous approval nor subsequent ratification.

does not escape liability for personal injuries resulting from negligence because the court did not authorize the receiver to commit the tort. It is equally unfounded to argue that a receiver may unilaterally take another's money, property, rights or other thing of value to the enrichment of the estate and yet not subject the enriched estate to liability unless the court had authorized the receiver to incur the liability.

Court officers are held peculiarly bound by obligations arising on principles of unjust enrichment, *Mosser* v. *Darrow*, 341 U. S. 267. No prior approval or authorization by the court to incur the liability is necessary: *In Re Hunter*, 151 Fed. 904; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134.

If a trust estate is enriched by the unauthorized acts of the trustee, the estate must account (*Restatement of Trusts*, Sec. 262; 2 *Scott on Trusts*, Sec. 269 to 269.3). If a trustee, not empowered to borrow money for the trust, nevertheless does so to pay taxes on trust property and so applies the funds, the estate is liable in equity to the lender (*Restatement*, Sec. 269, Comment a, Illustration 1). A leading case is Judge Cardozo's decision in *Whiting* v. *Hudson Trust Co.*, 138 N. E. 33, 234 N. Y. 394. Also *Central Trust Co. of New York* v. *Ohio Central R. Co.*, 23 Fed. 306.

While an unauthorized express contract may not bind the receivership, it will create a personal liability of the receiver, which courts strictly enforce. *Haines* v. *Buckeye Wheel Co.*, 224 Fed. 289, 297 (6 Cir.); *In re Erie Lumber Co.*, 150 Fed. 817; 1 *Clark on Receivers*, (2d ed), p. 527. Hence it is of no moment whether the liability was that of the trust or of the trustee personally, because by the Assumption Agreement respondent assumed all liabilities and obligations of the trustees in order that they might personally be exonerated.

The Filing of the Return Using the Loss Was Authorized by the Bankruptcy Court

But in fact the trustees were authorized to do the acts from which the obligation to the petitioner arose. The authority to manage and conduct the business of the railroad (R. 1098) carried with it authority under *Internal Revenue Code*, Sec. 52, to file income tax returns in respondent's name. Before filing the 1943 return the trustees petitioned the court for authority to create the reserve fund (R. 1772), and on the hearing trustees' counsel explained their intention to file consolidated returns and to use petitioner's stock loss therein (R. 2023). The court then granted the petition (R. 616). Respondent argues that the "court considered the potential tax reduction was for the trustee's advantage" (Br. 104). This is gratuitous but also irrelevant. Being authorized to do what they did, the trustees were authorized to incur the legal and equitable consequences, whatever they were, and the resulting liability was assumed by respondent when it executed the assumption agreement.

There is no limitation in the Assumption Agreement

Respondent further attempts to escape the express provisions of the Assumption Agreement by arguing that it did not thereby assume *all* obligations of the trustees but only some, that it did not assume "costs and expenses of administration", and that liability to the petitioner is such an expense. But the Assumption Agreement specifically provided that respondent assumed

> "generally any and *all* liabilities and obligations with respect to claims of any character *whether heretofore or hereafter asserted* arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business * * * ." (R. 1711, 1713).

Not only is this language comprehensive, it was so construed by the court by later order which found that respondent did assume "all" obligations of the trustees (R. 1988, quoted O. B. 136).

It would be difficult to draw an agreement which would more clearly include claims of the kind here advanced. No question appears to have been raised by respondent as to scope, when Messrs. Coulson and Polk on November 15, 1948 rendered their bill and were paid $300,000 "covering professional services in the tax disputes as to the taxable period January 1, 1942 through April 30, 1944", services which commenced in March 1943 during the reorganization. (R. 1749).

Respondent urges that petitioner's claim, based on tax savings, is to be treated like the taxes (Br. 9). Yet both the Plan and the revesting order dealt with taxes in different paragraphs than they did expenses of administration. They provided for assumption of liability for taxes "whether or not proof thereof was made in said proceeding and without prejudice by reason of such proof not having been made" (233 I.C.C. at 455 and par. 9, Revesting Order, R. 49).

Respondent's Fiduciary Relation to Petitioner Prevents a Destruction of the Claim

Petitioner's tax affairs were managed by agents of the respondents and the trustees. Not until mid-1946 did any of petitioner's officers or directors know of the use of its stock for its except Mr. Schumacher, a trustee himself, and such as were acting for the trustees. Coulson and Polk, who nominally acted as petitioner's counsel and held its power of attorney were employed and directed by the trustees and respondent and received their entire compensation from it. If claims had to be presented to protect petitioner's rights, it was their duty and that of the trustees

and respondent to present them. Respondent became petitioner's fiduciary and may not take advantage of its own delinquency to retain what does not equitably belong to it.

There is no "sacro-sanctity to bar orders", *Wheeling Valley Coal Co.* v. *Brady*, 159 F. 2d 155 at 159 (4 Cir.), and "even where an order of this sort is made, it does not follow that its binding effect is greater than needs dictate" (ibid, 157, quoting *Glenn on Liquidation*, p. 429).

B. Statute of Limitations, Estoppel, Laches

Not only are the contentions that the petitioner's claim is barred by the Statute of Limitations, laches and estoppel not supportable in law, but respondent, because of its fiduciary relation, is also precluded from raising them as defences.

The defence of the Statute of Limitations is addressed only to the 1943 tax savings (Br. 107). The cause of action arose, not when the returns were filed, but when, by the settlement with the Treasury in 1947, the tax savings were effected (O.B. 132). This suit had already been filed in October 1946, and at that time was for declaratory relief preceding the accrual of the cause of action. *Maguire* v. *Hibernia Savings and Loan Association*, 23 Cal. 2d 719, 734, 146 Pac. 2d 673. Even if, as respondent contends, the claim arose while the trustees were in possession, respondent assumed it by the written Assumption Agreement, and the applicable statute is *Cal. Code of Civil Procedure, Section* 337(1), prescribing 4 years. *Sherwood & Sherwood* v. *Gill & Lutz*, 36 Cal. App. 707, 173 Pac. 171; *Anderson* v. *Calaveras Cent. Min. Co.*, 13 C.A. 2d 338, 342, 57 P. 2d 560.[17]

[17] Even apart from the written assumption, the period would be 4 years under C.C.P., Sec. 343, generally applied to suits in equity (*Sherman* v. *S.K.D. Oil Co.*, 185 Cal. 534, 545, 197 Pac. 799), particularly fo

Respondent asserted no laches below. There can be no laches, for petitioner sued (1) within four months of its Board of Directors' learning of the use of its loss, and (2) before the tax settlement. Thus respondent could not possibly have been misled to its prejudice, and no one had relied on the Plan of Reorganization as giving the tax benefits to respondent (O.B. 49-56).

The claim of estoppel is based on the irrelevant past practice of filing consolidated returns. The cases cited (Br. 108) are cases where a party sought to place a new interpretation on a contract. There was no contract here between petitioner and respondent (See discussion at O.B. 124).

III

THE AMOUNT OF THE TAX SAVINGS

Arguing at length about the amount of the tax savings, respondent asserts that the courts below never decided the amount (Br. 109-115).

But they did. Respondent presented a quantity of evidence on this phase of the case, and the question was extensively briefed. Thereafter, in its opinion the trial court stated:

> "Operations of the debtor * * * were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some $17,000,000 in income taxes" (R. 262) and the "net savings" or 'escape' [was] $17,201,739" (R. 267).

The opinion concluded that it might serve as the findings but gave permission to counsel to propose findings (R. 276).

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an accounting (*Moss* v. *Moss*, 20 Cal. 2d 640, 644, 128 P. 2d 526; *McArthur* v. *Blaisdell*, 159 Cal. 604, 115 Pac. 52; *Austin* v. *Harry E. Jones*, 30 C.A. 2d 362, 368, 86 P. 2d 379), which lies to settle the rights and liabilities between all persons standing in fiduciary relations to each other (1 *Pomeroy, Equity Jurisprudence* (5th ed.) Sec. 186-(a), pp. 267-8).

Respondent took no exception to the above statements. The court then adopted its opinion as its findings (R. 319).

In its brief in the Court of Appeals, respondent asserted that the savings were less than $17 million, but that court in its opinion declared:

> "Except for the offset of the capital stock loss of the Corporation [petitioner] the taxes would have been some $17,000,000." (R. 2217-8).

Under the "two court rule" the finding concludes the issue. *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 213, 214.

CONCLUSION

We respectfully submit that the judgment should be reversed, with direction to remand to the District Court for entry of judgment for petitioner.

Dated: December 13, 1952

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OCTOBER TERM 1952

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THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. duP. BAYARD, Receiver,
Petitioners,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,
Respondents.

No. 150

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,
Petitioners,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, et al.,
Respondents.

No. 160

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
The Holding of the District Court	10
The Decision of the Court of Appeals	11
Argument	12
I. Petitioners have failed to present a case calling for the exercise of the power of supervision of the Supreme Court of the United States	12
A. There is no conflict between the decision below and decisions in other circuits	12
B. The decision of the Court of Appeals and the decision of the District Court rest upon identical grounds. The trial court made adequate findings. Petitioners made no complaint respecting findings upon their appeal and the Court of Appeals made no findings of its own	14
C. The court below has not decided a question of federal law	15
D. The Corporation's claim is contrary to the policies and objectives of Section 77 of the Bankruptcy Act and would frustrate the Western Pacific reorganization	18
II. There is no equity in the Corporation's claim to the "tax savings" of the reorganization trustees	20
A. The Corporation has suffered no wrong and sustained no damage, and has no unjust enrichment claim	20
B. The Corporation has no claim arising from fiduciary obligations	21

Page

C. It was the duty of the Corporation to join in filing consolidated returns and it could not bargain as a condition to such joinder 22

D. Petitioners do not escape the application of the accepted rule against "tax saving" payments in consolidated return allocations by claiming that their case is exceptional 24

E. The Corporation has no right qua parent to "tax savings" realized by the reorganization trustees, nor has it any right to such tax savings by reason of the loss of its "economic interest" in its former subsidiary through consummation of the reorganization plan 26

F. The Corporation has no claim on account of duality or domination 28

III. In disposing of the petitions for rehearing the court has not departed from the accepted and usual course of judicial proceedings 31

Conclusion 33

Appendix I. Opinion of the Court of Appeals, and dissenting opinion, rendered July 9, 1952 ..... App. 1

Appendix II. Value of the stock received by secured creditors of the debtor under the reorganization plan ..... App. 19

AUTHORITIES CITED

Cases

	Page
Case v. Los Angeles Lumber Co., 308 U.S. 106	23
Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580	21
Commercial National Bank in Shreveport v. Connolly, 176 F.2d 1004	13
Connecticut Ry. Co. v. Palmer, 305 U.S. 493	21
Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510	16, 22, 24
Ecker v. Western Pacific R. Corp., 318 U.S. 448	4
George A. Fuller Co. v. Commissioner, 92 F.2d 72	12, 13
Helvering v. Cement Investors, 316 U.S. 527	27
In re Western Pacific R. Co., 34 F. Supp. 498	4
J. D. and A. B. Spreckels Co. v. Commissioner, 41 B.T.A. 370	21
Meriwether v. Garrett, 102 U.S. 472	16
Pfister v. Finance Corp., 317 U.S. 144	33
Phillips-Jones Corp. v. Parmley, 302 U.S. 233	16
Securities Comm'n v. U. S. Realty Co., 310 U.S. 434	16
Trinity Buildings Corporation of New York v. Commissioner, 40 B.T.A. 1315	13
United States v. Butler, 297 U.S. 1	16
Wayne Gas Co. v. Owens-Illinois Co., 300 U.S. 131	33

Statutes and Regulations

Bankruptcy Act:	
Section 7b	16
Section 77(l)	16, 19, 27, 28
Section 708(e)(1)	28
Internal Revenue Code:	
Sec. 23(g)(4)	3
Sec. 141	3

Page

Judicial Code:
Sec. 46 3
Sec. 46(c) 32

Securities and Exchange Commission:
Release No. 53, Accounting Series "In the Matter of 'Charges in Lieu of Taxes'," November 16, 1945, 61 P.U.R. (N.S.) 193-225 25
Rule U-45(b)(6) 24

Treasury Rulings:
I.T. 3637 (1944 Cum. Bull. 258) 24
I.T. 3692 (1944 Cum. Bull. 261) 24
I.T. 4085 (June, 1952) 24, 25

MISCELLANEOUS

3 Collier on Bankruptcy (14th Ed.) Par. 62.30, p. 1573 24

C.C.H. Standard Federal Tax Reports, par. 6219 24

Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1725, p. 255 18

Hearings before the Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1725, pp. 83, 122, 255, 557 18

Hearings before the Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. on H.R. 5423, pp. 153, 849, 992, 1061, 1522 18

House Ways and Means Committee Report No. 704, 73d Cong., 2d Sess., p. 16 17

Memorandum of the Finance Committee of the Senate on the 1918 Act, p. 9 17

Reports of the Committee on Accounts of the National Association of Railroad and Utilities Commissioners for 1943, pp. 255-6; for 1945, pp. 458-60 24

Senate Report No. 665, 72d Cong., 1st Sess., p. 9 17

Senate Report No. 960, 70th Cong., 1st Sess., pp. 1, 13, 29 17

Summary Report of the F. T. C. to the Senate pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., Part 72-A, Sen. Doc. No. 92, 70th Cong., 1st Sess., p. 478 ..... 17, 24, 25

The Western Pacific Railroad Company reorganization, 230 I.C.C. 61 3

The Western Pacific Railroad Company reorganization, 233 I.C.C. 409, 451, 452 ..... 3, 4

In the Supreme Court of the United States

OCTOBER TERM 1952

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver, *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 150
MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 160

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Respondents in Opposition

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of California, Southern Division (R. 258), is reported at 85 F. Supp. 868. The opinions in the United States Court of Appeals for the Ninth Circuit (R. 2214, 2239) have not yet been reported. On July 9, 1952 the Court of Appeals rendered an opinion in banc in this case, one Judge dissenting, respecting its practice on rehearings in banc. The opinion and dissent are printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered October 29, 1951 (R. 2255). The order of that Court denying the petitions for rehearing and striking them, in so far as they sought rehearing in banc, was entered January 30, 1952 (R. 2259). The petitions for a writ of certiorari were filed on June 23 and June 26, 1952, the time having been extended by order of Mr. Justice Douglas. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does a holding company, whose stock interest in an operating railroad company has been lost by judicial decree confirming a plan for reorganizing the railroad company, have a right in equity to be paid, at the expense of unpaid secured creditors of such subsidiary, for the reduction of the taxes of the reorganization trustees of the railroad company resulting from the entry of the holding company's loss as a deduction in consolidated federal income tax returns, in repudiation of the holding company's own practice in tax dealings with its former subsidiary, and notwithstanding that the holding company suffered no loss or damage through the entry of its loss in the tax returns?

2. Has such claim of the holding company been lost through failure to present it to the bankruptcy court in the course of the reorganization proceeding?

3. Has a Court of Appeals acted within its powers by denying a petition for rehearing and ordering that the petition, in so far as it sought rehearing in banc, be stricken as "being without authority in law or in the rules or practices of this court"?

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STATUTES INVOLVED

1. The consolidated returns were filed under Section 141 of the Internal Revenue Code. The stock loss deduction is authorized in Section 23(g)(4) of the Code, enacted in October, 1942.

2. Section 46 of the Judicial Code contains provision for hearings and rehearings in banc in the Courts of Appeal.

STATEMENT

The petitioner, The Western Pacific Railroad Corporation, hereinafter referred to as the "Corporation," owned from 1916 until April 30, 1944, all of the stock of the *pre-reorganization* The Western Pacific Railroad Company, predecessor of the respondent herein, the *reorganized* The Western Pacific Railroad Company. In 1935 the Corporation directed its railroad subsidiary to file a debtor's petition for reorganization (230 I.C.C. 61). The railroad properties were transferred by the bankruptcy court to reorganization trustees who held title to the properties and operated them from 1935 to December 31, 1944, a period exceeding nine years.

The Interstate Commerce Commission announced its plan of reorganization in 1939 (230 I.C.C. 61, 233 I.C.C. 409). The plan limited the first mortgage bonds of the reorganized company to $10,000,000 to be exchanged for trustees' certificates (Par. O, 233 I.C.C. 451) and it required the old first mortgage bondholders to exchange their securities for income bonds, preferred and common stock. Junior secured interests were not paid in full by at least $3,495,900, plus interest (R. 1222, 2021) and the new securities given to the old bondholders and to other secured creditors were in-

ferior in grade and have not had the values assigned to them by the plan (Appendix, p. 19). The plan declared that the stock interest in and unsecured claims against the debtor were totally valueless and not entitled to participate in the plan (Par. P. (5), 233 I.C.C. 452). On March 15, 1943, the Commission plan was approved by this Court in *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, affirming *In re Western Pacific R. Co.*, 34 F. Supp. 493. In October, 1943, the plan was confirmed by the District Court (R. 496, 1674), on December 31, 1944 the railroad properties were turned over to the reorganized company, the respondent here (R. 499, 1711; R. 36-108), and the reorganization proceeding was closed by a final order dated March 28, 1946 (R. 1219, 2013).

In each year beginning with 1918 the Corporation prepared, signed and filed in New York consolidated tax returns for itself and all group members (R. 1258-9; R. 843-44). In each year the tax owing under the returns was allocated among the group members according to the formula universally accepted, that is: the consolidated return tax was distributed pro rata to those members of the group having taxable incomes in direct proportion to their several taxable incomes, without allocating any tax to a "loss company" or paying such company for the tax "saved" by another member through the entry of the loss in the returns.[1] During the years 1924 to 1935 the Corporation

[1]On the record now in this Court the proof is clear (R. 1262). Petitioner interveners challenge the corresponding statement of the Court of Appeals (their petition, pp. 21-22) and base their challenge on a Price Waterhouse report which respondent introduced in evidence as part of the proof of the facts as we have just stated them (R. 1504, 1510-1516, 1517). We believe the report

benefited in this way by tax reductions exceeding $500,000 (R. 1552, 2040).

This practice was continued during the reorganization. No taxable income was reported from 1935 through 1941 and no tax was paid (R. 1552, 2040). In 1942 and subsequent years the trustees had substantial income which could be offset by loss carry-overs and carry-backs, but only through the filing of consolidated returns (R. 591, 921, 1759). The consolidated returns for 1942 reported a tax of $4,201,821.54 (R. 172). With insignificant exceptions the tax resulted from the trustees' earnings and was paid by the trustees from the funds of the bankruptcy estate (R. 169, 824, 826, 1306-7).

The order confirming the plan of reorganization (R. 496, 1674) became final in November, 1943. The Corporation's stock loss was realized, for tax purposes, when the order became final (R. 606, 1409-10) and the loss was reported in the consolidated returns for 1943. Since the loss greatly exceeded the trustees' income the returns reported a large net operating loss and no tax was paid (R. 172). In recognition of the uncertainties in the 1943 tax situation, and upon the authority of an order of the reorganization court, the trustees set aside out of their 1943 income a reserve fund of $7,100,000 to meet contingent tax liability of the trustees to the United States (R. 619, 1772; R. 1270-74; R. 1272, 2023; R. 1087, 1895).

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supports our statement and refutes what the petitioners say. The report is a trial exhibit. Pursuant to an order of the Court of Appeals it was not printed in the record on appeal, and petitioners have not yet sent it up to this Court. It seems improper for petitioners to challenge a statement by the Court of Appeals on the basis of a trial exhibit which is not presently in the record in this Court.

In March, 1945 the Corporation, as agent for the affiliated group (Regs. 104, Sec. 23.12) filed a claim for refund of the taxes paid for 1942, based on a carry-back of a part of the unused balance of the Corporation's net loss for 1943 (R. 492, 1654). This was a claim for taxes which had been paid by the trustees.

The affiliation ended when on April 30, 1944, the Corporation surrendered its stock in the debtor company, i.e., the *pre-reorganization* The Western Pacific Railroad Company, and this stock was later cancelled as required by the reorganization plan (R. 260, 493). In the returns for 1944, filed in June, 1945 (R. 491), a further part of the unused balance of the net operating loss for 1943 was carried forward to the first four months of 1944 (R. 172). No tax upon trustee income for that period was reported or paid (R. 172). In order to meet contingent tax liability to the United States for this period the reorganized railroad company set up a reserve fund in the amount of $3,000,000. Thus the reserve fund set up to meet the contingent tax liability of the trustees aggregated $10,100,000.

In August, 1947 the taxes for these years were settled with the Treasury on the basis of denial of the refund claim and acceptance of the returns as filed (R. 168-173). This meant in substance that the tax liability of the trustees for the tax years in question was settled at $4,201,821.54, the amount paid by them for 1942. Although the settlement was effected in form by a total rejection of the refund claim, the $4,201,821.54 payment for 1942 was intended to be a settlement payment not for 1942 alone but for the entire period of two years and four months.

From first to last these tax transactions were handled in the ordinary course of business. The returns related to a

period of trusteeship during which affiliation continued—indeed, they were possible only because affiliation continued—and they were prepared, signed and filed and the allocation of intra-group liabilities was made in strict accordance with twenty years of prior practice.

The recital on page 5 of the Corporation's petition that the tax savings were "accomplished by respondent's taking over and managing petitioner's affairs for its own benefit" is far from correct. The fact is that the tax proceedings continued to be handled just as they had been handled in the past. The fact is, also, that the complaint of the petitioners is improperly addressed to the respondent. It was the reorganization court and its trustees who were concerned and who took action with regard to the entry of the deduction of the corporation's stock loss in consolidated returns. This was done during the trusteeship and before the plan was consummated, and respondent, the reorganized company, had no part in the action then taken. Respondent's participation consisted of taking its part in subsequent tax proceedings following reorganization in conformity with the conclusions reached by the court and its trustees.

The returns for 1942 and 1943 were prepared in the New York office, maintained jointly by the Corporation and its subsidiary, latterly the subsidiary's trustees, and by the same personnel who had prepared and filed prior returns (R. 1258-9; R. 843-44). There was no change in the established practice respecting preparation and filing, unless it be a change that, upon the recommendation of counsel for the Corporation, an experienced tax counsel was retained to advise the trustees regarding tax returns. Tax counsel recommended that the filing of consolidated returns

be continued, this being in the interest of the taxpayers. He advised entry of the Corporation's loss in the returns for 1943, as authorized by a 1942 amendment to the statute.

This advice was followed, but only after the matter had been presented by the reorganization trustees to the bankruptcy court. Tax counsel had advised that the Government might question the loss deduction, and for this reason the trustees presented the matter to the court and recommended that a reserve fund for contingent tax liability be created. On the hearing, if was explained to the court that through filing consolidated returns the Corporation's loss could be offset against trustee income and the court made its order for a reserve fund for contingent tax liability because of uncertainty as to whether the Government would litigate the matter (R. 1272-1273, 116).

Thus it appears that petitioners' complaint on the score that its tax affairs were taken over and managed is in fact addressed to the action of the court and its trustees.[2]

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[2]Petitioners use the term "respondent" as descriptive of three distinct entities: *first*, the pre-reorganization railroad company, which was the Corporation's subsidiary and the debtor in reorganization; *second*, the reorganization trustees who were the court's agents in operating the railroad; and *third*, the reorganized railroad company, which was the defendant below and is the respondent here. The indiscriminate use of the term "respondent" by petitioners can serve only to mislead and confuse. For example, at page 6 of the petition of the Corporation it is said that when petitioner was so impoverished that it could no longer pay its officers' salaries, "respondent took them over as its own 'full time employees' before the tax returns were filed." The fact is that this action was taken by the trustees in June, 1943, and that respondent had, and could have had, no part in it (R. 1230). Misuse of the word "respondent," frequently in designation of the trustees and at times in designation of the debtor company, occurs repeatedly throughout both petitions.

Respondent, the reorganized company, had nothing to do with these transactions. Respondent commenced its operations on January 1, 1945. Subsequently it did participate in the tax transactions, by way of setting up an additional reserve, and of consenting to the returns for the period January to April, 1944, which, while they related to the trustees' income and taxes, were filed in 1945. In these returns a part of the net operating loss reported in the returns for 1943 was carried forward in the manner provided by the revenue acts.

In all this there was no "taking over and managing petitioners' affairs," nor any departure from practice which the Corporation itself had inaugurated and followed.

Neither was any wrong done to the Corporation in the tax transactions. The Corporation's loss was of no use to it, and could be used only in the consolidated returns. The Corporation paid no taxes under the consolidated returns and would have paid none under separate returns.

Petitioners have no complaint about the tax returns. They agree that the returns were properly prepared, properly signed and properly filed, that the Corporation's loss was properly entered in the returns for 1943 and that the work of the tax counsel, whose duty was to obtain a favorable tax result for the group, discharged that duty in a completely satisfactory fashion (R. 1007, 1103, 1422).

The Corporation's claim was never presented to the bankruptcy court. This suit was filed on October 10, 1946, more than a year and nine months after the consummation of reorganization and more than six months after the reorganization proceedings had been closed by the entry of the final order of the bankruptcy court (R. 1219, 2013).

This is a claim upon trustee income. By its bill of complaint the Corporation "claims to be the beneficial owner" of the claim for refund of taxes paid by the reorganization trustees for the calendar year 1942 (R. 8), and also "claims to be the beneficial owner" of the reserves which had been set up out of trustee income in order to meet contingent tax liability of the trustees for the calendar year 1943 and the first four months of 1944 (R. 9).

THE HOLDING OF THE DISTRICT COURT

The District Court concluded that there was no equity in the Corporation's claim and ordered judgment for defendants. The court felt that there had been an "escape" from taxes which should have been paid to the United States, but was "compelled to rest decision upon the fundamental issue of the justice and equity of plaintiff's right, if any, to be paid for that which was escaped" (R. 272). The conclusion was reached that the Corporation had no such right."[3]

The District Court recognized the true nature of the Corporation's claim:

> "What plaintiff really seeks is not all or a share of the so-called tax saving. Rather it is a circuitous way of obtaining something in the nature of equity or value for its ownership, rejected in the reorganization plan. Or put differently, it is an effort to share in the earnings of the debtor during the reorganization period." (R. 272)

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[3]Petitioners inadvertently err in stating that the trial court's judgment was founded on the conclusion that there had been a tax escape. As to that, the trial court said: "That is not true. I think I also placed the decision on the ground that I couldn't see any reason why the plaintiff would be entitled to it anyhow" (R. 429).

The court also held:

> "Not only that, but the philosophy underlying Section 77 of the Bankruptcy Act stands as a barrier against the equitable validity of plaintiff's claim in this cause." (R. 273)

THE DECISION OF THE COURT OF APPEALS

By its decision herein the Court of Appeals affirmed the judgment below. The findings and conclusions of the District Court were sustained, it being said, "we agree with the principal holding of the trial court * * *" (R. 2227).

The Court of Appeals could find no equity in the Corporation's claim.

ARGUMENT

I.

PETITIONERS HAVE FAILED TO PRESENT A CASE CALLING FOR THE EXERCISE OF THE POWER OF SUPERVISION OF THE SUPREME COURT OF THE UNITED STATES.

The case tendered by the petitioners does not satisfy any of the criteria customarily recognized in the granting of a writ of certiorari. No question of federal law has been presented or decided in this litigation. The Corporation's bill of complaint expressly recites that "there is no statutory rule or regulation" which can be invoked; the claim advanced has been rested solely and explicitly upon the "established principles of equity" (Bill of complaint, R. 8). Its petition herein recites: "Fundamentally, petitioner is entitled to recover on the principles of unjust enrichment" (p. 10).

Neither has the court below announced "a new principle of law." In holding that there is no equity in the Corporation's claim upon the income of the reorganization trustees of its former rail subsidiary, by reason of consolidated tax returns which were properly filed and resulted in no loss or damage to the Corporation, the court has observed principles which are as old as equity.

This is a private controversy, it is of importance to these litigants only, and the issue turns upon general principles of equity.

A. There Is No Conflict Between the Decision Below and Decisions in Other Circuits.

Petitioners represent that the decision below is in conflict with the decisions in *George A. Fuller Co. v. Commis-*

sioner, 92 F.2d 72 (C.C.A. 2, 1937) and *Trinity Buildings Corporation of New York v. Commissioner*, 40 B.T.A. 1315 (1939). The asserted conflict does not exist.

In each of the cited cases the Commissioner of Internal Revenue declined to accept a consolidated return, and was sustained in his refusal, for the reason that the return failed to meet the statutory condition that "all the corporations which have been members of the affiliated group at any time during the taxable year" consent to and join in the filing. In short, the technical requirements of the statute as to joinder by all the affiliates had not been met.

These rulings present no conflict with the ruling in the instant case wherein there was no refusal on the part of any member of the Western Pacific group to join in the consolidated returns. According to its own pleading, the Corporation "consented" to the filing of the consolidated returns (R. 221). The court below, in expressing the view that it was the duty of the Corporation to join in the returns, thereby permitting the reorganization trustees to reduce their tax liability and without loss or damage to the Corporation, rested its conclusion on the special equities of this case, including the established practice of the Corporation and the obligations owing from a holding corporation to the unpaid creditors of its bankrupt subsidiary. This was a ruling upon the equities, it did not involve construction of any statutory provisions, and is not in conflict with the holding in the cited cases.

The decision of the Fifth Circuit in the *Shreveport Bank Cases*[1] is equally wide of the mark. Those cases decided a

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[1] *Commercial National Bank in Shreveport v. Connolly*, 176 F.2d 1004; same case sub nomine *Bank v. Parsons*, 145 F.2d 191, cert.

question of local law, namely that the agreement between the old bank and the new bank made the new bank a trustee for the old bank and accountable as such for the profits of its trust.

B. The Decision of the Court of Appeals and the Decision of the District Court Rest Upon Identical Grounds. The Trial Court Made Adequate Findings, Petitioners Made No Complaint Respecting Findings Upon Their Appeal, and the Court of Appeals Made No Findings of Its Own.

Both of the petitions for certiorari are in error in representing that the decision of the Court of Appeals has been made upon different grounds, or upon different legal theories, from those upon which the decision of the District Court was made. The District Court found against the equitable validity of plaintiff's claim. The Court of Appeals sustained, saying—"we agree with the principal holding of the trial court" (Opinion, footnote 12, R. 2227). The Court of Appeals disapproved only what it recognized as "dictum" in the trial court's opinion, pointing out that the trial court had itself recognized that its criticisms of the tax returns and the compromise tax settlement were nothing other than "dictum."

Neither has the Court of Appeals made any findings of its own, nor has it disapproved findings of the trial court. In point of fact there was no problem as to findings since, as the petitioning Corporation expressly stated in its opening brief on appeal (pp. 30-31), "while the facts are unusual they are not in dispute." Moreover, in their specifications

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den. 323 U.S. 796; trial court opinions, 28 F. Supp. 927, 44 F. Supp. 5, 64 F. Supp. 888, 72 F. Supp. 961. The Court of Appeals held that under Louisiana law the pledge made the new bank trustee. 176 F.2d 1008.

of error upon appeal (R. 2168, 2173) the petitioners failed to assign any error respecting findings or failure to make findings on the part of the trial court. No ground exists for returning the case to the trial court for additional or amended findings which were not sought upon appeal, nor would any purpose be served by requiring findings as to matters wholly irrelevant to the holdings below.

C. The Court Below Has Not Decided a Question of Federal Law.

1. The Corporation argues that the Court of Appeals stated a general rule that whenever consolidated returns may be filed with a resulting tax reduction to anyone, they must be filed (pet. 13-14). It is plain that the opinion does not state any such rule. The Court was ruling on the equities of the case before it. What the Court of Appeals held, and all that it held, respecting joinder in consolidated returns, was that in the circumstances of this case the Corporation was obliged in equity to join. The circumstances of this case include (1) the Corporation's own consistent practice of many years' standing, under which it had received and retained tax benefits from its affiliates' losses in prior years, (2) the fact that in filing the returns it surrendered nothing because it had no income or taxes nor any use for its loss, (3) the need to preserve the loss carry-overs and excess profits credits of the reorganization trustees, which (because the prior returns had been consolidated) could be preserved only through consolidated returns, (4) the obligation to its insolvent subsidiary and the unpaid creditors of its subsidiary resting upon the Corporation as parent company, and (5) the duties imposed by the bankruptcy act upon the stockholders of a corporate

bankrupt to take action appropriate to the preservation of the bankrupt estate. Under these circumstances and under settled rules the holding of the Court of Appeals was plainly right. *Consolidated Rock Products Co. v. Du Bois,* 312 U.S. 510, 522; *Bankruptcy Act,* Sec. 77(l), Sec. 7b; *Securities Comm'n v. U. S. Realty Co.,* 310 U.S. 434, 455. This holding rests upon the application of equitable principles to the particular facts of this case and does not involve or state a general rule concerning consolidated returns.

2. The intervener-petitioners' chief argument appears to be that "consolidated returns were designed and intended for the benefit of the parent" (pet. pp. 13-14) and that the court below, in holding to the contrary, misconstrued the federal tax laws. This argument has neither substance nor merit. There is not a line in the revenue acts which lends support to this contention nor do the cited cases so rule.

Petitioners are mistaken in appealing to the tax laws as the source of any right in the Corporation. The function and operation of the tax laws were exhausted when the amount of the tax was determined and the tax was paid. Revenue acts do not create private rights and the provisions of the Code do not purport to do so. *Meriwether v. Garrett,* 102 U.S. 472, 513; *United States v. Butler,* 297 U.S. 1, 61. This Court has made it clear that private controversies as to the allocation of taxes are to be determined by the principles of equity. *Phillips-Jones Corp. v. Parmley,* 302 U.S. 233.

There is nothing either in the cases cited or the material quoted by petitioners, or in the history of consolidated returns, to indicate that Congress intended to confer a special benefit on holding companies. The true purposes of

may not benefit indirectly from the tax advantages of their affiliates. Subsidiary companies usually derive no benefit, direct or indirect, from the tax advantages which their affiliates receive from subsidiary losses. Nevertheless, no loss affiliate, whether parent or subsidiary, receives payment for the tax advantage of its loss.

Petitioners argue that the Corporation's case is exceptional and they appeal to equity for a different rule in this case. The contention is, in brief, that because the Corporation had no use for its loss nor benefit therefrom, direct or indirect, it was entitled to a cash payment from the trustees' earnings at the expense of the unpaid creditors of its former subsidiary, the debtor company, and in repudiation of the practice which it consistently followed in tax dealings with its subsidiary. If this be an exceptional case the facts call strongly for adherence to the rule rather than for deviation from it. Furthermore, a claim for special treatment upon the special facts of a case does not present "a question of general importance" suggesting review by certiorari.

E. The Corporation Has No Right Qua Parent to "Tax Savings" Realized by the Reorganization Trustees, Nor Has It Any Right to Such Tax Savings by Reason of the Loss of Its "Economic Interest" in Its Former Subsidiary Through Consummation of the Reorganization Plan.

The petitioners argue that in this case the Corporation has been deprived of the indirect benefit which, as stockholder of the subsidiary, a parent company may receive from the tax advantage to its subsidiary and assign this as a reason why the Corporation should be paid.

In so far as this is an argument that as *ex parent* the Corporation has better rights than it would have as parent, the argument defeats itself. The Corporation as *ex parent* has lost, not improved, whatever rights it had when it was the parent company.

Moreover, there is no principle which could sanction a demand such as that of the Corporation in this case upon the income of trustees of its former subsidiary, whether that income be denominated "tax savings" or otherwise. The Corporation's loss of economic interest was effective upon the filing of the petition for reorganization under Section 77, as made clear by the decision of this Court in *Helvering v. Cement Investors,* 316 U.S. 527, in which it was said (p. 532):

> "In case of reorganizations of insolvent corporations, the creditors have the right to exclude the stockholders entirely from the reorganization plan. When the stockholders are excluded and the creditors of the old company become the stockholders of the new, 'it conforms to realities to date their equity ownership' from the time when the processes of the law were invoked 'to enforce their rights of full priority.' *Helvering v. Alabama Asphaltic Limestone Co.,* 315 U.S. 179. Under that approach, the ownership of the equity in these debtor companies effectively passed to these creditors at least when Sec. 77B proceedings were instituted."

The Corporation has expressly pleaded, by its supplemental bill of complaint, that its claim is rested upon "an obligation incurred by the trustees in their operation of the debtor's estate * * *." (R. 224) But in equity its ownership had passed to the unpaid creditors of its subsidiary

consolidated returns are well understood. They are, first, to facilitate the administration of the tax laws by relieving the Treasury of the burden of reallocating income and deductions on transactions between affiliated companies[5] and, second, to do tax justice between businesses organized as subsidiaries on one hand and business organized as departments on the other.[6] There is nothing here to suggest that Congress has any particular regard for holding companies.

The argument that the consolidated return system is intended to benefit holding companies is directly in contradiction to the conclusions of the Federal Trade Commission. In its investigation of utility holding companies the Commission reviewed in detail the use of consolidated returns, and concluded that "the subsidiary companies in a holding company group are entitled to the benefit of any savings in the group due to filing a consolidated return."[7]

Congress, in so far as it has indicated an intention as to who should receive the benefit of "tax savings" from consolidated returns, has indicated they should go to the operating companies of the group. Congressional Committees have been sharply critical of the practice which peti-

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[5]House Ways and Means Committee Rep. No. 704, 73d Cong., 2 Sess., p. 16; Senate Rep. No. 960, 70th Cong., 1st Sess., pp. 1, 13, 29.

[6]Memorandum of the Finance Committee of the Senate on the 1918 Act, p. 9; Senate Rep. No. 665, 72d Cong., 1st Sess., p. 9.

[7]Summary Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., on Economic, Financial and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, Part 72-A, Sen. Doc. No. 92, 70th Cong., 1st Sess., p. 478.

tioners now advocate, that is, a practice whereby the parent company takes to itself the benefit of group "tax savings."[8]

Nothing need be added to make it clear that the petitioners cannot find in the revenue acts any foundation for the claim of the Corporation upon the "tax savings" of the reorganization trustees.

D. The Corporation's Claim Is Contrary to the Policy and Objectives of Section 77 of the Bankruptcy Act and Would Frustrate the Western Pacific Reorganization.

We would again emphasize that the Corporation is here seeking to enforce its claim against a reorganized railroad company as successor to the reorganization trustees of the Corporation's former rail subsidiary. Both of the opposing petitions persistently ignore the distinction between (1) the debtor company, which was a subsidiary of the corporation, (2) the reorganization trustees, and (3) the reorganized company, respondent herein, in which the Corporation has at no time had any interest. These distinctions are important and are not to be disregarded. The tax

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[8]Senator Wheeler, chairman of the Senate Committee on Interstate Commerce, in speaking of this practice said of the holding companies: "So that, as a matter of fact, they took that $9,000,000, which should have gone either to the Government, or, if it was not necessary to pay it to the Government, then it should have gone back to the operating company." Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1725, p. 255. Similar comments appear in Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st Sess., on H.R. 5423, pp. 153, 849, 992, 1061, 1522; Hearings before the Committee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess. on S. 1725, pp. 83, 122, 255, 557.

returns with which we are here concerned are tax returns for periods within the trusteeship, the taxes were paid by the trustees out of their income, and the tax savings are tax savings of the trustees. The Corporation's claim is necessarily a claim against the trustees, and the Corporation has so pleaded.

But the Corporation's claim, even if it had substance, cannot be asserted against respondent, the reorganized railroad company. The claim here asserted never acquired validity against the reorganization trustees, not having been presented to and approved by the reorganization court, which alone had jurisdiction to entertain it. Had the claim been there presented, approved and paid, its payment would have been an expense of administration within the express control of the reorganization court under the statute. In no forum, other than the reorganization court, could the Corporation's claim be advanced or entertained.

As pertinently observed in the opinion of the District Court, the Corporation's claim represents "an effort to share in the earnings of the debtor during the reorganization period" (R. 272). It is to take precedence over the claims of secured creditors, now stockholders in the reorganized company. It was clear to the District Court that the philosophy underlying Section 77 of the Bankruptcy Act "stands as a barrier against the equitable validity of plaintiff's claim in this cause" (R. 273). The policy and objectives of Section 77 of the Bankruptcy Act would be set at naught and the Western Pacific reorganization would be frustrated if the Corporation were allowed recovery against the reorganized railroad company on the basis of

a claim related to the period of reorganization and which was neither advanced nor considered in that proceeding.[9]

It remains only to observe that this is a private controversy, it is of importance to these litigants only, and the issue turns solely upon general principles of equity. The District Court found no equity in the Corporation's claim upon the "tax savings" realized by the reorganization trustees of the Corporation's former rail subsidiary, and the Court of Appeals affirmed that holding.

II.

THERE IS NO EQUITY IN THE CORPORATION'S CLAIM TO THE "TAX SAVINGS" OF THE REORGANIZATION TRUSTEES

Although a ruling upon the equities does not involve a question of federal law it can readily be demonstrated that the Corporation's claim is without the pale of equity.

A. The Corporation Has Suffered No Wrong and Sustained No Damage, and Has No Unjust Enrichment Claim.

The reorganization court confirmed the Commission's plan of reorganization and thereby adjudicated the Corporation's stock loss. Under the authority of the Revenue Act the loss was entered as a deduction from income in the consolidated returns. Nothing in this process constituted a wrong to the Corporation. No tort was committed; no

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[9]The Corporation's failure to present its claim in the bankruptcy proceeding bars the claim under the orders of the Court in that proceeding and under the principles of *res judicata*. The claim is also barred by the California statutes of limitation. These defenses were presented below and respondents rely upon them but the courts below found it unnecessary to consider them, having ruled that the claim was without equity.

property was taken; no contract was breached; no statutory right was infringed. The Corporation, therefore, has no cause of action.

The Corporation was not damaged. It paid no tax under the consolidated returns just as it would have paid no tax under separate returns. The failure of the reorganization trustees to pay additional taxes was not, in contemplation of law, an enrichment. Even if it were, the enrichment was not unjust to the Corporation, and without proof of injustice to the Corporation it cannot recover. The entry of the loss in the returns cost the Corporation nothing. The Corporation had no income, it could not have used the loss itself and could not have sold it. *J. D. and A. B. Spreckels Co. v. Commissioner*, 41 B.T.A. 370 (1940).

These are the facts which brought about the "tax savings" of the reorganization trustees, and there is in them no element of contribution or unjust enrichment, or of any other cause of action known to the law. "Wrong without damage or damage without wrong does not constitute a cause of private action * * *." *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (C.C.A. 8, 1945), cert. den. 326 U.S. 734. Compare *Connecticut Ry. Co. v. Palmer*, 305 U.S. 493, 504.

B. The Corporation Has No Claim Arising from Fiduciary Obligations.

The income and the tax savings under discussion are for a period in the trusteeship prior to May 1, 1944, a period when the Corporation was the sole stockholder of the old company. As parent, the Corporation had fiduciary responsibilities to its subsidiary and particularly to the sub-

sidiary's creditors. "A holding company, as well as others in dominating or controlling positions (*Pepper v. Litton*, 308 U.S. 295), has fiduciary duties to security holders of its system which will be strictly enforced. See *Taylor v. Standard Gas Co.*, 306 U.S. 307." *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 522.

The fact that the returns for 1943 and 1944 were physically filed after the Corporation had surrendered its stock to the reorganization committee does not affect the Corporation's obligations. The returns related to the period of affiliation and to the period of trusteeship, and the obligations of the parties with respect to them were therefore the obligations of those periods. The Corporation was not entitled to prefer its own interest over the interest of the unpaid creditors of its former rail subsidiary by demanding a "tax savings" payment out of income of the trustees on account of an entry in the tax returns which cost the Corporation nothing.

C. It Was the Duty of the Corporation to Join in Filing Consolidated Returns and It Could Not Bargain as a Condition to Such Joinder.

The Court of Appeals addressed itself directly to the contentions of petitioners, particularly interveners, that the Corporation could have exacted a "bargain" from the reorganization trustees in consideration of continued joinder in the tax returns. The Court of Appeals pointed out that, while the Corporation suffered a severe loss through the decision of this Court upholding the plan of reorganization, nevertheless "there was no possible way for it to achieve any tax advantage to offset the loss. But its affiliate did have use for the loss and the group was entitled, under the

tax law, to make use of that means of tax savings" (R. 2232). There was a duty to make use of the loss to offset the income of members of the affiliated group. Such had been the practice of the group in previous years of affiliation and "Corporation had effected substantial tax savings (Def. Ex. 46) by reason of filing consolidated returns." The Court observed that "The officers would have been derelict in their duty to the subsidiary had they failed to file consolidated returns," and added that "After the transaction Corporation was in exactly the same position that it was in before the subsidiary had effected the tax saving allowed by the tax laws" (R. 2233).

Not only was there no duty on the part of the Corporation to exact such tribute but it was the affirmative duty of the Corporation to refrain therefrom. In this aspect of the case the conclusions of the Court of Appeals were as follows:

> "If Corporation had required tribute as a condition of its cooperation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors. Equity will not permit a recovery as a substitute for a bargain which would have been unfair." (R. 2235)

The suggested "bargain" to have been "exacted" by the Corporation would necessarily have been so exacted from the reorganization trustees who could not have yielded without the approval of the reorganization court. But would that court have yielded? This Court has said respecting such strategic efforts:

> "In these proceedings there is no occasion for the court to yield to such pressures."
>
> *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 129.

As sole stockholder of the old company the Corporation had general fiduciary duties to its subsidiary, particularly in the interest of the latter's creditors (*Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 522) and special duties arising out of the bankruptcy proceeding to conserve the assets for the benefit of creditors (3 *Collier on Bankruptcy* (14th Ed.) Par. 62.30, page 1573). It was the legal duty of the Corporation, and alike its moral duty, to join in these returns for the protection of the creditors of its former subsidiary, and no loss or disadvantage to the Corporation itself could result from such joinder.

D. Petitioners Do Not Escape the Application of the Accepted Rule Against "Tax Saving" Payments in Consolidated Return Tax Allocations by Claiming That Their Case Is Exceptional.

There is a formula for the allocation of consolidated return taxes among the members of an affiliated group under which the tax is borne ratably by the members of the group having incomes, but no payment is made to a loss company for the tax advantage which its loss brings to other members of the group. This formula has been approved by the Federal Trade Commission, the Securities and Exchange Commission and the Treasury Department.[10] The semi-official National Association of Railroad and Utilities Commissioners has reached similar conclusions.[11]

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[10]By the Federal Trade Commission, op. cit. note 7 supra, pp. 478-9; by the Securities and Exchange Commission in its Rule U-45(b)(6); by the Treasury Department in I.T. 3637, C.B. 1944, 258; I.T. 3692, C.B. 1944, 261; and I.T. 4085, issued June 1952, C.C.H. Standard Federal Tax Reports, par. 6219.

[11]Reports of the Committee on Accounts of the National Association of Railroad and Utilities Commissioners, for 1943 at pp. 255-6, for 1945 at pp. 458-60.

This formula has been accepted by the business community for many years[12] and it is the formula which the Corporation has used since 1918 when it commenced filing consolidated returns for the Western Pacific group (R. 1262).

One reason for the formula is to protect the public which is served by operating subsidiaries, as well as the security holders of subsidiaries, from upstream payments or credits to the parent company. The formula is also needed to prevent the sort of bargaining about tax losses that is demanded here. Other reasons for the formula are indicated in the studies of the Federal Trade Commission and the Securities and Exchange Commission.[13] The Treasury Department by I.T. 4085 issued in June, 1952, recently reaffirmed its prior use of the formula for tax purposes.

The formula operates without regard to whether loss companies derive benefit from its application. Depending on the facts of the particular case parent companies may or

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[12]As reported in Release No. 53, Accounting Series, Securities and Exchange Commission, November 16, 1945, on "Charges in lieu of taxes," reported in 61 P.U.R. (N.S.), at pp. 193-225. The Commission says of the business custom in note 36, p. 222, that "In assigning to each constituent its fair share of the consolidated tax paid by the group it is usual to divide the actual tax among the companies who would have had to pay a tax on an individual basis. If one of the included companies operated at a loss, the consolidated tax is of course reduced, but *no* part of the 'saving' is ordinarily paid over to the loss company by the other members of the group. Instead, only those *contributing* income to the consolidated return share directly in the benefit of the current reduction. This principle is incorporated in our Rule U-45 under The Public Utility Holding Company Act."

[13]Federal Trade Commission, op. cit. note 7, supra; Securities and Exchange Commission, Release No. 53, Accounting Series, 61 P.U.R. (N.S.) 193.

when the subsidiary filed its petition for reorganization under Section 77. Thereafter the earnings of the subsidiary or, more correctly, the earnings of the subsidiary's reorganization trustees, belonged in equity to the creditors and could not be claimed by the Corporation at the creditors' expense.

F. The Corporation Has No Claim on Account of Duality or Domination.

Petitioners rely upon so-called "dual relations" to implement the Corporation's claim upon the tax savings of the reorganization trustees. This reliance is misplaced.

Quite naturally, and indeed properly, the Corporation and its wholly owned rail subsidiary had certain officers in common upon the inception of the reorganization proceedings. These dual relations continued in some measure throughout the reorganization period. Thus one of the trustees, appointed at the instance of the Corporation itself, was an officer of both the Corporation and its rail subsidiary. The remaining "dualities" were all attributable to the Corporation which brought them into being and sponsored their retention. Moreover, they had statutory sanction (Bankruptcy Act, Section 708(c)(1)) as well as the approval of the reorganization court (R. 1187, 1916, par. 2, at 1920-21; R. 1192, 1923), and were not a mask for undisclosed transactions of any character.

Duality itself is not wrongful. It does not give rise to a cause of action, nor can it implement a cause of action, unless wrong or unfairness issues therefrom.

Here there was no wrong or unfairness to the Corporation by virtue of the asserted dualities, however critically they may be examined. The two trustees discharged their

duties under the direction of the reorganization court and with full knowledge and to the satisfaction of all parties. The recitation of dualities in which the petitioner-interveners have indulged is barren of any evidence of wrongdoing. It was not wrongful on the part of the trustees to join in the consolidated tax returns for 1943, nor was it wrongful to enter the Corporation's stock loss therein as a deduction from the trustees' income. It was not wrongful for the special tax counsel retained by the trustees to advise the entry of the Corporation's stock loss as a deduction from income. After reorganization had been consummated and the trustees had been discharged it was not wrongful on the part of the Corporation's president to sign and file the returns for 1944 and the claim for refund of taxes paid by the trustees for 1942. These were the natural and proper consequences of what had taken place during the trusteeship. Accordingly, this is not a case in which "duality" cloaked wrongful conduct or unfairness or has significance for any purpose. Thus an essential ingredient of a cause of action, viz., wrong or unfairness, is lacking.

The District Court recognized the fact of dual relations but concluded that "The so-called 'duality of control' much discussed and emphasized, is not important in resolving the tendered issue" (R. 274). The Court of Appeals expressly approved (R. 2235). Both courts found that no injustice or unfairness to the Corporation had issued from the duality. The claim of domination is equally devoid of substance. The Corporation has no standing to exploit the domination theory in view of its express denials of all allegations of "domination and control" by its answer to the Complaint in Intervention in this cause. These denials are in the following terms:

"The plaintiff denies on its own behalf and on behalf of its officers and directors all allegations of the Complaint in Intervention of domination and control of the plaintiff, its officers and directors, by the James Foundation of New York, Inc., and The Western Pacific Railroad Company, or any one or more of the subsidiaries or affiliates of either; * * *." (R. 156) (Cf. Opinion of Court of Appeals, R. 2224, footnote 7)

These denials are unqualified.

The opinion of the Court of Appeals deals explicitly and realistically with the asserted duality in conjunction with the claim of domination. The Court of Appeals concluded:

"The record is barren of evidence to support the contention that Corporation was dominated by the subsidiary, or that there was a breach of any duty owed to Corporation." (R. 2235)

Upon the assumption, however, "that the subsidiary dominated Corporation through control of the dual officers," the Court of Appeals nevertheless found that "it did not abuse its supposed dominant position because the officers and directors common to both corporations did not sacrifice Corporation's interests to those of the subsidiary" (R. 2232). The Court said that the dual officers owed fiduciary duties to both corporations to promote the interests of both and to obtain for each what it was entitled to under the tax laws. These duties were properly discharged. Finally the court said:

"The officers would have been derelict in their duty to the subsidiary had they failed to file consolidated returns. Their duty to Corporation required only that they not sacrifice its interests and did not require them to exact tribute for following the practice of the past twenty-five years." (R. 2233)

All of the transactions in relation to the tax returns were "open and above board." The District Court so found and the Court of Appeals approved that finding (R. 2234). Neither court could find injustice or unfairness in the tax transactions.

Such being the case, the petitioners' arguments directed to "duality" and "domination" are without a semblance of vitality.

III.

IN DISPOSING OF THE PETITIONS FOR REHEARING THE COURT HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The petitions for rehearing were denied and in so far as they sought rehearing in banc they were stricken as being without authority in law or in the rules of practice of the court (R. 2259).

On July 9, 1952, after the petitions for certiorari were filed herein, the court below rendered its opinion and decision in banc, denying the petition of the Corporation for leave to file a "motion to vacate order striking appellants' petition for rehearing en banc and reinstating such petition." The petition is in the record at R. 2267.

The full Court, with one dissent, reviewed its procedures for considering rehearings in banc and said, in the concluding paragraphs of its opinion:

> "On these considerations and in harmony with its understanding of the statutory scheme, the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc. Accordingly, in the exercise of its uncontrolled discretion the court has declined altogether

to entertain petitions of litigants for such hearings. The position it takes is that, apart from the possible disqualification of a judge, the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties.

It has been remarked by some commentators that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts. The hazard, we think, may easily be overestimated. It is minimized by the alertness of counsel and by informal and unofficial interchanges among the judges. Where conflicts occur they are capable of remedy by in-banc action without wholesale duplication of effort, as our own practice and experience have demonstrated.

The petition for rehearing in this cause has already been authoritatively denied by the division to which the cause was assigned. The petition for leave to file, addressed to the court in banc, is denied.

From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing."

Copies of the opinion of the court and of the dissenting judge are attached as an appendix to this brief.

Under Section 46(c) of the Judicial Code the full court has power to grant a rehearing in banc, but it does not follow, as contended in the Corporation's petition (p. 30), that "a litigant must be entitled to have his request presented to all those judges for consideration and action." It has never been so ruled. If such were the rule it would mean that every disappointed litigant could insist upon a review by the full court. This would impose impossible burdens. The ruling of the court below was clearly right.

No litigant is entitled to complain about the treatment of a petition for *rehearing*. Rehearings are matters of discretion and no appeal lies from the denial or other disposition of petitions for them. *Wayne Gas Co. v. Owens-Illinois Co.*, 300 U.S. 131, 137-8; *Pfister v. Finance Corp.*, 317 U.S. 144, 149-50.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

Dated: July 18, 1952.

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Appendix I

OPINION AND DISSENTING OPINION OF JULY 9, 1952, IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver, *Appellants,* vs. WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD., *Appellees.*	No. 12,506 Jul, 9, 1952

IN RE PETITION OF WESTERN PACIFIC RAILROAD CORPORATION FOR LEAVE TO FILE A MOTION DENOMINATED "MOTION TO VACATE ORDER STRIKING APPELLANT'S PETITION FOR REHEARING EN BANC AND REINSTATING SUCH PETITION."

BEFORE: DENMAN, MATHEWS, STEPHENS, HEALY, BONE, ORR, and POPE, Circuit Judges

HEALY, Circuit Judge

Case No. 12,506, supra, upon its coming at issue in this court, was regularly assigned for hearing and determination to a court or division of three judges comprising Circuit Judge Healy and District Judges Fee and Byrne. Subsequent to argument and submission of the case the court

handed down an opinion and order affirming the judgment of the district court, Judge Fee dissenting. —— F. 2d ——. Thereafter the appellants petitioned for "rehearing and rehearing en banc," and the court on January 30, 1952, denied the petition, Judge Fee again dissenting. —— F. 2d ——. Insofar as the petition sought a rehearing in banc it was ordered stricken as unauthorized by law or practice.

On March 10, 1952, the Western Pacific Corporation presented the petition for leave described in the caption. In its supporting brief it asserts that it is its right under the law to have its petition for rehearing considered and acted upon by all the circuit judges. On order of a majority of the circuit judges, the court has been assembled in banc for the purpose of announcing the principles of law and practice it deems applicable in respect of in banc hearings. This course is thought appropriate in order that litigants and the bar may be advised not only of the position taken by the court but of the reasons for it.[1]

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[1]In recent years it has become the custom of counsel almost as a matter of course to petition the full membership of the court for a rehearing in banc, upon suffering an adverse decision at the hands of a court of three judges. This hopeful concept of the right of litigants appears to stem from declarations in the dissenting opinion in Independence Lead Mines v. Kingsbury (1949), 9 Cir., 175 F. 2d 983, at p. 992, cert. den. 338 U. S. 900, to the effect that two judges in a court or division of three are without authority to pass upon or deny a petition for rehearing addressed to all the circuit judges.

The numerous petitions of this nature have been disposed of by the court or division concerned either (1) by ignoring the application for in banc action and treating the petitions simply as ordinary petitions for rehearing, or (2) by striking them insofar as they sought in banc action. The treatment has not in the least served to discourage losing counsel or to stem the growing tide of such petitions.

The governing statutory provision, 28 USCA §46(c), reads:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."[2]

The obvious intendment of this statute is to perpetuate the United States Courts of Appeals as courts of three judges in all cases save those in which an in banc hearing is ordered by all or a majority of the circuit judges. No doubt Congress was fully alive to the fact that these courts, despite the increase in their membership, would be unable to keep abreast of the constantly growing volume of judicial business unless they continued in all normal circumstances to function as courts of three.

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[2]The section was enacted as part of the 1948 Judicial Code revision. In its entirety it reads as follows:

"§46. Assignment of judges; divisions; hearings; quorum

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

Important light will be shed on the problem under inquiry if we examine the method pursued in the assignment of cases, as prescribed by our Rule 4.[3] In practice the calendars for the court are tentatively made up by the chief judge in collaboration with the clerk. On these calendars each case is assigned for hearing and determination to a court or division of three named judges, unless it has been otherwise ordered. The proposed calendar is circulated among all the judges, and any designation or assignment may be modified or set aside by a majority. When the calendar is approved by the judges their action is uniformly manifested by their initialing the same, as is done in the case of court orders generally. Thus the calendar as finally adopted evidences or necessarily implies at least the tentative determination of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc. In the instances in which at the time of assignment it is agreed by all or a majority of the judges that a particular case should be heard and determined in banc, it is calendared as such.[4] It sometimes occurs, too,

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[3]Rule 4, subdivisions 1 and 2, reads:

"ASSIGNING OF CAUSES FOR HEARING

"1. The calendars of the court shall be made up by the Clerk under the direction of the Chief Judge subject to the approval of the majority of the judges.

2. The Chief Judge after conference with the Circuit Judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be modified or set aside by a majority of the judges."

[4]Since the decision in Textile Mills v. Commissioner, 314 U. S. 326 (1941) approximately thirty cases in all have been heard in banc in this circuit. Nineteen of these, or about two-thirds of the whole, were assigned to the court in banc at the time they were originally calendared. Perhaps more than half of the nineteen were cases of

that examination of a case preliminary to hearing, or consideration of it after argument, leads the judges to whom it was assigned to conclude that it is an appropriate cause for in banc consideration, and they so indicate to the remaining judges. If the latter or a majority of all agree, the case is then reassigned for hearing by all the judges.[5]

If we examine the status of Case No. 12,506 in the light of this practice, it becomes apparent that it was calendared and heard by court order as one in which in banc consideration was not deemed requisite. There remains to inquire whether the losing party in the cause is at this juncture entitled as of right to have its petition for rehearing considered and ruled upon by a court composed of all the circuit judges.

The statute, it will be recalled, commits to a "court or division of three judges" the power to *hear* and *determine* the cases and controversies assigned to it. Obviously its determination of any such case or controversy is a decision of the Court of Appeals, and as such is a final decision,

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great public consequence, such, for example, as those growing out of the suspension during the war of the writ of habeas corpus and the institution of martial law in Hawaii, or cases involving the forcible removal of the Japanese from the Pacific Coast states. Others were contempt matters involving claimed violations of the constitutional prohibition against self-incrimination.

There are no definite criteria that we know of by which to determine what cases are suitable for in banc consideration. However, causes of extraordinary public importance or those involving constitutional questions probably belong in the category.

[5]McCoy v. United States, 9 Cir., 169 F. 2d 776; Samuel v. United States, 9 Cir., 169 F. 2d 787; Tee Hit Ton Tribe v. Olson, 9 Cir., 160 F. 2d 525; Los Angeles Building & Construction Trades Council v. LeBaron, 9 Cir., 185 F. 2d 405; Price v. Johnston, 9 Cir., 159 F. 2d 234, 161 F. 2d 705.

subject to review only as prescribed by 28 USCA §1254. Circuit judges other than those designated to sit on such court or division are not members of it, and officially they play, and are entitled to play, no part in its deliberations at any stage. That this is so is made clear by subdivision (a) of §46 (see Note 2 above) providing that "Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs." If regard be had for this mandate circuit judges may not intrude themselves, or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit.

A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals. If it grants a rehearing it may follow either of two courses: (a) it may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate suggest to the nonparticipating judges that the case is one which ought to be reheard in banc; and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration.[6]

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[6]This was the course followed in Hopper v. United States, 9 Cir., 142 F. 2d 181; Southern Pacific Co. v. Guthrie, 9 Cir., 180 F. 2d 295, 186 F. 2d 926; Evaporated Milk Ass'n v. Roche, 130 F. 2d 843; and Pacific Gas & Electric Co. v. SEC, 139 F. 2d 298. In the **Hopper** case, supra, and to a lesser degree in Southern Pacific v. Guthrie, intracircuit conflicts were resolved. The other two cases cited in this note were nondescript matters.

Adoption of the view currently being urged would render merely tentative or provisional the decisions of the court in 98 per cent or more of the cases that come before it. On petition of a dissatisfied party its decisions would automatically be subject to a species of horizontal appeal which would completely nullify the prime statutory objective of effecting a division of the court's work. The judges other than those to whom the cases had been assigned would perforce be required to acquaint themselves with the issues and problems involved in the same painstaking manner as did their associates who had heard and determined the causes initially, and this without the latter's advantage of having heard oral argument. Obviously, unless he is prepared to stultify himself, no judge would undertake to rule upon petitions for rehearing without adequate and full study and investigation of the merits.

On these considerations and in harmony with its understanding of the statutory scheme, the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc. Accordingly, in the exercise of its uncontrolled discretion the court has declined altogether to entertain petitions of litigants for such hearings. The position it takes is that, apart from the possible disqualification of a judge, the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties.

It has been remarked by some commentators that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts. The hazard, we think, may easily be overestimated. It is mini-

mized by the alertness of counsel and by informal and unofficial interchanges among the judges. Where conflicts occur they are capable of remedy by in banc action without wholesale duplication of effort, as our own practice and experience have demonstrated.

The petition for rehearing in this cause has already been authoritatively denied by the division to which the cause was assigned. The petition for leave to file, addressed to the court in banc, is denied.

From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing.

DENMAN, Chief Judge, dissenting from the court's holding that the circuit judges not participating in a division, here six of the seven judges, (a) are without power to consider a litigant's petition for a rehearing en banc, and (b) where a rehearing or rehearing en banc has been denied by a division, are without power to vote to grant a rehearing en banc, if two of the division's judges, here with but one circuit judge, do not desire such a rehearing. This appears from the following language of the opinion:

> "A petition for rehearing in any such case, whatever its form or wording, *must necessarily*[1] be treated as addressed to and is *solely* for disposition by the court or division to which the case was assigned for determination. If the court *so constituted*, or a majority of its members, denies the petition, *that ends the matter so far as concerns the Court of Appeals.* If it grants a rehearing it may follow either of two courses: (a) it

[1]Emphasis hereafter appearing in quoted matter is supplied.

may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate *suggest to the nonparticipating judges that the case is one which ought to be reheard in banc;* and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration."

* * * *

"The statute, it will be recalled, commits to a 'court or division of three judges' the power to *hear* and *determine* the cases and controversies assigned to it. Obviously *its* determination of any such case or controversy is a decision of the Court of Appeals, and as such is a *final decision, subject to review ONLY as prescribed by 28 U.S.C. §1254.*" Thus squarely is denied the power of the court en banc to review a division's decision in a "rehearing en banc . . . ordered by a majority of the circuit judges." See 28 U.S.C. 46 (c).

* * * *

"From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing."

In this case the Western Pacific Railroad Corporation, hereafter the Corporation, petitions the Court en banc for leave to file a petition for a rehearing en banc. The latter seeks to establish, inter alia, that the judgment of the division which heard the case decided the main issue therein contrary to the decision of a prior division of this court.

The division in the instant case, consisting of one circuit judge and two district judges, has ordered "stricken" a petition addressed to the seven judges constituting the court en banc. This order follows a precedent of similar

strikings of petitions for rehearings en banc in the cases of Kronberg v. Hale, 181 F.2d 767 (Cir. 9), Fruehauf Trailer v. Myers, 181 F.2d 1008 (Cir. 9), Northwestern Mut. Ins. Co. v. Gilbert, 182 F.2d 256 (Cir. 9).

Since Kronberg v. Hale, the Clerk has distributed no petitions for rehearings en banc to the non-participating circuit judges. From a casual remark of counsel in a social contact, I learned of the Corporation's instant petition and instructed the Clerk to distribute it to the six circuit judges not sitting in the division. But for this casual discovery and my suggestion that the stature and determination of the Corporation's counsel made it likely they would seek mandamus in the Supreme Court, the petition would have had the "striking" treatment of the above cases.

The court's opinion came after a conference originally called for the consideration of the adoption of the rule considered last in this dissent, which would have made the burden of such petitions one we easily could bear.

A. *The court's decision violates (as well as ignores) the Supreme Court's decision in United States ex rel. Robinson v. Johnston, 316 U.S. 649, 650, a decision aimed to settle differences in the circuit's divisions.*

The case of Textile Mills Corp. v. Commissioner, 314 U.S. 326, held that notwithstanding the three-judge provision of section 212 of title 28, U.S.C., 1940 ed., a court of appeals might lawfully consist of a greater number of judges, and that the five active circuit judges of the third circuit might sit in banc for the determination of an appeal.

The Third Circuit in C.I.R. v. Textile Mills Corp., 117 F. 2d 62 at page 70, in holding that its five circuit judges could

sit en banc, states that otherwise they would not have the power to correct differing views of the judges in the divisions of the court such as the Supreme Court describes as occurring in the Fifth Circuit in John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181.[2]

The Supreme Court in its Textile Mills case at page 334 in affirming the Third Circuit and overruling our decision in Lang's Estate v. C.I.R., 97 F.2d 867, 869, where we held we could not sit en banc where two divisions of the court differed as to the law controlling, states of rehearings en banc[3] that:

> . . . "Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those consid-

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[2]Following this the Textile Mills case states at page 71:

. . . "Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court, it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question . . ."

[3]What is said of the need of rehearings en banc for the then Third Circuit applies a fortiori today to the Ninth Circuit. The Third Circuit in the 1941 fiscal year had but five judges and 285 docketings. The Ninth Circuit has had an increase in population of six million in twelve years. In the fiscal year 1952 it had 446 docketings. On the national average of docketings for circuit judges the Ninth Circuit should have ten judges. It has seven judges but the Senate has passed a bill increasing the judgeships to nine and the House Judiciary Committee has agreed they are needed. No doubt within a year we will have nine judges with three divisions sitting simultaneously. That is to say, we have 56% more docketings and will have almost half again the number of divisions in which exist the hazard of conflicting decision referred to in the Textle Mills decisions.

erations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases . . ."

In enacting 28 U.S.C. § 46(c) Congress codified the Textile Mills decision, the Reviser's Notes stating that that section "preserves the interpretation established by the Textile Mills case."

Prior to this codification of the Textile Mills decision, there was decided by one division of this circuit the case of Robinson v. Johnston, 118 F.2d 998, and later in a division of three other judges, the case of Crockett v. United States, 125 F.2d 547. The two divisions differed on the controlling law. Certiorari was sought in the Robinson case before the Crockett case was decided and it was denied. A petition for rehearing in the Supreme Court was denied. The Crockett case was then called to the attention of the court in a second petition for rehearing which was granted. The order denying the petition for certiorari was set aside and the writ of certiorari granted. Certainly this action of the Supreme Court was purposeful and deliberate.

In granting certiorari the Supreme Court in United States ex rel. Robinson v. Johnston, 316 U.S. 649, held it was the duty of this court en banc to entertain a petition for leave to file a petition for rehearing en banc, for it vacated our judgment and remanded the case to us, stating:

". . . In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston, 118 F.2d 998, 1001, and Crockett v. United States, 125 F.2d 547, 548, 549), and in view of this Court's decision in Waley v. Johnston, ante, p. 101, reversing 124 F.2d

587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including *leave* to petitioner to apply for a hearing before the court *en banc*. See Textile Mills Corp. v. Commissioner, 314 U.S. 326 . . ."

The Corporation strongly urges the above contentions in its denied petition, all of which is ignored in this court's opinion. Instead it is said of the seeking of the leave to file the petition, that consideration of such action by any of the circuit judges not in the division (here six) would be "to *intrude* upon a . . . division on which they have not by order of the court been directed to sit."

How absurd it was, one must conclude, for the Supreme Court to order such an intrusion in Robinson v. Johnston!

B. *The Cavalier Refusal of the Court to Consider the Contentions of the Corporation's Petition.*

The shabby treatment of the litigant and his counsel in refusing to consider their contentions and authorities comes after the court's claim that its opinion gives consideration to *"the principles of law * * * which it deems applicable to en banc hearings."*

No self respecting federal judge sleeps comfortably if he is conscious of having rendered an opinion deciding a case in which he has *purposely* failed to consider a substantial contention supported by authorities submitted to him and by such evasion has based his decision on a ground directly opposed to the evaded contention.

A possible explanation for the silent treatment of the litigant's contention and authorities in this case is that Robinson v. Johnston was deemed irrelevant because de-

cided before the codification of the Textile Mills case in 28 U.S.C. § 46(c). That seems absurd, however, for the Supreme Court's construction of a law before its exact codification, as here, is applicable after codification. Otherwise, why in 28 United States Code Annotated are there the thousands of citations in sections of the Judicial Code, enacted in 1948, which codifies the then law and statutes?

C. *The Opinion's Absurd Misstatements Respecting the Assignment of Cases to the Court's Divisions.*

The opinion states:

> "... Thus the calendar as finally adopted *evidences* or necessarily implies at least the *tentative predetermination* of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc ..."

The Supreme Court in the Textile Mills case has established a definite criterion for the rehearings en banc provided for in 28 U.S.C. § 46(c). It is the only one there stated, though there are others. It is that conflicts of law between the decisions of two of the court's divisions are cause for rehearing en banc. By clearing the law en banc, the circuit does so for the 96.3% of litigation in which this court's decisions are final.

Such en banc action prevents the burden on the Supreme Court, such as in the certification of the question of such differing divisions in Lang's Estate v. C.I.R., 97 F.2d 867, 869, a burden the Supreme Court later refused to assume in its return of Robinson v. Johnston for our en banc consideration of our divisions' divergencies.

It is almost a rude question to ask, "How, in heaven's name, are the seven judges en banc to know tentatively or otherwise that the division to which they assign the case will thereafter decide it without conflict with a prior decision of a different division"? The phrase, "How, in heaven's name," is used advisedly, for our tentative decision would require divine omniscience.

The opinion states that another criterion is whether the case to be assigned to a division is "one involving constitutional questions."

The slightest reflection shows that the court en banc could make its tentative assignment of a case to a division because *not* involving a constitutional question only by examination of all the briefs in all the cases to be assigned to determine whether such a constitutional contention is at issue.

Were this truly what we have done, it would have involved a volume of judicial effort comparable to that the court's opinion seeks to avoid with petitions for rehearings en banc.

In the eleven years since the Textile Mills case, the Clerk advises, we have assigned to division over two thousand two hundred cases. In but nineteen cases, less than one per cent, have they been assigned to the court en banc. These were cases whose extraordinary importance had wide newspaper notoriety. In *none* of the remaining two thousand two hundred cases has the court en banc assigned them to division after an examination of the briefs for that purpose.

D. *Further to avoid considering the corporation's contention and authorities, the opinion misstates the source of the contention that rehearings en banc are needed to cure the divergence of divisions.*

On the source of this contention the court's opinion states, "It has been remarked by *some commentators* that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts."

"Some commentators"! To what extent will the court go in order to avoid mentioning that this hazard was stated first by the Third Circuit in the Textile Mills case and on its appeal by the Supreme Court, and later implicitly by the Supreme Court in returning Robinson v. Johnston to this court because of the difference in viewpoint of our divisions. That is to say, in such holdings on the criterion of divergence, the Third Circuit and the Supreme Court are no more than mere commentators.

The opinion seeks to minimize the likelihood of a division overruling sub silentio a prior division's holding and this with the certainty of nine judges and three divisions in the near future.[4] The idea is that the judges in the division so acting, "by *in*formal and unofficial interchanges" with the non-participatig judges, will advise the latter that the decision is at variance with that of a prior division. In my seventeen years on the bench I have had no associate so confess his mistaken act.

An examination of the three cases cited, supra, the Kronberg, Fruehauf Trailer and Northwestern Mutual cases, in which the petitions for rehearing en banc were stricken, shows that two of them were founded on such conflict of

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[4]See footnote 3, supra.

divisions and the third on conflicts in district court decisions on important matters. Also in the seven cases of Bradley Mining Co. v. Boice, 12684; Acheson v. United States, 12772; Independence Lead Mines Co. v. Kingsbury, 11959; Tanimura v. United States, 13014; California v. United States, 12184; Sunbeam Lighting Co. v. Sunbeam Corp., 12357, and Zamlock v. United States, 12753, the division judges refused consideration of the petition addressed to the seven and thus prevented the court en banc from considering the contention in each that the division's decision conflicted with the decision of a prior division.

E. *The court's confessed fear of the burden of an overwhelming volume of such petitions may be avoided by an amendment of its rules.*

Against a flood of such petitions we can protect ourselves, as has the Supreme Court, by amending our Rule 25 as follows:

"Rule 25.
REHEARING

"A petition for rehearing of a decision by a division of the court may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

"Where there has been a denial of a rehearing of a decision by a division, a petition for a rehearing in bank may be filed within fifteen days. The petition shall be in the form above described and with the same certificate of counsel. No petition will be entertained, unless one of the judges participating in that decision shall join in seeking such rehearing."

The Supreme Court has similarly protected itself on its petitions for rehearing by a provision in its Rule 33, of which the pertinent portion is:

> "Such a petition . . . will not be granted unless a justice who concurred in the judgment desires it and a majority of the Court so determines."

In the last seven years there have been but 75 dissents, an average of less than 11 per year. Probably less than 11 judges per year would join in petitioning for a rehearing en banc.

In view of our prospective three divisions and the likely need for such rehearings en banc, an average of eleven such petitions would not be an intolerable burden, less than 4% of our submitted cases. It would substantially reduce the likelihood of conflict between the divisions.

By requiring first a rehearing by the division, the district judges would not be barred from the reconsideration of a decision.

The motion to file should have been considered on its merits and granted.

(Endorsed:) Opinion and Dissenting Opinion. Filed Jul. 9, 1952. Paul P. O'Brien, Clerk.

Appendix II

VALUE OF STOCK RECEIVED BY SECURED CREDITORS OF THE DEBTOR UNDER THE REORGANIZATION PLAN

Under the plan of reorganization, the preferred stock was given an assumed value of $100 per share and the common assumed values of $57 and $62 per share. (233 I.C.C. 452)

THE WESTERN PACIFIC RAILROAD COMPANY

Range of Common and Preferred Stock on the New York Stock Exchange

Year	Common		Preferred	
	High	Low	High	Low
†1944	31¾	29¾	66½	65
1945	57⅛	30½	92	64¼
1946	56½	27	101	71
1947	42¼	26½	90	65
1948	36½	25½	74½	58¼
1949	30	20	70¼	53¾
1950	55	28	89	64½
1951	58¾	46½	94¼	84¼
*1952	56¾	46½	95	89

†From December 29, 1944.
*To June 30, 1952.

Above quotations from THE COMMERCIAL AND FINANCIAL CHRONICLE, WALL STREET JOURNAL *and* STANDARD CORPORATION RECORDS.

Due service and receipt of a copy of the within is hereby admitted this.....day of July, 1952.

.....

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.....

.....

Attorneys for petitioners The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver

.....

.....

Attorneys for petitioners Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc.

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OCTOBER TERM 1952

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver, *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 150
MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 160

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS INVOLVED	2
STATUTES INVOLVED	3
STATEMENT	3
SUMMARY OF THE ARGUMENT	27
ARGUMENT	40
I. Petitioners Have No Claim	40
A. The General Rule. The Claim of the Holding Company Is Contrary to the Applicable Rule, Under Which No Payment Is Made for "Tax Savings" Resulting from the Use of Consolidated Returns	41
The Securities and Exchange Commission Rule Does Not Permit "Tax Saving" Payments for Losses in Consolidated Returns	43
The Treasury Department Employs the General Rule	46
The Federal Trade Commission Investigated and Condemned "Tax Saving" Payments to Holding Companies for Taxes Saved by Consolidated Returns	47
The Interstate Commerce Commission Has Disapproved "Tax Saving" Claims	48
No Court Has Approved a Claim for Taxes Saved by Consolidated Returns	49
There Is Nothing in the Revenue Acts to Require a Departure from the Rule	50

Page

Committees of Congress Have Investigated and Condemned "Tax Saving" Payments to Holding Companies for Taxes Saved by Consolidated Returns 52

The Rule Is in Accordance with Sound Policy 54

The Rule Is Fair and Equitable 55

The Rule Has Been Followed from the Beginning by the Western Pacific Group 57

B. Nothing in the Circumstances of This Case Takes It Out of the General Rule or Gives to the Holding Company a "Tax Saving" Claim 58

The Alleged Severance of "Economic Unity" Affords No Reason for Taking the Case Out of the Rule or for a "Tax Saving" Payment to the Holding Company 59

There Is Nothing Special in the Holding Company's Position as Parent or as Loss Company 63

As "Former Parent" the Holding Company Can Neither Escape the General Rule Nor Claim an Equity 63

C. The Fallacies in Petitioners' Argument That the Holding Company Was Free to Make a Choice of Returns: (1) The Holding Company Was Bound to File Consolidated Returns, and (2) It Could Derive No Equity from a Supposed Power to Withhold Its Consent 64

The Holding Company Was Obliged to File Consolidated Returns 65

The Corporation's Obligation to File the Returns Survived the Termination of Affiliation 68

The Power to Choose Between Returns Is Not the Source of Any Equity and the General Rule Makes No Allowance for Such a Power .. 69

D. Petitioners Have No Case Under the Rules of Law They Invoke 71

Page

Petitioners Have Suffered No Wrong and Proved No Damage 71

Petitioners Have No Unjust Enrichment Claim.. 73

Respondents Were Not "Enriched" 73

Assuming an Enrichment, It Was Not Unjust to Petitioners 73

Petitioners' Unjust Enrichment Recovery Could Not in Any Event Exceed the Actual Loss to Them 75

Petitioners Have No Claim Arising from Fiduciary Obligations 76

The Position of the Corporation Was Not That of a Cestui Que Trust 77

Petitioners Have No Claim on Account of Duality 79

Petitioners Have No Claim Based on a Hypothetical Bargain 82

There Has Been No Unfairness to Petitioners.. 83

Petitioners' Authorities 84

E. The Corporation Cannot in Equity Deplete the Assets of Its Former Subsidiary at the Expense of Creditors Who Were Not Paid in Full 88

II. The Bar of Reorganization 89

A. The Claim Is a Claim Against the Trustees in Reorganization, and Is Invalid Because It Has Never Been Approved by the Reorganization Court 91

B. Unallowed Claims for Expenses of Administration Were Barred and Extinguished in the Western Pacific Reorganization 93

The Assumption Agreement Does Not Provide for Payment of the Holding Company's Claim 96

C. The Reorganization Bar Is Final and Can Neither Be Opened Nor Avoided 99

D. Reply to Petitioners' Contentions 100

Page

E. The Reorganization Bar Has Special Merit Against Petitioners 107

III. The Defenses of Limitations, Laches and Estoppel 107

IV. The Amount of the Tax Saving 109

V. The Decisions Below Rest Upon Undisputed Facts and on Identical Grounds. There Has Been No Error in Findings or in the Failure to Make Them and the Court of Appeals Made No Findings 115

VI. In Disposing of the Petitions for Rehearing the Court of Appeals Has Not Departed from the Accepted and Usual Course of Judicial Proceedings 118

Conclusion 123

App. Page

APPENDICES:

Appendix A—Excerpts from Relevant Statutes 1

I. Section 141, Internal Revenue Code 1

II. Section 23(g), Internal Revenue Code 3

III. Section 7(b), Bankruptcy Act 3

IV. Section 77, Bankruptcy Act 3

Appendix B—Material Relating to Allocation of Taxes by Corporations Filing Consolidated Returns 5

I. Material from the Federal Trade Commission 5

A. Report of the Federal Trade Commission on Public Utility Holding Companies 5

II. Material from the Securities and Exchange Commission 10

A. Excerpts from Securities and Exchange Commission Release No. 53, Accounting Series 10

App. Page

III. Material from the National Association of Railroad and Utilities Commissioners 17

A. Excerpts from the 1943 Report of the Committee on Accounts and Statistics of the National Association of Railroad and Utilities Commissioners 17

B. Excerpts from the 1945 Report of the Committee on Accounts and Statistics of the National Association of Railroad and Utilities Commissioners 18

IV. Material from the Treasury Department 20

A. I.T. 3637 (1944 Cumulative Bulletin 258) 20

B. I.T. 3692 (1944 Cumulative Bulletin 261) 25

C. I.T. 4085 (1952-1 Cumulative Bulletin 68) 26

D. Excerpts from T.D. 5086, Amendments to Regulations 103 (1941-2 Cumulative Bulletin 46) 28

V. Tabulation of Congressional Material Relating to Consolidated Tax Returns 29

Appendix C—Petition and Order "In the Matter of Missouri Pacific Railroad Company, Debtor," No. 6935 30

Appendix D—Value of Stock Received by Secured Creditors of the Debtor Under the Reorganization Plan 37

TABLE OF AUTHORITIES CITED

Cases	Pages
American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350	67n
Atwater v. Wheeling & L. E. Ry. Co., 56 F.2d 720	67n
Bailis v. R.F.C., 128 F.2d 857	74
Bankers Trust Co. v. Florida East Coast Car Ferry Co., 92 F.2d 450	49n, 86
Beckley v. Erie R. Co., 175 F.2d 64	90n
Bell v. Bank of California, 153 Cal. 234, 94 Pac. 889	108
Beneficial Corp. v. Commissioner, 18 T.C. ....., No. 147 (May 23, 1952)	49n
Black v. Richfield Oil Corp., 146 F.2d 801	90n
Blaustein v. Pan American Petroleum & Transport Co., 293 N.Y. 281; 56 N.E.2d 705	81
Bonney v. Seely, 2 Wend. 481 (N.Y.)	76n
Bowles v. Cudahy, 154 F.2d 891	117
Bradley Mining Co. v. Boice, 198 F.2d 790	122
Bray v. Cohn, 7 Cal. App. 124, 93 Pac. 893	108
Brown v. Gerdes, 321 U.S. 178	91, 102
Burman v. Lenkin Construction Company, 149 F.2d 827	118
Butler v. Butler's Administrator, 8 W.Va. 674	76n
Byrnes v. Missouri National Bank, 7 F.2d 978	92n
Callaway v. Benton, 336 U.S. 132	66n, 106
Case v. Los Angeles Lumber Co., 308 U.S. 106	33, 67n, 78, 82, 89
Central of Georgia Railway Co. Reorganization, 252 I.C.C. 587	48n
Chelrob, Inc. v. Barrett, 293 N.Y. 442, 57 N.E.2d 825	80, 87, 88
Chicago Deposit Vault Co. v. McNulta, 153 U.S. 554	92
Chicot County District v. Baxter State Bank, 308 U.S. 371	95
Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580	73
Commercial National Bank in Shreveport v. Connolly, 176 F.2d 1004	84n
Commercial National Bank in Shreveport v. Parsons, 144 F.2d 231	84, 85
Commissioner v. General Gas & Electric Corp., 72 F.2d 364	61n

Pages

Commissioner v. Phipps, 336 U.S. 410 62
Comstock v. Group of Institutional Investors, 335 U.S. 211 ..... 68, 80, 117
Connecticut Ry. Co. v. Palmer, 305 U.S. 493 72
Consolidated Cut Stone Co. v. Seidenbach, 189 Okla. 128, 114 P.2d 480 ..... 74n
Consolidated Rock Products Co. v. DuBois, 312 U.S. 510 ..... 66, 67, 77, 88
Cooper v. Central Alloy Steel Corporation, 43 Ohio App. 455, 183 N.E. 439 85
County of Los Angeles v. Cline, 185 Cal. 299, 197 Pac. 67 109
Crawford v. Mexican Petroleum Co. of Delaware, 130 F.2d 359 81

D. & R. G. W. Co. v. Reconstruction Finance Corporation, 328 U.S. 495 104
Dobson v. Commissioner, 320 U.S. 489 55
Douds v. Local 1250, Retail etc. Union, 170 F.2d 695 115
Duda v. Sterling Mfg. Co., 178 F.2d 428 66
Duke Power Co. v. Commissioner, 44 F.2d 543 86
Duryee v. Erie R. Co., 175 F.2d 58 ..... 81, 90n

Ecker v. Western Pacific R. R. Corp., 318 U.S. 448 ..... 6, 59
Edwards v. Lee's Administrator, 265 Ky. 418, 96 S.W.2d 1028 87
Erie Lighting Co. v. Commissioner, 93 F.2d 883 ..... 61n
Espach v. Nassau & Suffolk Lighting Co., 177 Misc. 521, 31 N.Y.S.2d 259 80
Estate of Bell, 153 Cal. 331, 95 Pac. 372 100

Fontes v. Porter, 156 F.2d 956 115
Foust v. Munson SS Lines, 299 U.S. 77 90

Galveston Elec. Co. v. Galveston, 258 U.S. 388 49
Gardner v. New Jersey, 329 U.S. 565 ..... 90, 93
Geddes v. Anaconda Mining Co., 254 U.S. 590 80
Goldie v. Cox, 130 F.2d 695 ..... 66n
Greek Catholic Congregation of Borough of Olyphant v. Plummer, 347 Pa. 351, 32 A.2d 299 ..... 75n
Gregory v. Helvering, 293 U.S. 465 ..... 54, 73

Pages

Guaranty Trust Co. v. York, 326 U.S. 99 108
Guetzkow Bros. Co. v. Breese, 96 Wis. 591, 72 N.W. 45 ..... 67n

Hall v. Creswell, 12 Gill & Johnson 26 (Md.) 76n
Hanover National Bank v. Moyses, 186 U.S. 181 105
Hazeltine Research, Inc. v. General Motors Corp., 170 F.2d 6 118
Hellier v. Baush Machine Tool Co., 21 F.2d 705 ..... 81, 82
Helvering v. Cement Investors, 316 U.S. 527 60
Helvering v. Morgan's, Inc., 293 U.S. 121 ..... 61n, 86
Hopkins v. Detrick, 97 C.A.2d 50, 217 P.2d 78 85
Houck v. Hubbard Milling Co., 140 Minn. 186, 167 N.W. 1038 74n

In re Beck, 92 Fed. 889 ..... 66n
In re Chicago, R.I. & P. Ry. Co., 168 F.2d 587 108
In re Colorado & S. R. Co., 84 F. Supp. 134 ..... 90n
In re Commonwealth Light & Power Co., 141 F.2d 734 68
In re Connecticut Co., 95 F.2d 311 ..... 66n
In re Ducker, 134 Fed. 43 81
In re Erie Lumber Co., 150 Fed. 817 ..... 92n
In re Floyd's Estate, Del. Co. Orphans Ct., No. 113 (Pa. 1950), 51-2 U.S.T.C., Par. 9415 ..... 66n
In re Hines, 69 F.2d 52 ..... 66n
In re Missouri Pacific Railroad Co., Docket No. 6935 (E.D. Mo. 1947) ..... 50n, 86, App. 30
In re Peyton Realty Co., 148 F.2d 771 ..... 90n, 105n
In re Songood Realty Co., 32 F. Supp. 121 ..... 66n
In re Watts and Sachs, 190 U.S. 1 100
In re Western Pacific R. Co., 34 F. Supp. 493 60
Insurance Group v. D. & R. G. W. R. Co., 329 U.S. 607 ..... 58, 60, 89
International Radio Telegraph Co. v. Atlantic Communication Co., 290 Fed. 698 ..... 81, 82
Isaacs v. Hobbs Tie & T. Co., 282 U.S. 734 ..... 82, 100

J.C.F. Holding Corp. v. General Gas & Electric Corp., 181 Misc. 283, 46 N.Y.S.2d 605 81
Jacobson v. Mead, 12 C.A.2d 75, 55 P.2d 285 108
Jordahl & Co., 35 B.T.A. 1136 ..... 47n

Kelley v. Caplice, 23 Kan. 3[illegible], aff'd 27 Kan. 359 ..... 67n
Kendrick v. Forney, 22 Gratt. 748 (Va.) 76n

	Pages
Koppers Co., 8 T.C. 886, 11 T.C. 894	49n, 86
Krier v. Krier, 28 C.2d 841, 172 P.2d 681	100
Lain v. Rennert, 308 Ill. App. 572, 32 N.E.2d 375	67n
Lang v. Commissioner, 97 F.2d 867	120n
Lazzarevich v. Lazzarevich, 88 C.A.2d 708, 200 P.2d 49	108
Leavenworth County Commissioners v. Chicago, Rock Island & Pacific Ry. Co., 134 U.S. 688	80
Leiman v. Guttman, 336 U.S. 1	93
Local Loan Co. v. Hunt, 292 U.S. 234	95
Manufacturers Trust Co. v. Becker, 338 U.S. 304	78
McColgan v. Maier Brewing Co., 134 F.2d 385	90n, 108
Meriwether v. Garrett, 102 U.S. 472	50, 54
Michigan v. Michigan Trust Co., 286 U.S. 334	91
Mohonk Realty Corp. v. Wise Shoe Stores, 111 F.2d 287	90n, 105n
Montezuma Canal v. Smithville Canal, 218 U.S. 371	99
Muncie Gear Co. v. Outboard Co., 315 U.S. 759	118
Myers v. Louisiana & A. Ry. Co., 7 F. Supp. 97	80
Naylor v. Cantley, 96 F.2d 761	100
New York v. Irving Trust Co., 288 U.S. 329	94
North American Car Corp. v. Peerless W. & V. Mach. Corp., 143 F.2d 938	90n
North American Co. v. S.E.C., 327 U.S. 686	52
Northern Finance Corp. v. Burns, 5 F.2d 11	92n
Northern Pacific Ry. v. Boyd, 228 U.S. 482	89
Northern Pacific Railway Co. v. Slaght, 205 U.S. 122	99
Oedekerk v. Muncie Gear Works Inc., 179 F.2d 821	117
Oswald v. El Centro, 211 Cal. 45, 292 Pac. 1073	67n
Pepper v. Litton, 308 U.S. 295	66
Phillips-Jones Corp. v. Parmley, 302 U.S. 233	56
Piedmont Ice & Coal Co. v. American Service Co., 130 F.2d 78	108
Railroad Company v. United States, 103 U.S. 703	108
Rees v. Schmitz, 164 Ill. App. 250	67n
Reinecke v. Gardner, 277 U.S. 239	91
Richter v. Henningsan, 110 Cal. 530, 42 Pac. 1077	108

	Pages
Rosaly v. Gonzales, 106 F.2d 169	80
Russo v. Hosmer, Inc., 312 Mass. 231, 44 N.E.2d 641	75n
Schilling v. Schwitzer-Cummins Co., 142 F.2d 82	117
Seaboard Air Line R. Co. v. Savannah Union Station Co., 181 F.2d 267	100n
Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80	79n
S.E.C. v. United States Realty Co., 310 U.S. 434	65
Sellers v. Bell, 94 Fed. 801	66n
Smith v. Illinois Bell Tel. Co., 282 U.S. 133	49, 57n
415 South Taylor Building Corp., 2 T.C. 184	101n
Southern Pacific v. Bogert, 250 U.S. 483	56
Spreckels, J.D. & A.B. Co. v. Commissioner, 41 B.T.A. 370	72n
St. Louis-San Francisco Railway Co. Reorganization, 257 I.C.C. 399	48n
Stagg v. Insurance Company, 10 Wall. 589	109
Standard Steel Works v. American Pipe & Steel Corp., 111 F.2d 1000	90n
Stoll v. Gottlieb, 305 U.S. 165	95, 106
Straube v. Bowling Green Gas Co., 360 Mo. 132, 227 S.W.2d 666	74
Succession of Dinkgrave, 31 La. Ann. 703	76n
Taylor v. Standard Gas Co., 306 U.S. 307	56, 89
Texas and Pacific Railway Co. v. Bloom, 164 U.S. 636	103
Texas and Pacific Railway Co. v. Johnson, 151 U.S. 81	103
Textile Mills S. Corp. v. Commissioner, 314 U.S. 326, affirming 117 F.2d 62	40, 120n
Thompson v. Texas Mexican R. Co., 328 U.S. 134	105, 106
Tilney v. City of Chicago, 134 F.2d 682	72
Tilt v. Kelsey, 207 U.S. 43	95
Trice v. Comstock, 121 Fed. 620	68n
Trower v. San Francisco, 157 Cal. 762, 109 Pac. 617	108
Truncale v. Universal Pictures Co., 76 F. Supp. 465	87
Ullman v. May, 147 Ohio 468, 72 N.E.2d 63	102
Union Pac. R. R. Co. v. Public Service Comm., 248 U.S. 67	67n
Union Trust Co. v. Illinois Midland R. Co., 117 U.S. 434	92n
United States v. Bethlehem Steel Corp., 315 U.S. 289	67n

Pages

United States v. Butler, 297 U.S. 1 ..... 50, 54
United States v. Butterworth-Judson Corp., 269 U.S. 504 60
United States v. California & Ore. Land Co., 192 U.S. 355 99
United States v. Donaldson Realty Co., 106 F.2d 509 ..... 61n
United States v. Throckmorton, 98 U.S. 61 106
U. S. Fidelity & Guaranty Co. v. Bray, 225 U.S. 205 ..... 82, 105

Vanderbilt University v. Williams, 152 Tenn. 264, 280 S.W. 689 ..... 75n

Western Pac. R. Co. Reorganization, 230 I.C.C. 61 ..... 5, 6
Western Pac. R. Co. Reorganization, 233 I.C.C. 409 ..... 6, 88
Williams v. Southern Pacific R. Co., 150 Cal. 624, 89 Pac. 599 .. 108
Woolford Realty Co. v. Rose, 286 U.S. 319 86

Young v. Higbee Co., 324 U.S. 204 ..... 54n, 65, 67n

STATUTES AND REGULATIONS

Bankruptcy Act:
Sec. 7(b) ..... 66n, App. 3
Sec. 77 ..... 3, 81, 90, 93, 99, 103, 104, 107, App. 3
Sec. 77(b) 90
Sec. 77(c)(1) 107
Sec. 77(e) ..... 91, 92, 98, App. 4
Sec. 77(f) ..... 94n, App. 5
Sec. 77(l) ..... 66n, App. 5

Bankruptcy Rules 81
General Order 44 ..... 81, 107

California Code of Civil Procedure, Sec. 339(1) 108
California Corporations Code, Sec. 15030 ..... 68n

Federal Rules of Civil Procedure, Rule 52(a) 115

Internal Revenue Code:
Sec. 23(g) ..... 12, App. 3
Sec. 23(g)(4) ..... 3, 55n, 76, App. 3
Sec. 51(b) 54
Sec. 52 ..... 101n
Sec. 122(b) 13

Pages

Internal Revenue Code (Continued):
Sec. 127(c) 44
Sec. 129 54
Sec. 141 ..... 3, 55, 61, 69n, App. 1
Sec. 141(b) ..... 69n, App. 1
Sec. 141(d) ..... 52, App. 2

Public Utility Holding Company Act of 1935 52

Revenue Act of 1918, Sec. 240(b) 61n
Revenue Act of 1921, Sec. 240(b) 46n
Revenue Act of 1924 ..... 46n
Revenue Act of 1926 ..... 46n

Securities and Exchange Commission Regulations, Rules and Releases:
Rule U-45(b)(6) 27, 38, 43, 50n
Release No. 53, Accounting Series "In the Matter of 'Charges in Lieu of Taxes'", November 16, 1945, 3 C.C.H. Fed. Sec. Law Serv. 2d Ed., Par. 72,071; 61 P.U.R. (NS) 193 ..... 42n, 45, 111n, App. 10
Release No. 4444, July 28, 1943, "In the Matter of Consolidated Electric Gas Company, The Islands Gas & Electric Company", 13 S.E.C. 649 44
Release No. 4806, January 3, 1944, "In the Matter of Consolidated Electric & Gas Company", 15 S.E.C. 161 45
Release No. 5535, January 3, 1945, "In the Matter of Cities Service Company", 17 S.E.C. 839 44

Treasury Regulations, Rulings and Decisions:
G.C.M. 12208, Cum. Bull. XII-2, p. 87 ..... 101n
I.T. 3637, 1944 Cum. Bull. 258 ..... 46n, App. 20
I.T. 3692, 1944 Cum. Bull. 261 ..... 46n, App. 25
I.T. 4085, 1952-1 Cum. Bull. 68 ..... 46n, App. 26
Reg. 75, Art. 15(a) (1928) 46n
Reg. 78, Art. 15(a) (1932) 46n
Reg. 89, Art. 15(a) (1934) 46n
Reg. 97, Art. 15(a) (1936) 46n
Reg. 102, Art. 15(a) (1938) 46n
Reg. 104 ..... 47n

Pages

Treasury Regulations, Rulings and Decisions (Continued):
Reg. 104, Sec. 23.11 ..... 69n
Reg. 104, Sec. 23.15(a) (1942) 46n
Reg. 104, Sec. 23.15(b) 46n, 101n
Reg. 104, Sec. 23.16 17
Reg. 104, Sec. 23.34(c) 47n
Reg. 110 ..... 47n
Reg. 110, Sec. 33.11 ..... 69n
Reg. 110, Sec. 33.31(e) 12, 113
Reg. 110, Sec. 33.31(f) 113
Reg. 129, Sec. 24.31(d) 113n
Reg. 129, Sec. 24.31(e) 113n
T.D. 5086, Amendments to Regulations 103, 1941-2 Cum. Bull. 46-7 ..... 46n, App. 28
T.D. 5244, 1943 Cum. Bull. 439 ..... 113n
T.D. 5245, 1943 Cum. Bull. 801 ..... 113n

Uniform Partnership Act, 7 U.L.A. Sec. 30 ..... 68n

11 U.S.C. Sec. 205 ..... 3, 81, 90, 94n
26 U.S.C. Sec. 141 3
28 U.S.C.:
Sec. 46 ..... 3, 38, 39, 40
Sec. 46(c) 40, 119, 120n
Sec. 212 10
Sec. 959 105
Sec. 1254(1) 2

United States Supreme Court Rules 33 ..... 123n

TEXTS, TREATISES AND OTHER MATERIAL

Barnes, The Economics of Public Utility Regulation (1947) p. 73 ..... 61n

Bonbright and Means, The Holding Company (1932) p. 147 ..... 61n

16 California Jurisprudence, p. 429 108

3 Collier on Bankruptcy (14th ed.) Par. 62.30 p. 1573 ..... 66n

Congressional Reports and Hearings:
Hearings before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., on H.R. 5423, pp. 153, 849, 992, 1061, 1522 ..... 53n

Pages

Congressional Reports and Hearings (Continued):

Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1725, pp. 83, 122, 255, 557, 822, 873-4 ..... 53n

Hearings before the Senate Finance Committee on the Revenue Act of 1928 ..... App. 29

Hearings before the Senate Finance Committee on the Revenue Act of 1932, p. 24 ..... App. 29

Hearings before the House Ways and Means Committee on the Revenue Revision of 1934, pp. 86, 99 ..... 51n, App. 29

Hearings before the Senate Finance Committee on the Revenue Act of 1934 ..... App. 29

Hearings before the Senate Finance Committee on the Revenue Act of 1940 ..... App. 29

Hearings before the House Ways and Means Committee on Revenue Revision of 1942 ..... App. 29

Joint Hearings of the House Ways and Means Committee and the Senate Finance Committee on Excess Profits Taxation, 1940 ..... App. 29

House Ways and Means Committee Reports on the Revenue Bills of 1921, 1928, 1934 ..... App. 29

Memorandum of the Senate Finance Committee on the 1918 Revenue Act, p. 9 ..... 51n, App. 29

Preliminary Report of Sub-Committee of House Committee on Ways and Means on Prevention of Tax Avoidance, 1933 ..... App. 29

Report of Joint Committee on Internal Revenue Taxation on the Revenue Act of 1926, p. 63 ..... 51n

Report of Senate Finance Committee on the Revenue Act of 1928, Sen. Rep. No. 960, 70th Cong., 1st Sess., pp. 1, 13, 29 ..... 51n

Report of Senate Finance Committee on the Revenue Act of 1932, Sen. Rep. No. 665, 72d Cong., 1st Sess., p. 9 ..... 51n

Report of House Ways and Means Committee on the Revenue Act of 193- H. Rep. 704, 73d Cong., 2d Sess., p. 16 .. 51n

Senate Finance Committee Reports on the Revenue Bills of 1918, 1921, 1928, 1932, 1934 ..... App. 29

Pages

2 Dewing, The Financial Policy of Corporations (4th ed. 1941) pp. 1042, 1051 ..... 61n

16 Fletcher, Corporations (Perm. Ed.) Sec. 8174 ..... 69n

8 Mertens, Law of Federal Income Taxation (1942) Sec. 46.13, p. 426 ..... 61n

Moody's Industrial Manual 1941, p. 2598 ..... 49n, 86

National Association of Railroad and Utilities Commissioners Material:
Excerpts from 1943 Report of Committee on Accounts and Statistics ..... 49n, App. 17
Excerpts from 1945 Report of Committee on Accounts and Statistics ..... 49n, App. 18

Restatement of Restitution:
Sec. 1, p. 13 74
Sec. 80, p. 356 76
Sec. 107, p. 447 102
Sec. 155, p. 618 76
Sec. 149, p. 596 76

3 Scott on Trusts (1939) Sec. 344 ..... 68n

Summary Report of the F.T.C. to the Senate pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., Part 72-A
Sen. Doc. No. 92, 70th Cong., 1st Sess., p. 479 ..... 48n, App. 5
pp. 69-70 ..... App. 9
p. 311 ..... 61n
pp. 477-479 ..... App. 5

Treasury Department Release, "Consolidated Returns and Intercorporate Dividends," June 9, 1948, p. 12 62
Treasury Press Release No. 44-54, December 31, 1944, p. 16 ..... 41n
Treasury Press Release No. V-229, February 25, 1946, pp. 6, 10 ..... 41n
Treasury Report, Statistics of Income for 1944, Part 2, Preliminary, pp. 10-11 ..... 41n
Treasury Report, Statistics of Income for 1941, Part 2, p. 293 ..... 41n

In the Supreme Court of the United States

OCTOBER TERM 1952

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver, *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 150
MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 160

Brief for Respondents

OPINIONS BELOW

The opinion of the District Court (R. 258), is reported at 85 F. Supp. 868. The Court of Appeals opinions on the merits (R. 2214, 2239) are reported at 197 F.2d 994; the opinions concerning rehearing procedures (R. 2260, 2261, 2288, 2296, 2313) are reported at 197 F.2d 1012. The supplement to the dissenting opinion of Chief Judge Denman (R. 2313) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered October 29, 1951 (R. 2255). The order of that court denying the petitions for rehearing and striking them, in so far as they sought rehearing in banc, was entered January 30, 1952 (R. 2259). On July 9, 1952, six of the seven judges of the Court of Appeals concurred in denying a motion to reinstate the petitions for rehearing, Chief Judge Denman dissenting. The petitions for a writ of certiorari were filed on June 23 and June 26, 1952, and granted October 13, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS INVOLVED

1. A holding company owned the stock of its subsidiary, an operating railroad company. That stock was determined to be valueless in a reorganization proceeding in which the holding company participated. Thereafter, in accordance with 25 years of prior practice, consolidated income tax returns were filed by the holding company for the members of the railroad group, including the trustees of the bankruptcy court. As a consequence of those returns income earned by the trustees was offset in large part by the loss of the holding company, thereby reducing the taxes otherwise payable by the trustees. Does the holding company have a claim for the taxes thus "saved"?

2. Does the failure of the holding company, a party to the reorganization proceeding, to present its "tax saving" claim to the bankruptcy court bar that claim even though it were otherwise valid?

3. Is the claim, even though otherwise valid, barred by limitations, estoppel and res judicata?

4. If the claim were valid and enforceable, what is the amount of the "tax saving" to which it relates and how would the claim for a "tax saving" payment be measured?

5. Did the Court of Appeals, having denied the petition for rehearing, err in striking the petition for rehearing in banc as "being without authority in law or in the rules or practice of this court"?

STATUTES INVOLVED

1. The consolidated returns were filed under Section 141 of the Internal Revenue Code (26 U.S.C. Sec. 141) and the provisions of Treasury Regulations 104 and 110. The stock loss deduction is authorized by Section 23(g)(4) of the Code, enacted in October, 1942.

2. The reorganization proceeding was conducted under Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205).

3. Section 46 of the Judicial Code (28 U.S.C. Sec. 46) contains provisions for hearings and rehearings in banc in the Courts of Appeals.

STATEMENT

This case brings here a claim rejected as invalid by both courts below and which, even if it were valid, could not now be allowed without nullifying the finality of a reorganization proceeding and disrupting the control of the bankruptcy court over the expense of that proceeding. The position of petitioners is without support in the precedents; it has never been approved by any disinterested person; it is radically at odds with the uniform practice of the Western Pacific group and the business community; and it is contrary to the conclusions of the Securities and Exchange Commission, the Federal Trade Commission and the Inter-

state Commerce Commission, the agencies of government most directly concerned with the regulation of holding company systems.

The circumstances of the case are related below and in greater detail than would ordinarily be appropriate for a brief here. The reason is that petitioners have briefed a case quite remote, in many fundamentals, from the case in the record. To correct, point by point, the inaccuracies and distortions appearing in petitioners' briefs would be a lengthy process of little assistance to the Court. Respondents believe that the Court can better be served by an accurate description of what the record reveals.

The facts, demonstrating that these were honest transactions honestly and openly conducted, are these:

The petitioner Corporation, a holding company, acquired all the stock of the operating railroad company in 1916, following the first Western Pacific bankruptcy (R. 493). The Corporation, as sole owner of the operating company, took charge of that company's affairs and managed the railroad from the Corporation's New York office (R. 737). That office was the head office of the system (R. 737) where policy was established and all significant decisions were made (R. 740-2). The expense of the office was divided between the Corporation and the operating company (R. 643-4).

In the fashion customary for holding company systems, the Corporation arranged for its officers to become officers of the operating concern: Thomas M. Schumacher, president of the Corporation, became the chief executive of the operating company (Ex. P. 34B,[1] R. 531, 519, 1719, 522,

[1]Trial exhibit numbers cited herein refer to exhibits which, with leave of Court, have not been printed.

1724); Michael J. Curry, the Corporation's Secretary and Treasurer, became a vice-president of the operating company (R. 519, 1719, 522, 1724, 640); and somewhat later Pierce & Greer, counsel for the Corporation in this litigation, became, on Mr. Schumacher's recommendation (R. 793), general counsel for the Corporation and counsel for the operating railroad (R. 793, 1031). Petitioners now criticize these "dualities". It must be plain, however, that the "dualities" were created by the Corporation itself for its own management purposes and, moreover, that what was done here is the accepted practice in holding company systems. Petitioners also attack the James interests. The record reveals, however, no more than this: that in 1925 Arthur Curtiss James acquired, directly or indirectly, approximately 61% of the common and 8.8% of the preferred stock of the Corporation (R. 501) and that until February, 1942, the James interests had a representative on the Corporation's Board (R. 1480, 520, 1720). Since then the James interests have had no special Board representation and nothing has been discovered to suggest that Mr. James and his associates failed in loyalty to the Corporation. Indeed, the James interests continued to support the Corporation by loaning it money long after it became apparent that in all probability the loans would never be repaid (R. 776, 1854-8).

The Corporation managed its subsidiary, the operating company, for nearly twenty years (R. 737, 740-2). In 1935 the company became unable to pay the interest on its large bonded indebtedness to the public and a second reorganization proceeding was begun (230 I.C.C. 61, 64). In October of that year trustees were appointed by the bankruptcy court

to take charge of the railroad properties (R. 1184-9, 1916, 1923). Those trustees were Sidney M. Ehrman, a San Francisco lawyer (R. 1223-4), and Thomas M. Schumacher, president of the Corporation, who became a trustee upon its recommendation (R. 1627). Charles Elsey, later to become president of the reorganized company, was managing agent for the trustees (R. 1224, 1251). The trustees operated the railroad for over nine years. The properties were returned to the reorganized company on December 31, 1944 (R. 36-108, 1711). This case relates to income received by the trustees during the period of their operation and to taxes on that income.

Under the reorganization plan formulated by the Interstate Commerce Commission (230 I.C.C. 61, 233 I.C.C. 409) and approved by this Court (*Ecker v. Western Pacific R. R. Corp.*, 318 U.S. 448) the new bonds of the reorganized company, in the total amount of $10,000,000, were issued to the Reconstruction Finance Corporation (Par. O, 233 I.C.C. 451), which had loaned money to the reorganization trustees for the purpose of rehabilitating the railroad properties. The public, holding the old first mortgage bonds, had to exchange those bonds for income bonds, preferred and common stock (Par. P(2), 233 I.C.C. 451). The stock of the old company, owned by the Corporation, was declared valueless and ordered cancelled (Par. P(7), 233 I.C.C. 452). The plan assigned certain values to the securities of the new company: par for the bonds and preferred stock and $57 to $62 per share for the common (233 I.C.C. 417). On this valuation the junior secured creditors of the old company were unpaid by $3,495,900 plus interest (R. 1220-2, 2021). With trivial exceptions, moreover, the new company securities have

never had, by a wide margin, the value the plan ascribed to them (Appendix D). Thus, whatever may be the situation in other cases, the reorganization plan in this instance was obviously no more drastic to the junior interests than circumstances required.

The Corporation, like most holding companies, depended for revenue on interest and dividends from its subsidiaries, in this instance the operating company and (to the extent of a half interest) the Denver & Rio Grande Western Railroad Company (R. 748). When both the Western Pacific and the Rio Grande properties were placed in reorganization the Corporation had little income (R. 774, 1854) and its financial situation grew critical. For a time it succeeded in paying its share of the New York office expense by borrowing from its secured creditors, including the James interests (R. 771-2, 776, 1854). When these advances stopped, the Corporation renewed its earlier suggestion (R. 771, 1839, 1845, 1852-3) that the trustees of the bankruptcy court assume a larger share of the office expense. The trustees, after consultation with the bankruptcy court (R. 1230-1) and to the knowledge and with the approval of the Corporation directors (R. 1002-3) agreed to assume and beginning June 1, 1943 did assume all the expense, including salary expense, of maintaining the New York office (R. 527, 1738). This arrangement had no relation to tax problems of the trustees (R. 1245, 1257). It was suggested by the Corporation itself and accepted by the trustees only because Mr. Schumacher, the New York trustee, needed a New York office (R. 1244-5, 1257) and because the Corporation, with no income, was desirous to stay active at least until the final result of both reorganizations was known. As a further economy measure, Mr.

Schumacher resigned as president of the Corporation (R. 743) and Mr. Curry, theretofore secretary and treasurer of the Corporation (R. 519, 1719), was selected by the Board as his successor (R. 644, 1016). Upon the resignation of Mr. Schumacher the officers of the Corporation became Mr. Curry and two office employees, Mary Valouch and J. F. Wienken (R. 519, 1719) and its directors, in addition to Mr. Schumacher and Mr. Curry, were A. Perry Osborn, Willis D. Wood, H. Brua Campbell and four employees of the New York office appointed to fill vacancies occurring during the reorganization period (R. 520, 1720).

The Corporation now complains about the character and competence of its officers and directors. It is hardly the part of respondents to defend Corporation personnel against an attack by Corporation counsel, but in the interest of fairness it should be said that there is no justification for counsel's criticism. Mr. Schumacher was a thoroughly experienced railroad executive (R. 637, 1231), characterized by petitioners themselves as a man "of great ability and great honesty of character" (R. 993). Mr. Curry, Mr. Schumacher's successor as president of the Corporation, had been for many years Mr. Schumacher's principal assistant in managing Corporation affairs (R. 736, 1135) and, according to the District Judge who heard him testify, he was "a perfectly competent man, intelligent, and probably a pretty good railroad man" (R. 785). Mr. Osborn was an experienced New York lawyer who, until his death, was of counsel for the Corporation in this case and who came to its Board at the suggestion of the Chase National Bank (R. 990). Mr. Wood was a broker (R. 1121), past governor of the New York Stock Exchange (R. 1122) and a director of many

well-known companies (R. 1122-23). Mr. Campbell was a member of the firm of Pierce & Greer, counsel for the Corporation here. For its lawyers the Corporation had in the reorganization proceeding Judge M. C. Sloss of San Francisco, a former Justice of the Supreme Court of California, a man whose competence and integrity are beyond question (R. 1600, 1603), and, as general counsel, Messrs. Pierce & Greer, who for thirty years have represented large railroad organizations (R. 1030) and who, during the period in question, were vigorously looking after the Corporation's welfare by prosecuting various claims on its behalf, including another suit against respondents (R. 1048-52). Mr. Nicodemus, the senior partner of Pierce & Greer, is sufficiently experienced in litigation to be on the Corporation's brief in this Court and he had had sufficient tax experience to be the 1943 chairman of a special tax committee organized by the railroads (R. 1034-35). The officers and directors of the Corporation and each of its lawyers all testified that they did their best on behalf of the Corporation in an independent fashion and free of any influence or control by anyone (Curry, R. 744, 747-8; Osborn, R. 1011-12, 1014-15; Wood, R. 1126; Hatton, R. 1136; Sheehan, R. 1143; Nicodemus, R. 1040, 1046; Sloss, R. 1610-11). There is not a word in the record to support a contrary conclusion.

Railroads and other large enterprises customarily file consolidated tax returns, one effect of which is that losses of one member in the holding company system offset the income of other group members. The return thus reflects the true income of the enterprise and the tax is measured accordingly. Under a consolidated return a single tax is calculated and paid for the parent and all its subsidiaries.

That tax must thereafter be allocated among the group members and the accepted and approved practice is to allocate the tax to those members of the group having taxable incomes and in proportion to those incomes. Payments such as those demanded by petitioners, that is, payment from one group member to another on account of taxes "saved" by filing a consolidated return, are not made.

Each year beginning in 1918 the petitioner Corporation filed consolidated returns for the Western Pacific group and under its direction the tax was allocated to and paid by the group members in the customary fashion and with no tax saving payments (R. 1258-9, 1262, Ex. D. 40, R. 1516-17). Each year the consolidated returns were prepared in the New York office, signed there and filed with the New York Collector of Internal Revenue (R. 1258-9, 843-4, Ex. D. 40). For fifteen years, from 1927 forward, the returns were prepared under the supervision of Mr. Curry, the Corporation treasurer (R. 844-6). Never at any time were the returns submitted to the directors for approval or discussion at Board meetings (R. 846). This identical practice continued during the period of trustee operation of the railroad properties (R. 1263). During part of that period, and particularly during the war years, the income of the trustees was large and in the absence of consolidated returns the trustees would have been required to pay a substantial tax to the United States. For reasons about to be explained, consolidated returns reduced those taxes. The first year of so-called tax saving is 1942.

The 1942 Western Pacific returns were prepared in tentative form early in 1943 in the New York office under the supervision of Mr. Curry, who signed and filed them on

March 15, 1943 (R. 821). They were consolidated returns and the 1942 losses of the Corporation were used to offset in part the income of other group members (R. 823-5, 1881-83). Shortly after these tentative returns were filed Mr. Nicodemus, counsel for the Corporation in this case, who had discussed the tentative returns with Mr. Curry (R. 697-8), suggested to Mr. Schumacher, one of the trustees, that in view of the large income received by the trustees from the railroad properties the trustees would do well to obtain expert tax advice and he suggested for that service the New York law firm of Whitman, Ransom, Coulson & Goetz (Ex. P. 39B, R. 544-5, 1079). James K. Polk of that firm had worked with consolidated returns for many years, both in and out of the Bureau of Internal Revenue (R. 1396-8). Mr. Schumacher consulted Mr. Ehrman, his co-trustee, and they decided to employ the Whitman firm (R. 543, 547, 1746, 1233).

Mr. Polk approached his task in exactly the fashion to be expected of any competent tax lawyer. His obvious responsibility was to obtain for the Western Pacific group the lowest tax consistent with the Revenue Acts. Accordingly he reviewed the tax history of the group (R. 1400), arranged for an independent tax accountant to assist in the preparation of the returns (R. 1402), computed the tax on a variety of assumptions (R. 1404, 1444-5) and recommended consolidated returns as final returns for 1942 (R. 1444). One important reason for consolidated returns was to make available the operating loss carry-overs and excess profits credits, amounting to several million dollars, accumulated by the trustees in prior years (R. 922). These carry-overs and credits could operate to reduce trustee taxes for

1942 only if consolidated returns were filed (Treas. Regs. 110, Section 33.31(e) and (f)). The 1942 returns, prepared as always in the New York office (R. 830), and signed and filed by Mr. Curry, president of the Corporation, on May 15, 1943 (R. 831, 837), reported a consolidated tax of $4,201,821.54 (Ex. P. 3 A/B, R. 490-1). With insignificant exceptions this tax resulted from the earnings of the bankruptcy court trustees (Ex. D. 40, R. 1516-17) and accordingly funds were provided from the bankruptcy estate to pay the tax (R. 824, 1306-07). The trustees allocated to the subsidiaries of the operating company, in accordance with the traditional formula, the small amount of tax owing from them (Ex. D. 40, R. 1516-17). The Corporation having no taxable income, paid no tax (R. 1552, 2040).

Shortly after the 1942 returns were filed Mr. Polk orally reviewed the tax situation with Mr. Curry, the Corporation president, and Mr. Nicodemus, Corporation counsel (R. 839, 1079-80) and immediately thereafter prepared a detailed written report dated May 20, 1943, which was addressed to Mr. Curry (R. 591, 1757) and circulated to Mr. Schumacher (R. 862) and Mr. Nicodemus (R. 862, 1884), who reviewed it together (R. 864). A copy of the report was provided to Mr. Elsey in San Francisco (R. 1266). The report suggested, among other things, that it was possible that under a then recent amendment to Section 23(g) of the Internal Revenue Code the loss of the Corporation, upon a determination that its stock in the operating company was worthless, would constitute a consolidated return offset to income of other group members (R. 591, 1757).

During the fall of 1943 the courts approved the reorganization plan and thus there was a final determination that

the Corporation's stock in the operating company was worthless. The loss of the Corporation's investment in the operating company, calculated for tax purposes at $73,478,023.04, greatly exceeded group income for 1943 (Exs. P. 4A/B, R. 491, Ex. D. 40, R. 1517). As an economic matter that loss had occurred over the years as the operating company became increasingly insolvent. As a tax matter, however, the loss was realized when the order confirming the reorganization plan became final in November 1943 (Ex. P. 54, R. 605-10, 1409-10). It was therefore a 1943 loss.

Consolidated returns for 1943 reporting the loss of the Corporation as an offset to group income were prepared as in all prior years in the Corporation's New York office (R. 1414), signed by Mr. Curry (R. 664) and filed by him on July 15, 1944 (Exs. P. 4A/B, R. 491). Mr. Curry had been consulted from time to time in connection with the preparation of the returns (R. 1415) and he knew that the Corporation's loss was taken as a deduction (R. 682, 702-4). The returns reported no tax owing (Exs. P. 4A/B, R. 491).

Some months earlier the reorganization trustees, recognizing the uncertainties in the 1943 tax situation, had asked the bankruptcy court for leave to establish a reserve for taxes (R. 619, 1772). A hearing was held (R. 1270-4); the tax situation was reviewed (R. 1267, 2023, 1270-4); and an order was entered approving a reserve of $7,100,000 for tax purposes (R. 1086, 1895). Judge Sloss and Mr. Nicodemus, attorneys for the Corporation, received notice of the hearing and copies of the order of the court (R. 1991, 1217).

Under the provisions of the Internal Revenue Code (Sec. 122(b)) the 1943 loss of the Corporation could be carried backward and forward to offset group income for earlier

and later periods. Accordingly, a claim for refund of the 1942 taxes paid by the trustees was prepared by Mr. Polk as a routine matter (R. 1450), signed by Mr. Curry (R. 667), and filed in ordinary course on March 9, 1945 (R. 492, 1654). The 1944 returns reporting no tax owing (Exs. P. 5A/B, R. 492) were signed and filed by Mr. Curry (R. 666) on June 15, 1945 (Exs. P. 5A/B, R. 492). The effect, however, of the Corporation's loss on group taxes did not extend beyond the first four months of 1944. For on May 1st of that year, with the approval of the bankruptcy court (R. 1192, 1930), the stock of the operating company owned by the Corporation was transferred to the reorganization committee for cancellation (R. 493). This terminated the affiliation between the Corporation and the other group members and thus the possibility of filing consolidated returns for a subsequent period was eliminated.

After the returns for 1942 and 1943 and the 1942 refund claim had been filed but before the 1944 returns were completed, the New York office of the Corporation was closed (R. 650A, 891). This left Mr. Curry, who had been with the Western Pacific group for more than twenty years, without a satisfactory source of income (R. 1017, 1110, 1496). Conversations on his behalf were held by Mr. Nicodemus and Mr. Osborn with Mr. Coulson of the Whitman firm (R. 1017, 1110) and arrangements were eventually made to provide Mr. Curry with quarters in the Whitman offices in New York (R. 651). Mr. Curry also received a small retainer to stand by to assist in tax matters if, upon the audit of the returns, his services were required (Ex. P. 33, R. 529). The Corporation directors were familiar with this arrangement (R. 899, 901-3, 1017) and Mr. Curry's

testimony made it clear that during the period his office and files were in the Whitman suite he was quite free to take any action he though advisable in the Corporation's interest (R. 904).

In view of the large amounts involved, it was inevitable that the Bureau would carefully audit the Western Pacific returns. That audit took place during 1946 and 1947 and Mr. Polk, holding powers of attorney from all group members, including both the Corporation and the company (R. 626, 1784, R. 1441), represented the group in that connection. Correspondence (R. 626, 1779) and conferences between Mr. Polk and Bureau representatives (R. 1418-20, 1423-31) culminated in a proposal that the United States accept the returns as filed and deny the refund claim designed to recover the 1942 tax (R. 2142). This meant, in effect, that the tax liability for the entire period of two years and four months would be discharged by the payment of $4,201,821.54. Mr. Polk, with the approval of the reorganized company (R. 683, 1801) which was responsible for the taxes of the trustees (R. 499, 1711), submitted this proposal to the Bureau on February 11, 1947 (R. 2142). On April 2, 1947, he advised the Corporation in detail (R. 669, 1788). In the meantime and on October 16, 1946 this litigation had begun (R. 5). After a good deal of negotiating and following a stipulation in this proceeding recognizing that the tax moneys received by the United States were intended to apply pro rata over the entire period involved (R. 493, 1658), the directors of the Corporation by formal action approved the settlement proposal (R. 1103, 1644-5). On August 13, 1947 the proposed settlement was accepted by the Bureau (R. 492, 1664-5).

Petitioners complain that the Corporation was uninformed as to these tax transactions. The record contains overwhelming evidence to the contrary. The consolidated returns were prepared in the Corporation's office (R. 829-30, 844-6, 1258-9, 1414) as long as the office was open (R. 891, 1287) and were signed and filed by its president (R. 663-66, 831, 837). The Corporation had, therefore, an immediate and unimpeachable source of information as to the nature and content of those returns. In addition, the Corporation had, among other things, Mr. Polk's oral report on tax matters to Mr. Curry and Mr. Nicodemus on May 18, 1943 (R. 839, 1079-80), Mr. Polk's letter of May 20, 1943 (R. 588, 1757) reviewing the tax situation in detail, the annual reports of the trustees which discussed tax problems (Exs. P. 20-B, 20-C, R. 511-14, 1279) and the order of the bankruptcy court establishing a tax reserve (R. 1216, 1991, 703, 1085). Mr. Curry, the Corporation president, had handled tax matters for the Western Pacific group for many years (R. 841-45). He fully appreciated the difference between consolidated and separate returns (R. 1637, 2087-90) and he thoroughly understood the effect of these particular returns, as evidenced by the fact that he wrote to Mr. Nicodemus explaining them (R. 705, 2125). Mr. Schumacher was familiar with the tax transactions throughout (R. 876-77); Mr. Osborn, another director, knew that consolidated returns resulting in substantial benefits to the trustees were being filed (R. 1019-22); Mr. Wood did not doubt that consolidated returns would be used (R. 1132-3). Since the Corporation would pay no tax in any event (R. 1551, 2040), it had no financial interest in tax matters but, nevertheless, the returns could not be filed except as they were signed and

filed by the Corporation (Treas. Regs. 104, Sec. 23.16). The trustees, who would have had to pay any tax the Government collected, quite naturally hired and paid tax counsel (R. 543, 1746, 1233). But Mr. Polk only gave advice (R. 1403, 1414, 1415, 1417). He did not make decisions. The effective decisions were necessarily made by the Corporation itself when it filed the returns and when by formal action of its Board and after this litigation was under way it approved the settlement.

Nor did the Corporation suffer from a lack of resourceful legal representation. The possibility of a "tax saving" claim on behalf of the Corporation occurred to Mr. Nicodemus, its counsel, and he discussed that possibility with three prominent tax lawyers: Thomas Tarleau, then recently legislative counsel for the Treasury (R. 1059), Leslie Rapp, formerly minority clerk of the House Ways and Means Committee (R. 1059-60) and Claude Dudley, who was associated with Mr. Nicodemus in his efforts to obtain favorable tax legislation from Congress (R. 1063). Mr. Dudley, like Mr. Polk (R. 1433), Mr. Elsey (R. 1285), Mr. Ehrman (R. 1240-42) and the prominent tax specialists who offered to testify on the call of respondents (R. 1586-95), had never heard of any such claim (R. 1063). Mr. Tarleau and Mr. Rapp thought the idea had no merit (R. 1062-63). On this advice and until this litigation Mr. Nicodemus did not pursue the suggestion further. But obviously the Corporation did not suffer from lack of information or ingenuity.

On December 31, 1944 the railroad properties were returned, by order of the bankruptcy court, to the reorganized company (R. 36, 498, 1711). At that time all duality ceased. Those of the Corporation's directors and officers who had

It has ruled that for the purpose of determining earnings and profits available for dividends a company which joins in a consolidated return is to be charged only with its pro rata of the tax and without tax saving payments. Moreover, a holding company which offsets its income by a subsidiary's loss must reduce the basis upon which it holds the stock of the subsidiary by an equal amount, a manifest injustice if it were contemplated that the holding company would pay for the tax saving.

The reasons for this unanimous disapproval of petitioner's position are not far to seek. Consolidated returns are authorized by Congress because, as an administrative matter, they free the government from the necessity of allocating and reallocating profit and loss among the group members and because, as a matter of fairness, they permit a business organized by subsidiaries to pay no more tax than a business organized by departments where the losses of one department freely offset the profits of another. The taxpayers under the consolidated returns remain, nevertheless, the individual companies and the effect of the return, concisely stated, is only that the tax of each is calculated to some extent by the financial transactions of all the others. No one has been able to see why on that account the companies joining in the return have claims against each other.

The argument for compensation for the "use of the loss" proves on examination to be based entirely on loose definition and inexact analysis. The loss, since it has tax consequence, is said to be "property," an "asset" of the loss company. This is casuistry. A loss is not an asset but the lack of assets, not property but no-property. In a consoli-

dated return the loss has tax consequence—but is still a loss and nothing more. And even this is not precisely accurate. Fundamentally the tax law operates on business transactions, events in the world of affairs. A company operates its plant and sells its product at a net loss in the taxable year of $100,000. This fact entered in a separate return means that it pays no tax. Entered in a consolidated return this fact may mean that neither the company itself nor its affiliate pays a tax. But the first company on that account has no claim on the second. It has manufactured its product as best it knew how and sold that product at the best price it could obtain. This activity, undertaken purely on its own account and for its own purposes, has as a side effect, so to speak, tax consequences for the second concern. But this incidental effect does not create a claim. The loss company has done nothing for its affiliate — provided no property or service, taken no action of any kind. The most that can be said is that its misfortune has resulted, because Congress has said so, in another's gain. But this is not enough for a cause of action.

Nor can a cause of action be predicated on an assumed power to bargain. A consolidated return can be filed only if all the members of the group join in the return. Hence, if one can bargain, all can bargain; and the net result of bargaining would be only to reward the most obstinate. Affiliated companies, as this Court has so often said, must deal decently with each other. Their claims inter se are measured by justice and the law—not by power and hard trading. A loss company in an affiliated group provides no asset and no service in bringing about the tax saving. It has, therefore, no claim. And every disinterested person has said so.

There are other reasons why no one agrees with petitioners. To accept their position would be to engraft upon an already elaborate tax system an equally elaborate system of tax saving payments. Husbands and wives sign joint returns; businessmen arrange their affairs with an eye to the tax consequence; a lawyer sends a bill to make a deduction available to his client in the current accounting period. Thus far no one has supposed that the consequence is a right to compensation. If, however, the ideas of petitioners are to be accepted, there must in all such cases be agreement on a tax saving payment or a suit such as this one. And all for nothing. Whatever the immediate gain to these petitioners, the net benefit from any such practice to any particular person, over the years, is speculative indeed. What is certain is confusion and needless complexity.

Petitioners argue that the tax law intends that the parent company shall have the saving from consolidated returns. But the Revenue Acts, as everyone knows, create no private rights and even if they did there is not a word in the Code to indicate that Congress, generally hostile to holding companies, had any such intent as petitioners ascribe to it.

2. *The merits of the claim: the circumstances of this case.* There is no reason why the general rule should not apply in this case. The decision of this Court in March, 1943, approving the reorganization plan, is said to have "severed the economic unity" between the Corporation and the other group members, thereby creating a special situation. To describe the action of this Court as a "severance of economic unity" is dramatic, perhaps, but misleading. In sober truth the decision did this and no more: it made it clear that at an indefinite date not far in the future the

Corporation would be required to surrender its stock in the operating company for cancellation, which in turn made it unlikely that the Corporation would receive any benefit from the tax saving from the consolidated returns. Or, to say it shortly, it became plain that the group affiliation was about to end. But is this a reason to compel respondent to make a $17,000,000 tax-saving payment to the Corporation? For 25 years the Western Pacific group under Corporation management had filed consolidated returns, often to the Corporation's advantage, with no tax saving payments. Why, because the end of the affiliation comes in sight, is the Corporation justified in reversing its settled practice by demanding a payment the like of which had never before been made?

The fact that otherwise the Corporation would receive no benefit from the tax saving is not an argument for petitioners. The Corporation is not and was not entitled to a benefit. Aside from the formality of preparing and signing the consolidated returns it did nothing to bring about the tax saving to the trustees. That saving resulted directly from the decision of this Court and the bankruptcy court declaring worthless the Corporation's stock in the operating company. In acquiring that stock nearly 30 years earlier the Corporation was plainly acting for its own purposes and with no thought of providing a tax advantage to the trustees. In declaring the stock worthless this Court and the court below were equally unconcerned with trustee taxes. Moreover, the Corporation vigorously opposed the declaration of worthlessness. In a very real sense, therefore, the tax saving came about not because of but in spite of the Corporation.

been on the debtor's Board of Directors withdrew (R. 2109). The New York office was shortly thereafter closed (R. 1287) and thenceforth none of the Corporation's directors or officers held any position with the reorganized company (R. 1719-20, 1724, 2109, 519-21). The majority of the Board of the reorganized company were western men of affairs, who had not theretofore been directors, and who have never held any office in the Corporation (R. 1720, 2109, 519). Charles Elsey, who became president of the reorganized company, had never held a Corporation office (R. 1251). Prior to revestment Mr. Elsey arranged with Mr. Nicodemus for the termination of the latter's relations as counsel, except for some small traffic matters (R. 1047-8).

In April, 1945 the trustees filed their final account (R. 1203, 1944) and on May 21, 1945 received their discharge (R. 1203, 1986). The reorganization proceeding was closed by a final decree dated March 28, 1946 (R. 1219, 2013).

Beginning on December 11, 1939, and at all times thereafter, the petitioner Corporation was a party to the reorganization proceeding (R. 1217, 1994, 1600-3). The Corporation did not suggest, however, that it had a claim against the trustees on account of tax savings—and this even though the last of the tax returns was filed July 15, 1945 (Ex. P. 5A/B, R. 492), nine months before the reorganization proceeding closed on March 28, 1946 (R. 1219, 2013). An important reason, expressly stated, why the reorganization proceeding remained open after the properties were returned to the reorganized company was to permit the bankruptcy court to hear and consider claims against its trustees (R. 62). Nevertheless the tax saving claim was never asserted either by the petitioner Corporation or by the peti-

tioner stockholders who acquired their interest in the Corporation from two to four years before the proceeding was closed (Int. Brief, p. 3).

The complaint in this action was placed on file October 10, 1946 (R. 5, 11), five months after the final decree of the bankruptcy court. As a practical matter, however, the litigation began when the petitioner stockholders acquired a small portion of the preferred stock of the Corporation at a nominal cost[2] and in June, 1946, brought a stockholders' suit in New York against the officers of the Corporation (R. 147) charging, among other things, failure to protect the interests of the Corporation in connection with the consolidated returns. Three months later this action was filed (R. 5) and in due course the stockholders intervened (R. 121-55).

The District Court, following elaborate discovery proceedings and an extensive trial, gave judgment for respondents (R. 258, 320). The District Judge believed that the tax result was unjustified (R. 260-270) but concluded that the failure, if any, to pay taxes owing to the United States could not be corrected by awarding the tax moneys to the Corporation (R. 270-1), that the Corporation's claim as a substantive matter was without merit (R. 271-2, 274) and that it was in any event foreclosed by the failure to present it to the bankruptcy court (R. 272-5). On appeal the judgment for respondents was affirmed (R. 2214). The Court of Appeals reviewed the history of the transaction (R. 2214-18,

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[2]Respondents offered to prove that the intervenors bought their $100 par value preferred stock in the Corporation in 1942 and thereafter at a total cost of $37,007.39 or an average of $1.00 per share (Exs. D. 18 id., 19 id., 59 id., R. 1146, 1642-3, 1905-07, 2102). The evidence was excluded as irrelevant (R. 1175, 1643).

2224-6), joined in the conclusion of the District Court that from first to last the tax transactions were conducted in the ordinary course of business without fraud, suppression or wrongdoing (R. 2219, 2226, 2234, 2235), noted that under the circumstances a failure by the common officers of the Corporation and its subsidiaries to file consolidated returns, thereby incurring unnecessary taxes, would have been unjustified (R. 2232-4), and determined that the Corporation, with fiduciary duties to the unpaid creditors of its subsidiary (R. 2234-5), had no claim to all or any part of moneys which in the absence of the consolidated returns would have been paid to the United States. The Honorable James Alger Fee, the United States District Judge for Oregon, sitting on special assignment in the Court of Appeals, dissented. The dissenting opinion argues that the opinion below, adopted by the District Court as its findings, was inadequate for that purpose (R. 2239). To the extent that the dissent considers the merits of the case, it tends to assume rather than argue the point at issue by assuming that the Corporation "had a property right to file or refuse to file consolidated returns" for the surrender of which it might have a claim (R. 2242).

Petitions for rehearing and for rehearing in banc were filed with the Court of Appeals. The application for rehearing was denied (R. 2259-60). The petition for rehearing in banc was stricken as being unauthorized by law or by the rules of court (R. 2260). A petition to file a motion to reinstate the petition for rehearing in banc (R. 2267) was denied by six of the seven Circuit Judges, Judge Denman dissenting (R. 2288, 2313). Application was made to this

Court for certiorari and on October 13, 1952 the certiorari petitions were granted.[3]

This detailed account of the circumstances of the case must surely demonstrate the validity of the conclusion of the courts below: that these tax transactions were in every respect open, candid and honest, free from any taint of subterfuge, improper purpose or wrongdoing (R. 970, 2219, 2226, 2234, 2235). It must demonstrate, too, that the charges which the petitioners fling so freely into this case are untrue. Petitioners would have the Court believe that the trustees of the bankruptcy court, or their representatives, seized upon the crippled Corporation, craftily kept it alive, and then by devious dealing suppressed its claims and manipulated its affairs to their own advantage. Nothing could be further from the truth. No witness so testified; no document was produced to support any such claim. The record from beginning to end is a record of honest and capable men conducting their affairs openly and in the ordinary course of business. The dualities now found invidious were in fact created by the Corporation itself for its own purposes (R. 735, 992, 1627), the same purposes of management which result in the same dualities in every holding company system. The arrangement by which the operating

[3]The courts below, both believing that as a matter of substance the Corporation's claim was without merit, had no occasion to consider all the problems presented by the litigation. The District Court accepted respondents' argument that the reorganization put an end to the claim but the majority judges of the Court of Appeals did not reach this issue. Neither court reached the defenses offered by respondents of limitations, estoppel and res judicata. Neither court had occasion, moreover, to determine the amount of the tax saving, a difficult question on which the testimony is conflicting, and neither court, of course, made any effort to define the amount of the Corporation's claim, assuming it had one, a point upon which petitioners themselves are in disagreement.

company paid part of the expense of the Corporation's New York office, now alleged to be a device for controlling the Corporation and its affairs, was as old as the affiliation itself (R. 644); and when the trustees undertook to pay all the New York expense, they did so only because the Corporation, finding itself without funds (R. 789-90, 1243-4), repeatedly requested that this arrangement be made (R. 790, 1244, 1257). The alleged capture of the Corporation's president by the Whitman firm proves to have been an arrangement made with the approval of the Corporation's directors (R. 899-903, 1017, 1495) and motivated by an attempt to provide financial security during a difficult period for a man who had rendered twenty years of exemplary service to the Western Pacific group (R. 1017, 1496). The consolidated tax returns, said to be the end product of a dark plan deviously executed, were in fact prepared in the Corporation's own offices in the identical fashion and by the same personnel who had been preparing similar consolidated returns for the Western Pacific group for many years (R. 841, 843-7). They were signed and filed by the Corporation's president (R. 846-7), a man now said to be incompetent in tax matters, but who had managed Western Pacific taxes for nearly twenty years (R. 845) and who wrote a letter about these very returns to Corporation counsel, describing them with a ludicity which would have done credit to anyone (R. 705, 2125). Mr. Polk, the tax lawyer, is harshly criticized, but on inquiry from the court petitioners found themselves obliged to concede that the tax returns were in fact properly prepared (R. 834-5), properly filed (R. 834-5), and that Mr. Polk handled tax matters for the group to the complete satisfaction of everyone (R. 1422-3). Finally,

in spite of all the intimations of suppression of the Corporation and its rights, the record shows without contradiction that counsel for the Corporation considered the possibility of a tax saving claim (R. 1060), took advice of those best qualified to advise him and decided against it (R. 1059-64). Small wonder that on this record not one of the judges below has been willing to give a moment of credence to the charges which petitioners now bring to this Court. If it is true, as petitioners apparently believe it to be true, that they can succeed only by proving that the Corporation was somehow manipulated and managed, its rights suppressed and its people beguiled and abused, consideration of this case can stop now. For both courts below in explicit fashion and on an overwhelming record have found against these contentions. The Court of Appeals, quoting the trial court, said:

> "It hardly seems conceivable that Corporation could complain because consolidated returns were filed. Not only was it in accordance with past practice of the group and under the supervision of Corporation's president, as in former years, but it was done under the guidance of the independent tax experts employed upon the suggestion of the General Counsel for Corporation, who represents appellants in the present proceeding. As the trial court stated '* * * when everybody was, as they were in this case, acting completely in the open in the matter, nobody was concealing anything from anyone else, the element of fraud or deception, of the kind that you refer to, is absent * * * Everybody knew that consolidated returns were being filed * * * Everybody knew that these attorneys were being employed to file this consolidated return. It was all done right out in the open.' " (R. 2226)

But this failure to prove wrongdoing is only half the difficulty with petitioners' case. Beneath the problem of the conduct of the parties are more fundamental problems. Does the use of a loss in a consolidated return create a right to compensation? If it does not, petitioners have no claim, whatever the conduct of the parties may have been. Did the Corporation under the circumstances have a right to bargain against the trustees? If it did not, the identity of the Corporation representatives is immaterial. It is to these fundamental questions that the balance of this brief is devoted and respondents believe that the answers are plain. The Corporation does not now have and it never had any basis for a claim to compensation because of the tax transactions. The Corporation does not now have and it never had a position from which it could bargain against the trustees.

Petitioners seek to obscure their failure to establish a claim by arguing that the court trustees had fiduciary obligations to the Corporation which they failed to discharge. But a cestui, even the cestui of an express trust, cannot sue his trustee unless there has been a violation of the cestui's rights. Here, the Corporation has no claim on account of the tax transactions and it does not acquire one by proclaiming itself a cestui and the court trustees, trustees on its behalf.

The fact is, moreover, that neither the respondent nor the trustees had trust obligations to the Corporation. Prior to January 1, 1945, the respondent, the reorganized company, did not exist and the old company with its assets in the hands of the court was completely inactive.[1] The

[1]Petitioners use the term "respondent" as descriptive of three distinct entities: *first*, the pre-reorganization railroad company,

duties of the trustees of the bankruptcy court are defined by bankruptcy law and they do not include special and overriding obligations to the Corporation. Furthermore, the foundation of the Corporation's claim to a special position, the contention that it was dominated and controlled by the trustees, is completely unproved. Neither court below could be persuaded to counsel's position and the Corporation itself in answering the complaint in intervention categorically denied all charges of domination or control (R. 156). The truth is plain enough: the consolidated returns were filed not because the trustees took charge of the Corporation and its affairs but because for twenty years the Western Pacific group had filed such returns and because everyone, including the Corporation and its representatives, could see that consolidated returns produced the best tax result. The consolidated returns were the product of good sense, not the product of trustee domination of the Corporation or suppression of its rights.

But even if the trustees had controlled the tax transactions, nothing for which the Corporation contends would follow. Counsel for the Corporation have agreed that the returns were properly prepared (R. 834-5) and properly filed (R. 834-5, 1422-3). It must be obvious, moreover, that if consolidated returns had not been filed this case could not exist. Under these circumstances, with proper returns properly filed and this claim dependent upon them, what difference can it make who had charge of the work? To

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which was the Corporation's subsidiary and the debtor in reorganization; *second*, the reorganization trustees who were the court's agents in operating the railroad; and *third*, the reorganized railroad company, which was the defendant below and is the respondent here. The indiscriminate use of the term "respondent" by petitioners can serve only to mislead and confuse.

succeed here the Corporation must show that by reason of the consolidated returns it has a valid claim to the taxes saved. The Corporation has in fact no such claim and it was never in a position to bargain for a payment to which it was not entitled. It makes no difference, therefore, who had charge of the tax transactions.

The petitioner stockholders also argue that the trustees had fiduciary obligations to the Corporation. But, unlike the Corporation, they impose those duties not because of control but because of dualities; they measure them not by the rules appropriate to express trusts but by an alleged obligation to deal fairly; and, as a consequence of the alleged breach of these fiduciary obligations, they claim not $17,000,000 but some amount they are unwilling to name. The arguments of the petitioner stockholders, like those of the petitioner Corporation, fail, however, to reach the question for decision. It is suggested that in consolidated return matters the arrangement between the group members must be such as would commend itself to independent boards of directors. This suggestion is not helpful, first, because by definition consolidated returns can exist only in the presence of affiliation, and, second, because this test or the test of "fairness" is largely meaningless, as petitioners themselves demonstrate by their inability to translate it into dollars. Fairness, it seems obvious, requires a payment only if the law recognizes a claim. Again, therefore, the problem returns: did the Corporation on account of these tax returns have a claim to compensation? The answer is "no."

SUMMARY OF THE ARGUMENT

1. *The merits of the claim: the general rule.* This case has to do with consolidated tax returns and the narrow question of the rights among themselves of taxpayers who file them. The problem reaches this Court after thousands of such returns have been filed over a period of 30 years and after the issue presented here has long since been considered settled. Only once before has there been a challenge to the accepted procedure whereby the consolidated tax is allocated pro rata among the income members of the group without tax saving payments to the loss members. Insull and Hopson and a few others once adopted a practice similar to that now advocated by petitioners. They compelled subsidiaries of the holding company system to pay the parent company "taxes" calculated as though the subsidiaries were to file a separate return, whereupon the holding company filed a consolidated return and took to itself the saving. The Federal Trade Commission, studying holding companies and their procedures, noted and condemned this practice; the Committees of Congress, formulating the Public Utility Holding Company Act of 1935, echoed this condemnation; and the Securities and Exchange Commission by its Rule U-45(b)(6) has put a stop to it in the utility field. The Interstate Commerce Commission, which is also concerned with the regulation of holding company systems, has had no occasion to issue a formal order, but on more than one occasion it has refused to recognize tax saving claims and, as respondents offered to prove, the uniform practice of the railroads under Commission supervision is in accordance with the general practice and with what was done here. The Treasury plans its tax procedures on the same basis.

profits taxes of the individual companies based upon separate returns. * * *"[7] (Emphasis supplied.)

Petitioners cite and rely upon three instances in which the Commission is said to have permitted deviations from this formula. In Release No. 4444, 13 S.E.C. 649, dated July 28, 1943, "In the Matter of Consolidated Electric Gas Company, The Islands Gas & Electric Company," Islands, a subsidiary in the Consolidated group, had large war losses in Manila, which were available as tax deductions for the group. If, however, Islands reacquired its properties it would be required to pay the tax which the deductions had eliminated (I.R.C. Sec. 127(c)). The group members proposed a special arrangement to protect Islands against this tax if it were later assessed. The Commission agreed. The purpose of the arrangement was to make certain that Islands did not pay more tax by joining in the consolidated return than it would have paid on a separate return basis. This principle is of no value to petitioners. The Corporation paid no tax under the consolidated returns and would have paid no tax on a separate return basis (R. 824, 826, 1306-07).

This same purpose to protect a subsidiary from an actual loss through paying extra taxes on account of a consolidated return underlies the ruling of the Commission in Release No. 5535, 17 S.E.C. 839, dated January 3, 1945, "In the Matter of Cities Service Company." There a subsidiary was amortizing the cost of a plant at a special war-time rate which would result in complete amortization in five years. This provided the subsidiary with large deductions

[7]For a detailed discussion as to the effect of the Rule by the National Association of Railroad and Utilities Commissioners, see Appendix B, p. 17.

from taxable income which were useful to the group in consolidated returns. It also meant that after the five-year period the subsidiary would have no amortization deduction. The group members accordingly agreed to compensate the subsidiary for the disadvantage to it arising from the tax procedures adopted.

The basis for decision in Release No. 4806, 15 S.E.C. 161, 164, dated January 3, 1944, "In the Matter of Consolidated Electric & Gas Company" is stated by the Commission as follows:

> "Inasmuch as Consolidated owns 100% of the common stock equity of each of its subsidiaries affected by the proposal, and there do not appear to be impairments in the earned surplus accounts of such subsidiaries, it is, apart from the accounting consequences of the transaction, immaterial whether the proposed payments are made in the manner proposed or the books of the subsidiaries are permitted to reflect the taxes as reduced by the subject savings and corresponding amounts paid to Consolidated by way of dividends."

Since the parent who received the payment was entitled to the money in any event, the Commission saw this case only as an accounting problem and agreed to the proposed arrangement for that reason.[8]

In none of these releases did the Commission recognize the existence of a right to a "tax saving" payment. Indeed,

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[8]Subsequent to the releases upon which petitioners rely the Commission issued its Accounting Release No. 53, wherein it gave further attention to "Charges in Lieu of Taxes." criticizing petitioners' position from the point of view of sound accounting. See Appendix B, p. 10.

Petitioners make much of an alleged power of choice residing in the Corporation, saying that the Corporation was free to file separate returns and that it therefore must be paid for its decision to file the consolidated returns, the formality which was requisite in order that the loss from the worthlessness of the stock might offset trustee income. But the Corporation had in fact no freedom of choice. It is true that the consolidated returns for 1943 and 1944 were filed after the group affiliation had terminated. But, for at least two reasons, this did not put the Corporation in a position to bargain for a payment to which it was not otherwise entitled. First, the returns related to the period of affiliation and were possible only because of that affiliation. With respect to those returns, therefore, the group members were all bound by the obligations appropriate to the affiliation period, including an obligation on the Corporation as parent to exercise its management powers in the best interest of the group and in that connection to file tax returns resulting in the minimum permissible tax payment. Payment of unnecessary taxes is no more compatible with sound management than any other waste of corporate assets. During the affiliation period, the Corporation plainly could not have bargained against its subsidiaries by threatening, in breach of its good management duty, to compel them to pay avoidable taxes. With respect to tax returns relating to the affiliation period the situation was not changed in one degree by the termination of affiliation. For it is well settled that fiduciary obligations, including the obligation of a holding company to its subsidiaries and their creditors, extend without interruption to all matters necessary to wind up the affairs of the fiduciary period.

The bankruptcy proceeding provides a second reason why the Corporation could not bargain with the group as a stranger. The operating company, unable to meet its obligations to its creditors, filed its reorganization petition at the command of the Corporation and the Corporation became a party to the proceeding, asserting there its claims against the estate. Under these circumstances the Corporation was plainly obligated to cooperate in such formalities, including the filing of tax returns, as would best protect the assets of the estate by minimizing tax payments by the trustees. This required consolidated returns not only because in such returns group losses would offset trustee income but also because only through consolidated returns would the operating loss carry-overs and unused excess profits tax credits accumulated by the trustees in earlier years operate to reduce trustee taxes. Consolidated returns could not in any conceivable fashion disadvantage the Corporation; and since the advantage of such returns to the estate was plain, the Corporation was obligated to file them, and having that obligation it could not set a price on cooperation. For in a reorganization proceeding, as this Court has been emphatic to say, the stockholders of the debtor have no strategic position, no power to bargain. "Threats by stockholders of the kind here in question are merely threats to the jurisdiction of the court, which jurisdiction these selfsame stockholders invoked for their benefit when they caused the debtor's petition to be filed. Consequently, these claims of the stockholders are, as we have said, entitled to no more dignity than any claim based upon sheer nuisance value." *Case v. Los Angeles Products Co.*, 308 U.S. 106, 130-1. The Corporation, as parent of the group and

stockholder of the debtor, could not assert a strategic position and by threatening to file separate returns drive a bargain for a payment to which it was not otherwise entitled. It was entitled to no payment on account of the tax saving because it had done nothing to bring that saving about. The tax saving resulted from a decision of the courts approving the reorganization plan—not from any property or service provided by the Corporation to the trustees.

Petitioners invoke many rules of law but make a case under none of them. Indeed, the bare fundamentals of any cause of action, proof of wrong and proof of damage, are not made out. The reference in the consolidated returns to the Corporation's loss did not wrong the Corporation and the Corporation on that account has suffered no damage. It paid no taxes under the consolidated returns as it would have paid none under separate returns. The Corporation has no unjust enrichment claim. It has been deprived of nothing; there is nothing to restore to it; and there is no ground of fraud, mistake or duress to justify an order of restitution.

The Corporation has no claim on quantum meruit. It did nothing to bring about the tax result except sign the returns, a service which, if it be one, it was plainly obligated to perform for reasons of good management and to conserve the bankruptcy estate. It transferred no property to the trustees; it never in a single particular shifted the course of its affairs to advantage the trustees. It has nothing, therefore, on which to base a claim. Discussion of dualities and fiduciary duties does not assist petitioners. This is not a case of corporate officers working for several companies

and being neglectful of the rights of one of them. The Corporation received nothing here; not because of divided loyalties, but because it was entitled to nothing.

Finally, the Corporation's position is truly without equity. The junior secured creditors of the operating company went unpaid in the reorganization proceeding by several million dollars and all the creditors, junior and senior alike, received their new securities on a valuation which the market has consistently refused to confirm. To these creditors of its subsidiary, the present stockholders of the reorganized company, the Corporation owed fiduciary duties. It now proposes to violate that fiduciary obligation by depleting the assets of the reorganized company by $17,000,000 and to that extent increasing the distance by which they go unpaid. That position has not commended itself to the courts below and it will not commend itself to this Court.

3. *The bar of the reorganization.* During 1942, 1943 and the first four months of 1944, the period in which taxes were saved, the railroad properties were operated by trustees of the bankruptcy court. If taxes were owing or saved for those years they were owing or saved by the trustees; and the taxes themselves or any valid claim on account of tax saving would have been an expense of administration. The Corporation, a party to the reorganization proceeding, failed to present its tax saving claim in that proceeding even though the bankruptcy court carefully retained jurisdiction until March 28, 1946, well after the returns were filed, to hear all such claims. This means that even if the claim were valid it could not now be allowed. There are two reasons. A claim against trustees administering properties on behalf of a court is in effect a claim against the estate and to have

validity it must receive, one way or another, the approval of the court in charge of the estate. This claim received no such approval; the estate no longer exists; the proceeding which gave rise to the estate is closed. The claim is dead.

The Corporation's claim is barred, moreover, by the finality which attaches to a reorganization proceeding. The principal purpose of such a proceeding is to so define and limit the obligations of the reorganized company that its financial position will be secure. All claims not allowed are foreclosed. This rule applies as forcibly to claims arising during the period of administration as to claims of an earlier date. The reorganization of the Western Pacific plainly fails if, with the bonded indebtedness of the reorganized company carefully limited to $10,000,000, the Corporation, a party to that reorganization, can now enforce an undisclosed claim for $17,000,000.

The assumption agreement requiring the reorganized company to discharge certain obligations of the trustees does not provide the Corporation with an escape from the bar of the reorganization. It is the practice in reorganizations to return the properties to the reorganized company before the proceeding is closed and while the court retains jurisdiction to hear claims against its trustees. After revestment, however, the court has no assets from which to pay such claims. Accordingly, it is customary to require the reorganized company to discharge them. The claims to be discharged, however, are those and only those which could be asserted effectively against the trustees, that is, claims presented to and allowed by the bankruptcy court. No one has ever supposed that this conventional method of providing credit to the court can be read to nullify the control

of the bankruptcy court over the expense of the reorganization proceeding. Nor is there any force in the suggestion that the Corporation's claim arose subsequent to the reorganization and is therefore outside the jurisdiction of the bankruptcy court. Petitioners base their demands on events which took place during the period of trusteeship, an alleged appropriation of the Corporation's loss in a return filed July 15, 1944, and on dualities which terminated December 31, 1944. Inevitably therefore petitioners relate their claim to the period of trustee operation and bring it within the jurisdiction of the bankruptcy court.

A reorganization proceeding is a judicial proceeding and a reorganization decree is a judgment. The Corporation had every opportunity to litigate its claim in the reorganization court. Having failed to do so the claim is foreclosed by principles of res judicata.

4. *Limitaiions, laches and estoppel.* Petitioners assert their claim in terms of unjust enrichment. Under California law the applicable period of limitations is two years. This case began more than two years after the 1943 returns were filed and the claim insofar as it relates to 1943 taxes or depends upon the 1943 stock loss is therefore barred. The claim is also barred by laches and estoppel.

5. *The amount of the tax saving.* Neither court below believed the Corporation had a claim and neither court, therefore, had occasion to compute the amount of the tax saving. The calculations of that saving in the record are conflicting, producing results varying from one to seventeen million dollars, depending, first, upon what returns for what years are to be imagined in place of the returns actually filed and, second, upon the treatment to be given

under the assumed returns to such items as loss carry-overs, unused excess profits credits, inter-company interest accruals, accelerated amortization deductions, refund claims, reparation claims and the partial worthlessness of a large debt owing to the reorganization trustees by one of the subsidiaries of the operating company. The calculation of taxes under a consolidated return is always difficult. To calculate taxes under imaginary returns, consolidated or separate, is to invite a nightmare of supposition and counter-supposition from which, thus far at least, the business community has happily been spared. Moreover, the calculation of the tax saving is only half the problem. Then comes the equally difficult question of the amount of the reward to be paid for the tax saving, a question on which petitioners themselves are unable to agree.

Petitioners have only their own interest before them and they are not to be criticized, perhaps, if they refuse to look beyond this case. This Court, however, cannot reckon so narrowly. To accept petitioners' argument would upset thousands of consolidated return transactions now considered closed; it would invalidate by indirection Rule U-45 (b)(6) of the Securities and Exchange Commission; it would require the railroads to revise procedures long accepted as settled; and, most important of all, it would invite tax saving claims nation-wide between husbands and wives, in holding company systems and whenever taxpayers cooperate to achieve a favorable tax result. Petitioners present nothing to justify a revision so radical in accepted procedures.

6. *Rehearing in banc.* Petitioners, relying on Section 46 of the Judicial Code, ask the Court to order all seven

judges of the Court of Appeals for the Ninth Circuit to consider their application for a rehearing by that court in banc. Section 46 provides in part:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

The obvious and controlling purpose of this provision is to permit a panel of three judges to dispose of the case, a result which can be accomplished only if the panel can rule effectively on all matters incident to the decision, including applications for rehearing. There would be little sense to a statute designed to permit a court of seven judges to function by panels of three if every litigant by applying for hearing or rehearing in banc can compel all seven to act. Moreover, any such result is contrary to the statute itself. The statute says that action in banc shall be taken only if a majority of the full court so orders. Petitioners claim they are entitled to compel in banc action upon their application for rehearing. They seek to take to themselves, therefore, a power which under the statute rests exclusively with a majority of the court.

Traditionally, the question of hearing by division or in banc is a question for the court with which the litigants are not concerned and upon which their views are not consulted. A litigant disappointed in the District Court files an appeal. The court, if it likes, can order the case heard in banc even though no request for such hearing is made and even though

both parties oppose it. In similar fashion a litigant loses its appeal and asks rehearing. Again the court, if it likes, can order the rehearing and again it is for the court and not for counsel to say whether the rehearing shall be by division or in banc. When the litigant has applied for rehearing he has done all he can. The problem of whether that rehearing, if granted, shall be by division or in banc is a problem for the court alone, a problem not unlike the problem of determining who among the available judges shall hear the case in the first instance.

Section 46 is immediately responsive to the decision of this Court in *Textile Mills S. Corp. v. Commissioner*, 314 U.S. 326, where, with some difficulty, it was held that a Court of Appeals had power to sit in banc in spite of the provision of 28 U.S.C. Sec. 212 (now Sec. 46(c)) for decisions by divisions. The sole purpose of the section was and is to make it clear that Courts of Appeal have power to conduct in banc proceedings. To grant power to the court to act in banc is one thing; to say, as petitioners say, that the court must act in banc in considering applications for rehearing is quite another. This Court made no such suggestion in the *Textile Mills* case and there is nothing to indicate that Section 46 had any such purpose.

ARGUMENT

I. Petitioners Have No Claim

During the reorganization, consolidated returns were filed in order that income and excess profits taxes should be kept to the least amount permitted by the revenue act. The reorganization trustees received tax advantages through the returns. Now petitioners seek, by a retrospective exami-

nation of the tax proceedings, to make out a claim to the trustees' tax advantage in favor of the holding company. As the trial judge said:

> "Everybody knew that consolidated returns were being filed. Everybody knew who the directors were. Everyone knew that these attorneys were being employed to file this consolidated return. It was all done right out in the open. The question that you have to present in this case is, now, can we go back and under principles of equity, redetermine the transaction on the basis that a legal or equitable wrong was done by what was done." (R. 970-1.)

Petitioners would have the Court belatedly redetermine the transaction in equity and thereby transfer to the holding company the tax advantages of the reorganization trustees, advantages which the reorganization court, and everyone else, knew were being sought for the taxpayer, i.e., for the trustees.

The District Court gave judgment for respondents on the merits. The Court of Appeals affirmed. Both courts have rightly held that there is no equity in petitioners' claim.

A. THE GENERAL RULE. THE CLAIM OF THE HOLDING COMPANY IS CONTRARY TO THE APPLICABLE RULE, UNDER WHICH NO PAYMENT IS MADE FOR "TAX SAVINGS" RESULTING FROM THE USE OF CONSOLIDATED RETURNS.

Since 1918 it has been regular practice for the business community to file consolidated tax returns. From 1928 to 1944, for example, 54,685 such returns, involving more than 176,000 companies, were placed on file.[5] In each of these

[5] See for 1928-1941, Statistics of Income for 1941, Part 2, p. 293; for 1942, Treasury Press Release No. 44-54, December 31, 1944, p. 16, and No. V-229, February 25, 1946, p. 6; for 1943, Treasury Press Release No. V-229, February 25, 1946, pp. 6 and 10; for 1944, Statistics of Income for 1944, Part 2, Preliminary, pp. 10-11.

50,000 cases the problem of adjusting intra-group rights and liabilities was necessarily presented. The formula which has always been used distributes the actual tax under the consolidated return to the group members in proportion to their respective taxable incomes without "tax savings" payments. No payment in lieu of taxes is made to a parent company or to a loss member of the group for the advantage of the loss in the return.

The Western Pacific group has followed this practice from the beginning (this brief, p. 57).

The Securities and Exchange Commission has noted the customary use of the formula:

> "We note the customary solution of a somewhat similar problem that arises when a group of companies files a consolidated tax return. In assigning to each constituent its fair share of the consolidated tax paid by the group it is usual to divide the actual tax among the companies who would have had to pay a tax on an individual basis. If one of the included companies operated at a loss, the consolidated tax is of course reduced, but *no* part of the 'saving' is ordinarily paid over to the loss company by the other members of the group."[6]

Respondents offered at the trial to support this statement by detailed proof of the business practice as revealed by a special survey of the railroads, the utility systems and representative industrial companies. The proof, excluded as irrelevant (R. 1383), would have demonstrated that business systematically does what respondents say should be done and what was done in this case (R. 1387-93).

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[6]Release No. 53, Accounting Series, November 16, 1945, 3 C.C.H. Fed. Sec. Law Serv. 2d ed., Par. 72,071; 61 P.U.R. (NS) 193, 222, n. 36. Excerpts from the Release are in Appendix B of this brief.

The precedents come mainly from those tribunals and departments of government which are most intimately concerned with holding company systems: the Securities and Exchange Commission, the Treasury Department, and the Federal Trade Commission. Without exception the practice which has been recommended is the practice which was followed in this case. The Interstate Commerce Commission and the semi-official National Association of Railroad and Utilities Commissioners have reached comparable conclusions. There is no contrary view.

The Securities and Exchange Commission Rule Does Not Permit "Tax Saving" Payments for Losses in Consolidated Returns.

The Securities and Exchange Commission has ruled that the proper practice is to allocate pro rata the consolidated tax without "tax saving" payments. Rule U-45(b)(6), adopted for the regulation of public utility systems, forbids intragroup extensions of credit without S.E.C. approval except in certain cases, one of which is:

> "(6) A loan or extension of credit or an agreement of indemnity arising out of a consolidated tax return filed by a holding company (or other parent company) and its subsidiaries: *Provided*, That the top company in the group assumes primary responsibility for the payment of any tax liability involved, subject to the right to contribution from the several members of the group in an amount *not exceeding* as to any company that percentage of the sum of the normal tax, surtax and excess profits tax on a consolidated basis which the sum of the normal tax, surtax and an excess profits tax of such company if paid on a separate return basis is of the aggregate amount of normal, surtax and excess

of reorganization which held worthless the Corporation's interest in the old company. It then became probable, but not certain (see *Insurance Group v. D. & R. G. W. R. Co.*, 329 U.S. 607, 611), that the reorganization plan would thereafter be confirmed by the District Court, that mechanics would be provided for putting it into operation and that at some undetermined date in the future the old stock would be cancelled and affiliation would cease to exist. Nothing else then occurred. The stock of the old company remained in the hands of the Corporation. The affiliation continued. The final "severance" took place May 1, 1944, when affiliation terminated with the surrender of the stock to the Reorganization Committee.

Second. The "economic unity" in the Western Pacific group which, according to petitioners, was severed on March 15, 1943, had never existed. From the outset the majority of the first mortgage bonds of the old company were with the public (34 F. Supp. 493, 497). As the financial condition of the old company became more critical, the value of the stock interest disappeared and the company belonged in truth and in equity to its bondholders. *Helvering v. Cement Investors*, 316 U. S. 527, 532; *United States v. Butterworth-Judson Corp.*, 269 U. S. 504, 513. There was no "economic unity." It could not, therefore, have been severed on March 15, 1943.

Third. "Economic unity" in matters related to consolidated returns is a false factor demonstrably of no significance. Rarely, if ever, does "economic unity" exist in holding company systems. Only in the exceptional case does the parent company completely own the subsidiaries. More often the parent, by voting control, controls properties which in reality belong to the public through the purchase

of senior securities.[28] The revenue acts recognize this diverse economic interest in the ordinary holding company system and they make no requirement of economic unity as a condition for filing consolidated returns. They require only that there be "affiliation," i.e. that 95% of the equity and voting stock be held within the group (I.R.C. Sec. 141).[29] Thus in emphasizing economic unity petitioners would have the Court accept the rare situation as the ordinary situation

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[28]Summary Report of the Federal Trade Commission on Economic Financial and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, Part 72-A, Sen. Doc. No. 92, 70th Cong., 1st Sess. See, for example, p. 311:

> "On the other hand, the long-term debt of the operating companies consists mostly of bonds which are secured by the mortgage on their physical properties. The long-term debt together with preferred stock usually represent the capital obtained from the investing public. The common stock of the operating companies is usually the voting stock and is owned by the holding companies for control purposes."

See, also, Barnes, *The Economics of Public Utility Regulation* (1947), p. 73; Bonbright and Means, *The Holding Company* (1932), p. 147; 2 Dewing, *The Financial Policy of Corporations* (4th ed. 1941), p. 1042. Dewing reports that in seven large holding companies, a total of 52% of the bonds, 32% of the preferred stock and 16% of the common stock was publicly held (p. 1051).

[29]Since 1918 the Revenue Acts have progressed steadily away from any theory of economic unity or common ownership as far as consolidated returns are concerned. The 1918 statute defined affiliation in general terms of ownership or control (Section 240b). By progressive steps through the Revenue Act of 1924 and the Revenue Act of 1928 the theoretical approach has been abandoned in favor of a technical requirement—ownership of 95% of the voting stock. See 8 Mertens, *Law of Federal Income Taxation* (1942) Sec. 46.13, p. 426.

The cases talk from time to time of a single business enterprise, but whenever it is important they have recognized that the test is what the statute requires and nothing more. See *United States v. Donaldson Realty Co.*, 106 F.2d 509, 517; *Commissioner v. General Gas & Electric Corp.*, 72 F.2d 364; *Erie Lighting Co. v. Commissioner*, 93 F.2d 883. The basic theory of consolidated returns is of course that the returns serve only as a method of computing the tax owing by the individual group members who are and remain the taxpayers. See *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 127.

if the law requires such payments, Rule U-45(b)(6), which in effect forbids them would be invalid.

The Treasury Department Employs the General Rule.

The rulings of the Treasury Department assume and provide for a pro rata allocation of the consolidated tax without tax saving payments. The formula appeared in the Revenue Acts of 1921, 1924 and 1926.[9] In 1928 Congress made all members of an affiliated group (except for a few special occasions) responsible for the full amount of the tax[10] and no allocation formula has since appeared in the statute. For special occasions, however, such as allocating consolidated excess profits tax, to provide deductions from normal tax net income, the Treasury has designated the customary formula[11] and the Bureau of Internal Revenue has ruled that it is to be used to determine earnings and profits available for dividends.[12]

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[9]Section 240(b) of the Revenue Act of 1921 provided:

> "(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each."

An identical provision appeared in the Revenue Acts of 1924 and 1926.

[10]See Art. 15(a) in Treas. Regs. 75 (1928), 78 (1932), 89 (1934), 97 (1936), 102 (1938), and Treas. Regs. 104, Sec. 23.15(a) (1942). Sec. 23.15(b) of Treas. Regs. 104, cited by the Corporation (its brief, p. 66), did not define the tax liability of bankruptcy trustees who joined in consolidated returns, but operated to limit the liability of such trustees.

[11]See T.D. 5086, Amendments to Regulations 103, 1941-2 Cum. Bull. 46-7. An excerpt from the text is in Appendix B, p. 28.

[12]I.T. 3637, 1944 Cum. Bull. 258, I.T. 3692, 1944 Cum. Bull. 261, and I.T. 4085, 1951-1 Cum. Bull. 68. The texts are in Appendix B,

The Federal Trade Commission Investigated and Condemned "Tax Saving" Payments to Holding Companies for Taxes Saved by Consolidated Returns.

The Federal Trade Commission has approved the formula which respondents defend and condemned the formula which petitioners propose. The Corporation, as parent, proposes that it should receive from the group members a "tax saving" payment equal to the tax which each group member would have paid had it filed a separate return. This practice, as adopted in the 1920's by a few of the more notorious utility systems, was one reason why the Securities and Exchange Commission was created. The Federal Trade Commission conducted an extensive investigation of the utilities prior to the enactment of the Public Utility Holding Company Act and condemned the practice which petitioners ask this Court to establish as law, saying:

> "Holding companies are not justified in recording as income the savings from this procedure of handling Federal income-tax payments. *The subsidiary com-*

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pp. 20, 25, 26. The consolidated return regulations (Treas. Regs. 104 and 110) assume that the tax allocation will be in accordance with the accepted formula. There are no specific provisions since before now it has never been suggested that consolidated returns required any "tax saving" payment. The regulations contain, however, provisions which are plainly inconsistent with petitioners' proposal. They require, for example (Treas. Regs. 104, Sec. 23.34 (c)), that whenever income of a parent company is offset in a consolidated return by the loss of a subsidiary (which could not have been availed of by the subsidiary in a separate return), the tax basis upon which the parent holds the stock of the subsidiary must be reduced in an amount equal to the loss. Then upon liquidation or sale of the stock of the subsidiary the amount of gain on which the parent must pay tax is increased. This rule was first developed in the decisions. See *Jordahl & Co.*, 35 B.T.A. 1136, 1139. Plainly neither the courts in adopting this rule nor the Commissioner in formalizing it in the regulations intended that the one-group member should pay another for the tax benefit of its loss. This would require a double payment for the tax benefit: once to the loss company and once to the Government in increased taxes through reduction in the tax basis of the stock.

panies in a holding-company group are entitled to the benefit of any savings to the group due to filing a consolidated income-tax return. Only the amount of Federal income tax paid by a holding company on the basis of a consolidated return should be borne, in proportion to the taxable income, by those companies having taxable income, for which companies a consolidated return was filed. Stated differently, each company in a holding-company group should pay only its pro-rata share of the tax paid for the group." (Emphasis supplied.)[13]

Petitioners are asking the Court to adopt a practice which Congress intended that the Securities and Exchange Commission should eliminate in the utility field and which has been eliminated.

The Interstate Commerce Commission Has Disapproved "Tax Saving" Claims.

There is no formal ruling by the Interstate Commerce Commission on the proper allocation of taxes under consolidated returns, perhaps because, as respondents offered to prove (R. 1387-93), the railroads universally employ the traditional formula. The Commission has considered occasional "tax saving" claims and has rejected them.[14]

Doubtless the Commission would disallow a "tax saving" payment to a parent company as an expense. All that could be charged as an expense would be a proper allocation to

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[13]Summary Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., on Economic, Financial and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, Part 72-A Sen. Doc. No. 92, 70th Cong., 1st Sess., p. 479. This report is quoted at greater length in Appendix B, p. 5.

[14]*Central of Georgia Railway Co. Reorganization*, 252 I.C.C. 587, 600; *St. Louis-San Francisco Railway Co. Reorganization*, 257 I.C.C. 399, 410.

the operating company of its share of the *actual cost* of services rendered by the parent, *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 157; cf. *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 399. The National Association of Railroad and Utilities Commissioners, of which the Interstate Commerce Commission is a member, has disapproved the treatment of a "tax saving" as an expense.[15] Petitioners, whose claim here is asserted as an expense of the reorganization trustees,[16] are asking the Court for a ruling that will invite the Commission to revise its views.

No Court Has Approved a Claim for Taxes Saved by Consolidated Returns.

The absence of judicial decisions is further proof of the general acceptance of the rule. In the few cases which have been concerned with intergroup relationships, a "tax saving" claim has never been approved.[17]

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[15]Reports of the Committee on Accounts and Statistics of the National Association of Railroad and Utilities Commissioners, for 1943, at pp. 255-6; for 1945, at pp. 458-60. Material from these reports is quoted in Appendix B, p. 17.

[16]Petitioners insist that theirs is a claim for *expense* incurred by the reorganization trustees (Corp. brief, p. 49, Interveners' brief, p. 90). They are not asking for dividends.

[17]In *Koppers Co.*, 8 T.C. 886, 11 T.C. 894, the intra-group settlement was in conformity with the usual practice. This was true though there was no "economic unity" within the group. See Moody's Industrial Manual, 1941, p. 2598. *Bankers Trust Co. v. Florida East Coast Car Ferry Co.*, 92 F.2d 450, also suggests approval of the general rule for tax allocation. Moreover, the case is direct authority for the proposition that any refund on account of the 1942 taxes would belong not to the petitioners but to the trustees. *Beneficial Corp. v. Commissioner*, 18 T.C. ....., No. 47 (May 23, 1952), disallows a claim for treatment of a "tax saving" from consolidated returns as an expense. There a holding company, contrary to the general rule, had collected "tax savings" from its subsidiary. The court held the amounts so paid to the holding company by its subsidiary were in fact dividends and treated them as such

These are the rulings now available on the specific question before the Court. They reach a single and unanimous conclusion: that consolidated returns do not create claims for "tax saving" payments.

There Is Nothing in the Revenue Acts to Require a Departure from the Rule.

The argument that Congress in enacting the revenue acts had some purpose to benefit parent companies in holding company systems is without foundation. There are a number of reasons.

The revenue acts create no private rights. They collect revenue to pay the expense of government. *Meriwether v. Garrett*, 102 U.S. 472, 513. Indeed, if a tax law requires the payment of money from one private person to another, it becomes unconstitutional. *United States v. Butler*, 297 U.S. 1, 61.

There is nothing either in the material quoted by petitioners or elsewhere in the extensive history of consolidated returns[18] to indicate that Congress intended to confer a special benefit on holding companies. The true purposes of consolidated returns are well understood. They are, first, to facilitate the administration of the tax laws by relieving the Treasury of the burden of reallocating income and deduc-

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for tax purposes. In the unreported decision *In re Missouri Pacific Railroad Co.*, Docket No. 6935 (E.D. Mo. 1947), a subsidiary by joining in consolidated returns was faced with an actual cash loss in increased taxes. The group paid the subsidiary not the amount by which the loss benefited the group but rather the amount of actual damage to the subsidiary from the returns. In fact, the order was in strict conformity to Rule U-45(b)(6) of the S.E.C. See the text of the order, Appendix C, p. 34.

[18] A tabulation of this material appears in Appendix B, p. 29.

tions on transactions between affiliated companies[19] and, second, to do tax justice between businesses organized as subsidiaries on one hand and businesses organized by departments on the other.[20] In a business organized by departments the losses of one department offset the income of another. If the same business were organized by subsidiaries this offsetting, without consolidated returns, would not take place. Consolidated returns collect an equal tax

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[19]The House Ways and Means Committee reported as follows on the Revenue Act of 1934:

> "Your committee considered at length the question of abolishing the consolidated return. Our subcommittee originally recommended this action. The Treasury believed this policy undesirable. The Treasury pointed out that the one way to secure a correct statement of income from affiliated corporations is to require a consolidated return, with all intercompany transactions eliminated. Otherwise, profits and losses may be shifted from one wholly owned subsidiary to another, and their separate statements of income do not present an accurate picture of the earnings of the group as a whole. * * * The administration of the income tax law is simpler with the consolidated return since it conforms to ordinary business practice; enables the Treasury to deal with a single taxpayer instead of many subsidiaries; and eliminates the necessity of examining the bona fides of thousands of intercompany transactions." H. Rep. No. 704, 73d Cong., 2 Sess., p. 16.

See, also, S. Rep. No. 960, 70th Cong., 1st Sess., pp. 1, 13, 29; Hearings of House Ways and Means Committee on Revenue Revision, 1934, pp. 86, 99; Report of the Joint Committee on Internal Revenue Taxation on the Revenue Act of 1926, p. 63.

[20]See Memorandum of the Finance Committee of the Senate on the 1918 Act:

> "Where a corporation does business through subsidiary corporations, such subsidiaries represent in effect merely different departments of one business. It is just as illogical to tax these subsidiaries separately as it would be to levy a separate tax upon the profits earned by different departments of a single corporation." (p. 9.)

See, also, Report of Senate Finance Committee on the Revenue Bill of 1928 as quoted in the Hearings before the Senate Finance Committee on the Revenue Act of 1932, p. 24; S. Rep. No. 665, 72d Cong., 1st Sess., p. 9.

from both enterprises. There is nothing here to suggest that Congress has any particular regard for holding companies.

Petitioners' argument is founded upon a singularly unsophisticated view of holding company systems. Petitioners would have the Court believe that the holding company systems which file consolidated returns are single ownerships. Nothing could be further from the truth. Consolidated returns can be filed if and whenever 95 per cent of the equity and voting stock is within the system. (I.R.C. Sec. 141(d)).[21] This says nothing about minority holdings, nor about preferred stock and senior securities such as notes and bonds. Those securities are normally in the hands of the public, *North American Co. v. S.E.C.*, 327 U.S. 686, 701. No one knows this better than Congress and it is hardly likely that Congress which has in general been hostile to holding companies would intend by consolidated returns to confer an advantage on those holding companies at the expense of their subsidiaries, the operating companies owned in truth by the public.

Committees of Congress Have Investigated and Condemned "Tax Saving" Payments to Holding Companies for Taxes Saved by Consolidated Returns.

In considering the bill which eventually became the Public Utility Holding Company Act of 1935, the Congressional Committees were sharply critical of the practice which petitioners now advocate, that is, a practice whereby the parent company takes to itself the benefit of group "tax savings." For example, Senator Wheeler, chairman of the

[21] It does not have to be held directly by the parent company. Subsidiaries can hold stock of the parent and of other subsidiaries (I.R.C. Sec. 141(d), Appendix A, p. 2). Petitioners who claim a special privilege for the top parent ignore these situations.

Senate Committee on Interstate Commerce, in speaking of this practice said of the holding companies:

> "The Chairman. What they did, according to the testimony here, was this. They went out and collected money from the operating companies as income taxes, in the amount that the local company would have to pay. It was paid into the holding company, and then the holding company, as a matter of fact, under the consolidated returns that they had made, and under the arrangements which they could make, made large profits in their income tax. In other words, they charged up to A, B, and C companies a certain amount of income tax that they said they would have to pay to the Government, and then they took that money. They acted as tax collectors, but they paid in only a portion of it, a half of it, or perhaps a third.
>
> Mr. DeVane. It was $11,000,000 that they collected, and they paid $2,000,000.
>
> The Chairman. So that, as a matter of fact, they took that $9,000,000, which should have gone either to the Government, or, if it was not necessary to pay it to the Government, then it should have gone back to the operating company."[22]

References to similar comments on petitioners' position are noted in the margin.[23] Thus to the extent that Congress has indicated a preference as to who should receive the benefits of "tax savings" from consolidated returns it has taken a

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[22]Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1725, p. 255.

[23]Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st Sess, on H.R. 5423, pp. 153, 849, 992, 1061, 1522; Hearings before the Committee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess. on S. 1725, pp. 83, 122, 255, 557, 822, 873-4.

position precisely contrary to that for which petitioners argue.

The Rule Is in Accordance with Sound Policy.

The rule against payments for "tax savings" is supported by sound policy. The reasons include:

First. The fact that the Revenue Acts do not create private rights. A tax is an impost levied by the Government to obtain revenues to maintain its existence. *Meriwether v. Garrett,* 102 U.S. 472, 513-14. It creates no private rights. *United States v. Butler,* 297 U.S. 1, 61.

Second. The fact that "tax saving" payments, if allowed, would contravene the policy against merchandising tax advantages. Transactions which have only a tax purpose are not recognized by the tax law. *Gregory v. Helvering,* 293 U.S. 465; I.R.C. Sec. 129. "Tax saving" payments, if approved, would offer new opportunities for tax avoidance and provide a new motive for distorting business transactions with relation to the tax law.[24]

Third. The fact that "tax saving" payments, if required, would create great uncertainties in the law. Husbands and wives file joint returns (I.R.C. Sec. 51(b)); stockholders to save taxes sell the stock of a business rather than its assets, a lawyer sends a December bill to make a deduction available to his client in the current tax year. Do these ordinary transactions create claims for taxes "saved"?

Fourth. The fact that a requirement of "tax saving" payments would unnecessarily complicate the tax system. Taxation "can never be made simple but we can try to

[24]Cf. *Young v. Higbee Co.*, 324 U.S. 204, 210, holding that the right of appeal given by the law could not be sold when that would produce a result contrary to the policy of the statute.

avoid making it needlessly complex." *Dobson v. Commissioner*, 320 U.S. 489, 495. To impose upon an already complex tax system a complementary system of "tax saving" payments would unnecessarily multiply the complexities of tax administration.

The settled practice against "tax saving" payments should not be disturbed.

The Rule Is Fair and Equitable.

The rule applies in cases where there are diverse interests—to affiliations in which creditors and stockholders of the several companies in the chain, as well as the public served by operating members of the group, have rights and interests distinct from the rights and interests of the parent company. In fact the rule is called into being for such cases, to supply a formula that protects against upstream payments of "charges in lieu of taxes" at the expense of operating subsidiaries and the holders of their securities.

In all such cases, the revenue act grants the privilege of filing the consolidated return to the group. The parent company files the return and each of the other members consents to it, I.R.C. Sec. 141. According to petitioners, this means that every loss parent is entitled to a price for its joinder.[25]

The law requires no such unhappy result. There is nothing about the tax advantage of a loss in a consolidated tax return to create a claim for compensation. The only service provided by the loss company is the nominal one of indicating its acquiescence in the return. Nothing else is

[25]Petitioners seem to think that other loss members are in a different position. Why? They too must consent. Their losses have equal efficiency in reducing taxes. A loss under section 23(g)(4) can be the loss of a subsidiary company in the chain.

taken from or provided by the loss company. The other group members benefit from the loss because the revenue act computes the tax by offsetting it against their earnings. But the loss company has no claim on that account because it does nothing to bring the benefit about—it contributes no service, no effort, no property or asset of any kind.

For obvious reasons, the rule gives nothing for an assumed power to bargain. If one group member can bargain all can bargain and the net result would be to reward the most recalcitrant. Affiliated companies must deal decently with each other. Their claims *inter se* are measured by justice and the law, not by a supposed power to impose unnecessary taxes.

The rule is fair. It applies equally to all group members all the time. It leaves with each the possibility of tax reduction from the coincidence of loss and gain, and protects each against claims in lieu of taxes arising out of such coincidences. No one, looking forward, can say whether a system of tax saving payments would leave him richer or poorer. Is a group member entitled to speculate on ameliorating its losses by collections from its affiliates? Equity demands no such uncertainty and confusion. Its demands are satisfied by equality, by a rule that applies equally to each member of the group and leaves to each what the revenue act leaves to it, namely, its earnings net after taxes.

The rule conforms to *Phillips-Jones Corp. v. Parmley*, 302 U. S. 233, which says that the applicable law is the equitable rule of contribution. Under that rule each taxpayer pays his share of the tax, and no more. It conforms to the principles laid down in *Southern Pacific v. Bogert*, 250 U. S. 483, and in *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307. Within the scope of the principles applied in those cases is the old-

fashioned idea that management must act with reasonably good judgment and cannot charge a price for preferring a good course of action over a bad one.[26] When the desirable choice between returns is as plain as it was in the circumstances of this case, consolidated returns are filed because good management requires that course. This neither justifies nor permits a charge for the "service."

One final point should be made as to the law arguments which petitioners advance. Those arguments are founded upon doctrines of unjust enrichment and duality which have been in the law for many years. Never, however, have these arguments, or an assumed purpose of Congress in connection with consolidated returns, led to the conclusion which petitioners argue. On the contrary, every tribunal, every informed person who has considered the problem, has reached the opposite conclusion.

The Rule Has Been Followed from the Beginning by the Western Pacific Group.

Since 1918 the Western Pacific group has filed consolidated tax returns (Ex. D. 40, R. 1504). At the direction of the Corporation the tax under the consolidated return has been allocated to the group members in proportion to net income (R. 1262). There has never been a "tax saving" payment (Ex. D. 40, R. 1504, 1262).[27] On many occasions this practice

[26] Cf. *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 157, referring to an allocation of the charges for the parent company's services based on the cost of the service to the parent company.

[27] Ex. D. 40, a printed Price Waterhouse & Co. report, shows that interveners (Int. brief, p. 70) are mistaken in referring to payments by Utah Fuel as made for "tax savings." Actually, a net payment was made by the Corporation under agreements whereby the Corporation undertook to absorb certain Utah Fuel taxes in connection with transactions in which the Corporation received a large dividend from Utah Fuel and made an agreement with the Missouri Pacific respecting the reorganization of the D. & R. G. W. R. Co. See pp. 1-2, 3-15, of the report, particularly note 2, pp. 5-6.

resulted in tax reductions for the Corporation. In each year from 1924 to 1935 the Corporation received a "tax saving" because the loss of another group member was included in consolidated returns (Ex. D. 40, R. 1504, 1552, 2040). The tax thus "saved" totaled $593,976.33 (R. 1552, 2040). No payment was made for that saving (R. 1262, Ex. D. 40).

The established rule was followed for each of the years in question. Only long after the event, after the returns were on file, after the reorganization trustees were discharged, after the reorganization proceeding was closed, after it was no longer possible for the trustees to file separate returns and take advantage of deductions unavailable under consolidated returns was this claim asserted. It is, as the court below pointed out, "an afterthought" (R. 274), a tribute to a lawyer's ingenuity. It has no substance. But if petitioners should be successful they will impose upon respondents a total burden of taxes and "tax saving" payments far in excess of the original tax obligation to the Government.

B. NOTHING IN THE CIRCUMSTANCES OF THIS CASE TAKES IT OUT OF THE GENERAL RULE OR GIVES TO THE HOLDING COMPANY A "TAX SAVING" CLAIM.

According to the general rule there is no right to payment for a "tax saving." Petitioners cannot succeed unless they show some special reason why they should be relieved from the rule. This they fail to do.

After the order of October 11, 1943, confirming the plan, it was theoretically possible, *Insurance Group v. D. & R. G. W. R. Co.*, 329 U.S. 607, 611, 618-9, that the Corporation might be readmitted to participation, but for practical purposes it was clear that at some date not far in the future the

Corporation would be required to surrender its stock in the debtor company.

This meant that the Corporation could not expect to derive indirect benefit from the trustees' "tax savings."

There is nothing in this to take the case out of the rule. The rule was not made exclusively for prosperous parent companies. It denies to subsidiaries the right to "tax saving" payments although they normally receive no benefit, direct or indirect, from the tax advantage of their losses. The rule was made for loss parents, too. There is nothing to suggest that its application depends on the financial condition of the group members, or upon the fact or degree of indirect benefit to the loss member.

The consummation of the plan excluded the holding company from participation. This proves that it is not entitled to a benefit. It affords no reason for repudiating the holding company's own practice of 25 years or for making a preferential payment to the parent company in violation of the established rule.

Thus it is clear that the special circumstances of the case provide no reason for a departure from the established rule.

The Alleged Severance of "Economic Unity" Affords No Reason for Taking the Case Out of the Rule or for a "Tax Saving" Payment to the Holding Company.

Petitioners argue that this Court's decision of March 15, 1943 (318 U. S. 448) approving the reorganization plan "severed the economic unity" of the group and thereby created circumstances requiring a special conclusion. This argument has no substance.

First. The decision "severed" nothing. On that date the Court approved the Interstate Commerce Commission's plan

and give significance to a factor to which Congress has attached no significance.

Fourth. The accepted formula for the settlement of intragroup liabilities in connection with consolidated returns makes nothing turn on economic unity. The Securities and Exchange Commission, the Treasury Department and the Federal Trade Commission are all intimately concerned with holding company groups. The officials of those tribunals are thoroughly familiar with the fact that ordinarily there is no economic unity within the group. They have nevertheless ruled that the intragroup settlement should be made without "tax saving" payments. No exceptions are stated in terms of "economic unity."

Fifth. The assumption by petitioners that a holding company in ordinary course receives the benefit of all "tax savings" to its subsidiaries is contrary to fact. Petitioners suggest that every benefit to a subsidiary is a benefit to the parent. This Court has reached a contrary conclusion. "So various are the possible permutations and combinations of the economic factors that equivalence of surplus or deficit in the accounts of the subsidiary with the gain or loss to the parent would be mere coincidence." *Commissioner v. Phipps*, 336 U.S. 410, 421, n. 15. The Treasury Department agrees: "Moreover, there is no reason for the assumption that the entire earnings of a subsidiary would become dividends to the parent" (Treasury Department release of June 9, 1948, "Consolidated Returns and Intercorporate Dividends," p. 12). If, to take some obvious examples, bonds are in default, debenture interest unpaid, preferred stock in arrears or general creditors unsatisfied, the benefit of any tax reduction on account of consolidated returns never reaches the parent.

There Is Nothing Special in the Holding Company's Position as Parent or as Loss Company.

In the final analysis the Corporation's position in this case has two elements: that of a parent company and that of a group member whose loss was claimed as a deduction in a consolidated return. The Corporation *as parent* has no right to take to itself the "tax savings" realized by its subsidiaries through the consolidated returns. That abuse of the holding company position has been condemned.

As a loss company receiving no benefit from the loss the position of the Corporation is not improved. The entry of a loss in a consolidated return produces no right to compensation in the loss company. This can be demonstrated by the general business practice, the past practice of the Western Pacific group and all the relevant rulings. Subsidiaries usually receive no benefit from the "tax savings" to the group through their losses. Nevertheless, the subsidiaries never receive "tax saving" payments. If the entry of a loss in a consolidated return entitles the loss company to compensation because it otherwise has no benefit, virtually every intragroup settlement in the past thirty years has been improper and public investors in subsidiary companies have been unlawfully deprived for thirty years of an asset to which they were entitled.

As "Former Parent" the Holding Company Can Neither Escape the General Rule nor Claim an Equity.

Petitioners' claim to a special equity comes to this: that the Corporation's position is different from that of the normal parent company. What is the difference? It is not that the Corporation had a loss that went into the returns. It is not that the tax law and regulations permitted separate or

consolidated returns. These things are characteristic of all the cases to which the general rule applies. In most cases the parent company may have an indirect benefit from the tax saving. Petitioners say their case is different because here that chance did not exist. Theirs is not the only case; it is usually true that subsidiaries cannot reach the assets of their affiliates, and no doubt the same is true at times of other parent companies. The rule is not qualified in favor of holding companies who are in financial difficulty.

Furthermore, the difference is not an equity. It is a statement that the parent's equity has been lost. We have seen that as parent the Corporation has no claim. As former parent, it can have no better right.

Petitioners are not helped by describing an ex-parent as a "stranger." As a stranger, the Corporation no longer has an equity but claims a supposed freedom to impose additional taxes on the trustees by choosing to file separate returns. That argument is fallacious.

C. THE FALLACIES IN PETITIONERS' ARGUMENT THAT THE HOLDING COMPANY WAS FREE TO MAKE A CHOICE OF RETURNS: (1) THE HOLDING COMPANY WAS BOUND TO FILE CONSOLIDATED RETURNS, AND (2) IT COULD DERIVE NO EQUITY FROM A SUPPOSED POWER TO WITHHOLD ITS CONSENT.

Petitioners insist that the Corporation was free to impose $17,201,739 additional taxes on the trustees by filing separate returns. They seem to think that the major premise of their claim is this supposed freedom of the holding company. It is this, they say, which gave it a right to bargain, or as the Corporation puts it, gave rise to a claim for the tax value of its loss. It is this, they say, which gives significance to the dualities upon which they so heavily rely.

There are two fallacies in the argument: first, the Corporation had no choice, and second, if it had been free to choose, that would have given it no right in the tax savings.

The Holding Company Was Obliged to File Consolidated Returns.

Under the circumstances of this case the Corporation was specially obliged to co-operate to reduce the trustees' taxes. It was not a stranger. Its obligation arose from the circumstances (1) that for upwards of twenty years it had used the accepted formula, and had received and retained the benefit of "tax savings" from its affiliates' losses (this brief, p. 57), (2) that in prior years there had accumulated credits and carry-overs resulting from the trustees' operations, which, because the returns for those years were consolidated, would be lost unless the returns for the years here in question should be consolidated,[30] (3) that the Corporation had no income and no use for its loss, (4) that the Corporation as parent was under fiduciary duties to its insolvent subsidiary's creditors, and (5) that as sole stockholder it was required by the Bankruptcy Act so to act as to preserve the estate.

The reorganization court would have required the Corporation to sign the returns without a "tax saving" payment. The reorganization court had power to compel the Corporation to sign the returns, had it proved recalcitrant. A bankruptcy court has the powers of a court of equity, *Young v. Higbee Co.*, 324 U. S. 204, 214; *S. E. C. v. United States Realty Co.*, 310 U. S. 434, 455. As such, it has full power in a reorganization proceeding to protect the assets of the estate.

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[30] $5,773,937 of the claimed $17,201,739 tax saving represents the tax advantage of the trustees' carry-overs and credits as calculated by the petitioners (this brief, p. 113).

"The jurisdiction of the bankruptcy court in Chapter X proceedings to protect and preserve the property of the bankrupt estate was not in question and could not be questioned." *Duda v. Sterling Mfg. Co.*, 178 F.2d 428, 434. In the exercise of that jurisdiction the reorganization court would have compelled the Corporation, a party to the reorganization proceeding,[31] to join in the returns and thus to conserve the assets of the bankruptcy estate. As sole stockholder of the old company, and initiator of the reorganization proceeding, the Corporation had general fiduciary duties to its subsidiaries, particularly in the interest of the latter's creditors. *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 522, 524, *Pepper v. Litton*, 308 U. S. 295, as well as special duties arising out of the bankruptcy proceeding to conserve the assets for the benefit of creditors.[32] Under such circum-

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[31] *Callaway v. Benton*, 336 U.S. 132, upon which appellants rely, involved the power of the reorganization court over a stranger to the proceeding.

[32] Compare 3 *Collier on Bankruptcy* (14th ed.) Par. 62.30, p. 1573: "Among [the duties of the bankrupt] is the duty to preserve the estate for the benefit of the creditors and to do whatever is needed to protect the assets from deterioration until, either a custodian or a receiver or the trustee has taken charge of them. This duty is not specifically mentioned in the statute, but has been recognized by the courts." See, also, *In re Hines*, 69 F.2d 52; *Sellers v. Bell*, 94 Fed. 801, 809; *In re Beck*, 92 Fed. 889, 891; *In re Connecticut Co.*, 95 F.2d 311, 315, cert. den. 304 U.S. 571. The obligations of the debtor are binding upon the stockholders of the debtor. Sec. 77(l) provides in part: "In proceedings under this section * * * the duties * * * of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed * * *." And Sec. 7b of the Act provides in part: "Where the bankrupt is a corporation, * * * its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this Act." See, e.g., *Goldie v. Cox*, 130 F.2d 695; *In re Songood Realty Co.*, 32 F. Supp. 121. See, also, *In re Floyd's Estate*, Del. Co. Orphans Ct., No. 113 (Pa. 1950), 51-2 U.S.T.C., Par. 9415, where a probate court ordered a recalcitrant executrix to sign a joint in-

stances the reorganization court would never have allowed the Corporation to deplete these assets by demanding payment for signing a paper.[33]

The Court of Appeals was right in holding that the Corporation "was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities" and that "It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty" (R. 2234). In so holding the Court of Appeals followed the rulings of this Court, among them *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 522, where it is said:

> "A holding company, as well as others in dominating or controlling positions (*Pepper v. Litton*, 308 U. S. 295),

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come tax return of the decedent and his former wife because it would "save the estate considerable expense in that the estate will be able to take advantage of the benefits to be derived from the split income provisions of the Internal Revenue Code."

[33] A reorganization court pays nothing for nuisance value. "In these proceedings there is no occasion for the court to yield to such pressures." *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 129. Moreover, if appellants had exacted a price for a signature to the consolidated returns they would have been forced to return the exaction thus collected. Cf. *Young v. Higbee Co.*, 324 U.S. 204, 214. It is not common practice to require payment for the service of signing a paper and the cases are not numerous. They agree, however, in requiring repayment of the price exacted. See *Kelley v. Caplice*, 23 Kan. 337, aff'd on rehearing, 27 Kan. 359; *Guetzkov Bros. Co. v. Breese*, 96 Wis. 591, 72 N.W. 45; *Lain v. Rennert*, 308 Ill. App. 572, 32 N.E.2d 375; *Oswald v. El Centro*, 211 Cal. 45, 292 Pac. 1073; *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350; *Rees v. Schmitz*, 164 Ill. App. 250. Cf. *Union Pac. R.R. Co. v. Public Service Comm.*, 248 U.S. 67, and cases cited in the dissenting opinion in *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326-30. The contention, moreover, that a hard bargain should have been made with the trustees has no merit in an equity court. "The complaint that its board of directors did not drive a harder bargain, or the hardest bargain, that it might have driven should have no appeal to a court of equity. On the contrary, courts of equity often proceed upon a contrary and opposite theory." *Atwater v. Wheeling & L. E. Ry. Co.*, 56 F.2d 720, 724.

has fiduciary duties to security holders of its system which will be strictly enforced. See *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307."

See, also, *In re Commonwealth Light & Power Co.*, 141 F.2d 734, 736, and *Comstock v. Group of Institutional Investors*, 335 U. S. 211.

The Corporation's Obligation to File the Returns Survived the Termination of Affiliation.

The fact that the returns for 1943 and 1944 were physically filed after the Corporation surrendered its stock does not affect the Corporation's obligations. As required by the statute, the returns related to the period of affiliation, and the obligations of the parties with respect to them were therefore the obligations of the affiliation period. The obligations of a fiduciary upon termination of the relationship continue unimpaired with respect to all past transactions and the incidents of winding up. The rule applies to all fiduciary relationships: partnerships, agencies, trusts and corporate affairs.[34]

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[34] *To Partnerships:* "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Uniform Partnership Act, 7 U.L.A. Sec. 30; Cal. Corp. Code Sec. 15030.

To Agencies: "The duty of an attorney to be true to his client, or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term." *Trice v. Comstock*, 121 Fed. 620, 625.

To Trusts: "When the time for termination of the trust has arrived, the duties and powers of the trustee do not immediately cease, but until the trust is actually wound up, he has such duties and powers as are appropriate for the winding up of the trust." 3 *Scott on Trusts* (1939) Sec. 344.

To Corporations: "* * * by statute in most jurisdictions it is now provided that upon the dissolution of any corporation in any

The Corporation had, therefore, fiduciary obligations with respect to the tax transactions which were entirely unaffected by the date the returns happened to be filed. Those fiduciary duties required that the Corporation co-operate in mimimizing the trustees' taxes. As fiduciary, the Corporation was not entitled to prefer its own interest over the interest of the unpaid creditors by demanding a "tax saving" payment on account of an entry in the tax returns which cost it nothing. The fiduciary obligations which the law recognizes for the circumstances of this case deprived the Corporation of any choice about the kind of return to file.

The Power to Choose Between Returns Is Not the Source of Any Equity and the General Rule Makes No Allowance for Such a Power.

It is not significant under the general rule that the revenue act frequently affords a choice between separate and consolidated returns.[35] The rule provides a formula to determine the obligations of the group members between each other whenever consolidated returns are filed. It does not distinguish between the cases in which there is a choice and cases in which there is none.

The claim of parent company's privilege or freedom of choice is the very thing that was denounced in the Congressional hearings (this brief, p. 53). All the reasons for the

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manner, or upon the expiration of its period of corporate existence, the directors at the time of the dissolution shall be the trustees of the creditors and stockholders of the corporation * * *." 16 Fletcher, *Corporations* (Perm. Ed.), Sec. 8174.

[35] I.R.C. Sec. 141 permits a change to consolidated returns at any time. The choice of consolidated returns, once made, is a commitment to continue with them, unless because of material amendments to the regulations, or for other reasons, the choice is reopened (Sec. 141(b); Regs. 110, Sec. 33.11; Regs. 104, Sec. 23.11).

general rule are opposed to a claim predicated on the supposition that a choice under the revenue act gives to any party to the returns a right to demand a price for his consent or to exact a payment in lieu of taxes.[36]

This is especially true where, as here, the supposed bargaining power is to be employed against the reorganization court and its trustees. The Corporation caused its subsidiary to petition for reorganization, and

> "As a result of the filing of the petition in this case, the court, not the stockholders, acquired exclusive dominion and control over the estate. Hence, any strategic position occupied by the stockholders prior to these proceedings vanished once the court invoked its jurisdiction. Threats by stockholders of the kind here in question are merely threats to the jurisdiction of the court, which jurisdiction these selfsame stockholders invoked for their benefit when they caused the debtor's petition to be filed. Consequently, these claims of the stockholders are, as we have said, entitled to no more dignity than any claim based on their nuisance value."
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> (*Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 130-1.)

This means that in the circumstances of this case the holding company could not secure from the reorganization court a price for its signature. Petitioners' insistence on the supposed freedom of the holding company to file separate returns serves only to expose the fallacy on which their claim is based.

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[36] A contrary ruling would produce the absurd result of every group member claiming a price for his consent, a contest in which the member least concerned would hold the highest cards.

D. PETITIONERS HAVE NO CASE UNDER THE RULES OF LAW THEY INVOKE.

There is nothing to support petitioners' claim in the elementary principles which they invoke.

The claim fails because nothing belonging to the Corporation was taken or used. The Corporation did not *contribute* the returns; all it did was sign them as under the law it was bound to do. In so doing it incurred no expense and gave up nothing. It did not forbear from separate returns: that choice was not available to it, either under the general rule, or under the circumstances of this case. The corporation was not the owner of a strategic position.

The petitioners do not accept this. All their arguments are based on the assumption that the power to determine the amount of the trustees' taxes was merchandise belonging to the Corporation and that its exercise in favor of lower taxes was a service which it furnished to the trustees. This mistaken assumption invalidates their appeal to the elementary principles they invoke.

Petitioners Have Suffered No Wrong and Proved No Damage.

Petitioners do not prove a cause of action. They have no title claim. The funds they seek came from shippers in exchange for transportation service. They have never belonged to petitioners. With no title to assert petitioners, as other litigants, must prove that they have been wronged and damaged. They prove neither. In 1943 the courts gave formal recognition to the financial truth that over the years the interest of the Corporation in the old company had become worthless. Congress authorized a tax calculation wherein the amount of the Corporation's loss was deducted from the income figures appearing in the returns. Returns thus prepared were filed and audited and the group liability

was compromised and satisfied. Nothing in this process constituted a wrong to petitioners. They suffered no tort; no contract was breached; no statutory right was infringed. Petitioners have, therefore, no standing in court. "The only injury of which plaintiffs may complain in a judicial tribunal is the invasion of some legal or equitable right." *Tilney v. City of Chicago*, 134 F.2d 682, cert. den. 320 U.S. 759.

Nor have petitioners been damaged. The Corporation paid no tax under the consolidated returns (Ex. P. 3A/B, 4A/B, 5A/B, R. 491, 492) just at it would have paid no tax under separate returns (R. 1552, 2040). The reference in the returns to the fact of its loss cost the Corporation nothing. The Corporation had no income (Ex. D. 40, R. 1504, 1552, 2040). It could not have used the loss itself[37] and it could not have sold it.[38] The Corporation has thus proved no damage and without proof of damage no litigant can recover. "The damages recovered by an injured party have always been limited to his 'actual damages'." *Connecticut Ry. Co. v. Palmer*, 305 U.S. 493, 504. "Wrong without damage or damage without wrong does not constitute a cause

[37]The consolidated returns and the refund claim applied only a portion of the stock loss against income of the reorganization trustees. From the balance of the loss amounting to more than $42,000,000 (Exs. D. 40, D. 52A), petitioners have not been able to derive any gain whatever—proof positive that no damage has been suffered.

[38]In *J. D. and A. B. Spreckels Co. v. Commissioner*, 41 B.T.A. 370, the taxpayer had acquired the stock of a subsidiary in order to take advantage of a tax loss which the subsidiary was about to realize. The loss was taken and the taxpayer sought to claim the loss as a deduction in a consolidated return. It was held that since the acquisition of the stock had no business purpose the loss could not be allowed.

of private action * * *." *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582, cert. den. 326 U.S. 734.

Petitioners Have No Unjust Enrichment Claim.

The failure of the reorganization trustees to pay additional taxes was not, in contemplation of law, an enrichment. Even if it were, the enrichment was not unjust to petitioners and without proof of injustice *to them* petitioners cannot recover. Finally, where, as here, the defendant is not a wrongdoer unjust enrichment recovery can never exceed the actual loss to the plaintiff—in this case, nothing.

Respondents Were Not "Enriched."

If separate returns had been filed for the years in question, or if the statute had not given a deduction for the loss in consolidated returns, the trustees would have paid additional taxes. The difference is not an "enrichment." Congress passed a statute authorizing the consolidated returns and prescribed that the loss should be entered as a deduction. The resulting benefits, if they are to be so termed, came from the statute. Congress expects that the deductions provided for by the Revenue Acts will be taken. "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering*, 293 U.S. 465, 469.[39]

Assuming an Enrichment, It Was Not Unjust to Petitioners.

Even assuming that a lawful calculation of taxes could be called an "enrichment," petitioners still have no claim.

[39]For a criticism by the Securities and Exchange Commission of the entire concept of a "tax saving" see Appendix B, p. 10.

"The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor." *Restatement of Restitution,* Sec. 1, p. 13. "But, in order to establish unjust enrichment it is not enough merely to show one's retention of the benefit. The retention must also be unjust." *Bailis v. R.F.C.,* 128 F.2d 857, 859. To succeed, a plaintiff must prove injustice to him. The doctrine is a doctrine of restitution. The plaintiff must show that something was taken from him and that there is some recognized basis—fraud, mistake, duress, undue influence, illegality—for revoking the transfer.

One consequence is that in every windfall situation, such as petitioners claim this to be, the defendant prevails. In *Straube v. Bowling Green Gas Co.,* 360 Mo. 132, 227 S.W. 2d 666, plaintiffs paid for gas at rates based upon charges made to the gas company by its suppliers. During litigation over the validity of an order reducing the rates of the supplier the difference between the new and the old rates was impounded and later paid to the gas company. Plaintiffs' unjust enrichment argument failed. "Since the facts alleged show no 'unjust privation' of appellants and no legal or equitable rights in appellants as to either fund, there could be no 'unjust enrichment' of respondent at the expense and loss of appellants." (227 S.W.2d 671). Other rulings to this effect are noted in the margin.[40]

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[40]In *Houck v. Hubbard Milling Co.,* 140 Minn. 186, 167 N.W. 1038, the defendant received refunds resulting from revision of freight rates. Plaintiff, who had made sales to defendant on the assumption the existing rates were to apply, attempted to claim the refunds. "The refunds amount to a find for the defendant. * * * No legal equity puts a right of recovery in the plaintiff." (167 N.W. 1039). In *Consolidated Cut Stone Co. v. Seidenbach,* 189 Okla. 128, 114 P.2d 480, subcontractors gave the owner certain credits on account of defaults of the general contractor. A surety

The cases make it clear that a windfall to respondents vests no claim in petitioners unless they can demonstrate injustice to them by an invasion of rights which the law recognizes. The rights of petitioners have not been invaded.

Petitioners' Unjust Enrichment Recovery Could Not in Any Event Exceed the Actual Loss to Them.

The law of unjust enrichment recognizes three situations: (a) that in which the defendant is free from fault; (b) that in which the conduct of defendant is tortious; and (c) that in which the defendant is a conscious wrongdoer. If the defendant is free from fault, the judgment, assuming a case is made out, is limited to the loss to the plaintiff or the benefit to defendant, *whichever is lower.* "If the [defendant] was no more at fault than the claimant, he is not required to pay for losses in excess of benefits received by him and *he is per-*

later compensated the owner for the same defaults. The subcontractors, arguing unjust enrichment, attempted without success to obtain judgment in the amount of the credits. "Unless these appellants had rights existing prior to or at the time payment was made * * * which were violated or altered by the payment, the mere fact of excess payment can give them no right." (114 P.2d 484). In *Greek Catholic Congregation of Borough of Olyphant v. Plummer, et al.*, 347 Pa. 351, 32 A.2d 299, plaintiffs failed to recover from defendant royalties which defendants had received on coal which belonged to plaintiffs. "In every case of 'unjust enrichment' the courts have been able to point out some wrong done by the party enriched. By 'wrong' is meant, of course, the violation of another's legal right." (32 A.2d 300). In *Russo v. Hosmer, Inc.*, 312 Mass. 231, 44 N.E.2d 641, Hosmer was paid by Massachusetts for work he had illegally contracted to Russo who sought relief in quantum meruit. Russo's claim was denied. "He [Russo] was not damaged nor affected by the failure to observe the provisions in Hosmer's contract with the Commonwealth governing the subletting of the work." (44 N.E.2d 644). In *Vanderbilt University v. Williams*, 152 Tenn. 264, 280 S.W. 689, defendant received rent for land over which he and plaintiff had identical easements which entitled neither to rent payments. Plaintiff's claim for half of the rent was denied: "Equity may not be invoked to supply a remedy until a right, legal or equitable, exists." (280 S.W. 692).

mitted to retain gains which result from his dealing with the property." (*Restatement of Restitution,* p. 596 and see the illustrations, pp. 356 and 618.)

The cases agree. A surety, for example, who pays an obligation of his principal at a cost to the surety less than the obligation discharged can recover only his outlay. If, for instance, he pays the principal's debt in depreciated currency, he recovers only the cost of the currency to him.[41]

If, therefore, petitioners' case rests upon unjust enrichment, they cannot recover because they suffered no loss. Plainly there was nothing wrongful in the handling of the tax transaction. The Internal Revenue Code provides for consolidated returns; the stock loss deduction is within the plain language of Section 23(g)(4); liabilities within the group were determined in accordance with the formula universally recommended and which the parties had followed for twenty years. Taxpayers who follow twenty years of past practice and the unanimous precedents are not conscious wrongdoers or tort feasors. Unjust enrichment recovery could not, therefore, exceed in any event the gain to respondents or the loss to petitioners, *whichever is lower.*

Petitioners Have No Claim Arising from Fiduciary Obligations.

Petitioners attempt to support their position by contending that fiduciary obligations were operating in favor of the Corporation in connection with the tax transactions. The

[41] See, for example; *Bonney v. Seely,* 2 Wend. 481 (N.Y.): "If the plaintiff had paid the defendants' debt by paying half the amount, can he recover the whole from the defendants? I think not. He is entitled to recover the amount paid, not the amount extinguished by that payment." See also *Kendrick v. Forney,* 22 Gratt. 748 (Va.); *Butler v. Butler's Administrator,* 8 W. Va. 674; *Succession of Dinkgrave,* 31 La. Ann. 703; *Hall v. Creswell,* 12 Gill & Johnson 26 (Md.).

argument is unsound. In those transactions the Corporation was itself charged with fiduciary duties and its position was in no respect that of a *cestui que trust.*

The Corporation was charged with fiduciary obligations, *Consolidated Rock Products Co. v. DuBois,* 312 U. S. 510, 522, 524, and was obliged to cooperate to reduce the trustees' taxes (this brief, pp. 65-9).

The Position of the Corporation Was Not That of a Cestui Que Trust.

Petitioners seek to reverse the fiduciary obligations imposed by law and place the Corporation in the position of a *cestui que trust* by an attack upon the Corporation personnel who handled the tax transactions.

This attack fails because the record does not support it. The Corporation's officers and directors were active in looking after its interests and were competent and informed (this brief, pp. 8-9, 16-17).

Petitioners attack the tax attorney's work but they have no criticism of the returns or of his conduct of the transaction *vis á vis* the Bureau. His work was devoted to bringing about the least taxes required by law. They commend this work unreservedly (R. 1422-3). Their only complaint is that he did not tell the Corporation it had a strategic position. As to this, they say he did not advise them of their "right" to file separate returns. Actually, he did point out that this alternative existed under the statute and recommended against it because it would result in higher taxes (this brief, p. 11). They also complain that he informed them belatedly of the 1947 settlement proposal, but he gave them full information about it several months before the settlement was effected, and they had adequate time to act (this brief, p. 15).

These criticisms are reflections on the Corporation, not on the attorney. They reflect the true character of the petitioners' claim, and show again that it is a claim of power to force a payment as the price of "co-operation." This is strikingly exposed by the testimony that the Corporation's directors in 1947 would have used their "strategic" position to force a release from the bar of reorganization (R. 1007-8). In this they were unsuccessful (R. 168-70).

Furthermore, neither incompetence nor control of Corporation personnel would either relieve the Corporation of its fiduciary obligations or impose fiduciary duties on others in the Corporation's favor. A fiduciary cannot avoid his responsibilities by lack of capacity. Nor can he, by complaining of his disability, impose those responsibilities on others. The Corporation as holding company, as a member of the affiliated group, and as petitioner for the reorganization of its subsidiary, had fiduciary duties in the tax transactions. Those duties bound the Corporation whoever its officers and directors might be. They were binding, moreover, on anyone who took charge of or participated in the tax transactions. Even if it were the fact, which it is not, that the trustees or their lawyers took charge of tax matters, the consequence would be only that the trustees and their lawyers, to the extent they acted for the Corporation, would be obligated to honor the fiduciary duties of the Corporation.

Those fiduciary duties, moreover, are not defined, as petitioners seem to believe, by the rules which apply to formal trusts. Fiduciary obligations in connection with corporate affairs are those which are appropriate for that purpose. They are not those which relate to express trusts. *Manu-*

facturers Trust Co. v. Becker, 338 U.S. 304, 311.[42] As far as consolidated returns are concerned they are best defined by the past practice of the group and all the precedents, all of which are in accordance with what was done and opposed to what petitioners claim should have been done.

Nothing which occurred in connection with taxes relieved the Corporation of its normal fiduciary duties to its subsidiaries and their creditors. Nothing imposed fiduciary duties on those subsidiaries in favor of the Corporation. The position of the Corporation was in no sense the position of *cestui que trust*. There was no trust, no trust *res*, and no trust obligation running to the Corporation. A discussion of fiduciary duties in this case serves only to support the judgment below.

Petitioners Have No Claim on Account of Duality.

The petitioners emphasize that the Corporation officers who handled the tax transaction were also employed by the trustees.[43] This duality is of no assistance to petitioners. Where significant duality exists, courts will examine a transaction in which the properties or interests of the complainant were taken or used. The examination is made to find out if the complainant received fair value for its properties or interests. Here nothing belonging to the Corpora-

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[42]Compare *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 85: "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"

[43]The petitioners insist on a species of misrepresentation by ascribing the dualities to respondent, the reorganized company. The fact is the dualities ended with revestment, this brief, pp. 17-18).

tion was taken or used. There is, therefore, nothing to consider or evaluate.

Duality as such proves nothing. It creates no right. Its existence does not constitute a wrong. "It is not mere existence of an opportunity to do wrong that brings the rule into play; it is the unconscionable use of the opportunity * * *." *Comstock v. Group of Institutional Investors,* 335 U.S. 211, 229; *Leavenworth County Commissioners v. Chicago, Rock Island & Pacific Ry. Co.,* 134 U.S. 688, 705. Petitioners do not prove a claim by an appeal to a general doctrine of "fairness" unsupported by proof that any asset belonging to them was taken or used.

In the cases on which petitioners rely the courts received proofs of the value of the properties. There was in the record evidence of the market value, *Geddes v. Anaconda Mining Co.,* 254 U.S. 590, 600-02, or some other established guide to fairness, *Espach v. Nassau & Suffolk Lighting Co.,* 177 Misc. 521, 31 N.Y.S.2d 259, 264-5, aff'd *sub nom. Chelrob, Inc. v. Barrett,* 293 N.Y. 442, 57 N.E.2d 825, to which the court could turn. Petitioners offer nothing. This is understandable; the "property" they claim, the strategic position, was not theirs to deal with as an asset or a service.

Moreover, the duality doctrine is particularly inapplicable here, for several reasons:

First: The Corporation cannot complain of a duality which it created for its own purposes. *Myers v. Louisiana & A. Ry. Co.,* 7 F. Supp. 97, 99; *Rosaly v. Gonzales,* 106 F.2d 169, 172.

Second. Duality between the Corporation and the officers of the reorganization court is of no significance. The pay from the reorganization trustees did not impose an obli-

gation on the officers of the Corporation inconsistent with their obligations to their company. The trustees had no personal interest in the reorganization. *In re Ducker*, 134 Fed. 43. Their only purpose was to see that all approved claims were paid. There was, therefore, none of the conflict of interest upon which the duality rule depends. "Here we are dealing with officers of the court and directors appointed by them, men of standing, ability and integrity. There is here no room for any reaction of prejudice or bias, conscious or otherwise, to the frailties of human nature * * *" *J. C. F. Holding Corp. v. General Gas & Electric Corp.*, 181 Misc. 283, 46 N.Y.S.2d 605, 611. Moreover, the Bankruptcy Rules themselves demonstrate that duality in connection with a reorganization proceeding is not a significant circumstance. Section 77 (11 U.S.C. Sec. 205) authorizes it and General Order 44 contains a special provision authorizing the court in a railroad reorganization proceeding to employ attorneys associated with the debtor. Duality does not affect the course or finality of a reorganization proceeding. *Duryee v. Erie R. Co.*, 175 F.2d 58, cert. den. 338 U.S. 861.

Third. The duality cases do not criticize a transaction conducted in accordance with what prudent and independent persons would have done under the circumstances, *Hellier v. Baush Machine Tool Co.*, 21 F.2d 705, 707; *International Radio Telegraph Co. v. Atlantic Communication Co.*, 290 Fed. 698, 702, without benefit of hindsight. *Blaustein v. Pan American Petroleum & Transport Co.*, 293 N.Y. 281, 56 N.E.2d 705, 715; *Crawford v. Mexican Petroleum Co. of Delaware*, 130 F.2d 359, 362. The tax transaction was handled in strict accordance with twenty years of past practice of the group, with the general practice of the business

community and with all the relevant precedents. Presumably, therefore, any prudent person would have done precisely what was done. The courts will not interfere. *Hellier v. Baush Machine Tool Co.*, supra; *International Radio Telegraph Co. v. Atlantic Communication Co.*, supra.

Petitioners Have No Claim Based on a Hypothetical Bargain.

Interveners argue in effect that this Court should make a retrospective bargain between the reorganization trustees and the Corporation and enforce it against respondents. This asks the impossible.

First. This Court has no power to exercise bankruptcy jurisdiction to make a bargain for petitioners. The reorganization trustees are not parties to this proceeding and cannot be made parties. The Court can hardly bargain for them in their absence. Moreover, jurisdiction over those trustees is vested not in this Court but in the bankruptcy court and the jurisdiction is exclusive. *U. S. Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217; *Isaacs v. Hobbs Tie & T. Co.*, 282 U. S. 734, 739.

Second. The reorganization court would have required the Corporation to sign the returns without a bargain for its "strategic position," *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, 130-1. The Corporation was obliged to co-operate and could not bargain for the performance of its duty (this brief, pp. 64-9).

Third. Nothing turns on the supposed freedom to choose to file a separate return. The accepted rule against "tax saving" payments applies alike to cases in which there is a choice and to cases in which there is none (this brief, pp. 69-70).

There Has Been No Unfairness to Petitioners.

The duality doctrine, even if it has application here, goes no further than to say that the tax transactions should be fairly conducted. By every available standard there has been no unfairness to petitioners. What was done was in strict accordance with the past practice of the Western Pacific group, with the generally accepted business practice and with the uniform conclusion of the Securities and Exchange Commission, the Treasury Department, the Federal Trade Commission and all persons who have considered the problem. What better test could there be of "fairness"?

Indeed, if "fairness" is the test, it is petitioners who must fail. There is no "fairness" in the effort of the Corporation to repudiate for its selfish purposes the established practice of the group; nor in the demand of the Corporation for a payment from a transaction in which it was neither wronged nor damaged; nor in the attempt of the Corporation to substitute itself as tax collector; nor in the effort of the Corporation to deprive the group of the benefit of a tax deduction allowed by Congress; nor in permitting the Corporation to recover a $17,000,000 judgment against a reorganized company owned by the unpaid creditors of its subsidiary (and their successors in interest) to whom the Corporation owed fiduciary obligations; nor in allowing the Corporation, a party to the reorganization proceeding, to repudiate that proceeding retroactively and assert a claim relating to the reorganization period which was never presented to the reorganization court and which, if allowed, would frustrate the purpose of the reorganization; nor in permitting the Corporation to undermine the financial position of the reorganized company on the basis of an after-

thought claim presented too late and in the wrong forum. Fairness is opposed to a claim which, in final analysis, rests on the assertion of a right to payment for refraining from the use of a separate return. "Fairness" in this case is with the judgment below.

Petitioners' Authorities

The case on which petitioners chiefly rely, *Commercial Nat. Bank in Shreveport v. Parsons,* 144 F.2d 231,[44] demonstrates the distance by which they fail to support their claim.

The Old Bank, virtually insolvent, conveyed all its assets to the New Bank, which assumed the Old Bank's liabilities to creditors. The contract between the banks (which proved highly profitable to the New Bank) authorized the New Bank to administer Old Bank assets and collect from them an amount sufficient to indemnify it for the liabilities assumed. The remaining assets were to be reconveyed to the Old Bank or liquidated for the Old Bank's account. The litigation was a suit by the Old Bank for an accounting.

The assets conveyed to the New Bank included certain parcels of real property. The Louisiana statute taxing the capital stock of banks provided that the assessed value of the stock might be reduced by the assessed value of all real property owned by the bank. The new Bank reduced the tax on its capital stock by the value of the Old Bank's real property. The court held that in the accounting the Old Bank

[44] The several opinions of the Court of Appeals in the Shreveport Bank cases are reported at 144 F.2d 231, rehearing denied, 145 F.2d 191, cert. den. 323 U.S. 796; 176 F.2d 1004, rehearing denied, 177 F.2d 514; 189 F.2d 668. Opinions of the trial court are reported at 28 F. Supp. 927, 44 F. Supp. 5, 64 F. Supp. 888, 72 F. Supp. 961, 89 F. Supp. 976, and 90 F. Supp. 264.

was entitled to a credit for the tax advantage which came to the New Bank in this fashion.

The basis of decision was the relation between the parties established by the express agreement of liquidation. The court held that the New Bank was not entitled to deduct from the assessed value of its own capital stock the value of the real estate of the Old Bank which it held as liquidator because it was not the owner thereof. The court said, 144 F.2d 231 at p. 236:

> "The credit thus obtained by the New Bank was a profit derived from the *trust property* as effectively as if it had been paid that much in cash." (Emphasis added.)

This case has nothing in common with the *Shreveport* case. The reorganization trustees received no assets from the Corporation for purposes of liquidation; they had no express liquidating agreement with the Corporation; they held no trust estate with a duty to account to the Corporation for the proceeds of the trust.

A case more closely in point is *Hopkins v. Detrick*, 97 C.A.2d 50, 217 P.2d 78, in which a husband claimed a portion of tax refunds payable to the wife on the theory, apparently, that by joining in community property returns he "saved" taxes for the wife. The claim was rejected. See also, *Cooper v. Central Alloy Steel Corporation*, 43 Ohio App. 455, 183 N.E. 439, 444, in which a stockholder's complaint about a "tax saving" arising from a merger was rejected because the complainants "were not interested or concerned" since they were "deprived * * * of not one penny."

The cases cited by petitioners which deal with consolidated returns are either plainly irrelevant (see *Woolford Realty Co. v. Rose*, 286 U. S. 319, holding that losses suffered by a subsidiary in years prior to affiliation cannot be deducted in a consolidated return, and *Duke Power Co. v. Commissioner*, 44 F.2d 543, holding that a return filed by subsidiaries in which the parent did not join was not acceptable), or they support the traditional formula for intragroup settlements without "tax saving" payments. For instance, in *Helvering v. Morgan's, Inc.*, 293 U. S. 121, the court recognized the propriety of the early statutory formula apportioning the consolidated tax in accordance with net taxable incomes of the group members. No tax saving payment was made or suggested. In *Koppers Co.*, 8 T.C. 886, 11 T.C. 894 the intragroup settlement was again according to the established formula and again there was no intimation that tax saving payments were required—and this even though in the *Koppers* situation there was no "economic unity" within the group. See Moody's Industrial Manual 1941, p. 2598. *Bankers Trust Co. v. Florida East Coast Car Ferry Co.*, 92 F.2d 450, is no different. Certain subsidiaries there agreed that a cash refund owing to them for overpayment of taxes should be applied to pay the tax deficiency of another group member. The court recognized that this use of the refund otherwise payable in cash created a right in the contributing subsidiaries to a compensatory payment from the subsidiary whose taxes had been thus paid. Here the Corporation made no tax payment to the Government (R. 1306-07) and it was entitled to no refund. All taxes which were paid were paid by the trustees (R. 824, 826, 1306-07). In the unreported decision *In re Missouri*

Pacific Railroad Co., Docket No. 6935 (E.D. Mo. 1947)[45] a subsidiary by joining in the consolidated returns was faced with an actual cash loss in increased taxes. The group paid the subsidiary not the amount by which the loss benefited the group but rather the amount of actual damage to the subsidiary from the returns. The Corporation in this case had no actual damage and on the theory of this decision it has no claim.

Truncale v. Universal Pictures Co., 76 F. Supp. 465 merely illustrates the familiar rule that corporate directors are not allowed to profit at the expense of their corporation. The directors reduced their personal taxes by causing the corporation to forego certain tax deductions. This increased the tax of the corporation. The District Court denied a motion for summary judgment on the ground that the corporation might possibly recover the full amount of the profit to the directors since "Directors and other officers of a private corporation cannot either directly or indirectly * * * in any * * * transaction in which they are under a duty to guard the interests of the corporation make any profit for themselves or acquire any other personal benefit or advantage, * * *" (76 F. Supp. at 468). *Edwards v. Lee's Administrator*, 265 Ky. 418, 96 S.W.2d 1028, the Kentucky cave case, involves nothing more than a distribution of profits where the defendants "were guilty of repeated trespasses upon" plaintiff's cave property. "The proof likewise clearly indicates that the trespasses were wilful and not innocent." (96 S.W.2d at 1030).

Chelrob, Inc. v. Barrett, 293 N. Y. 442, 57 N.E.2d 825 says only this: that the courts, otherwise reluctant to review busi-

[45]The opinion and order are set out in Appendix C of this brief.

ness transactions, will, when significant duality appears, make certain that the transactions were fair. The fairness referred to is the fairness which the law requires: a recognition of the rights of the parties. In most cases the extent of those rights requires no discussion. On a sale of property, for example, no one denies that the seller is entitled to a fair price. The problem, as in the *Chelrob* case, is only to determine whether the price was fair.

The decisions cited by petitioners in no way support their claims.

E. THE CORPORATION CANNOT IN EQUITY DEPLETE THE ASSETS OF ITS FORMER SUBSIDIARY AT THE EXPENSE OF CREDITORS WHO WERE NOT PAID IN FULL.

This is a demand for $17,201,739 presented against a reorganized railroad by the former parent company. That company directed its former subsidiary to sell securities to the public. The purchasers of those securities are the stockholders (and their successors in interest) of the reorganized company. To these stockholders, as creditors of the old subsidiary, the petitioner Corporation owes fiduciary obligations. *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 522.

By the plan of reorganization the old bondholders became the present stockholders. The exchange of securities was made on the assumption that the preferred stock of the reorganized company would be worth $100 per share and the common stock $57 and $62 per share. *Western Pac. R. Co. Reorganization*, 233 I.C.C. 409, 417. Even on this basis the secured creditors of the old company were not paid in full. The securities issued to the A. C. James Company, the creditor holding the junior secured position, fell short of

paying that company's claim by $3,495,900 (R. 1222, 2021). With interest, that unpaid claim now amounts to more than $5,000,000.

This $5,000,000 does not measure, however, the amount by which the secured creditors were not paid. These creditors, now stockholders of the reorganized company, not only surrendered their first mortgage bonds for securities of an inferior grade (income bonds, preferred stock and common stock) but those inferior securities have not had the value which the plan assumed they would have. This Court is entitled to take judicial notice of the market values. *Insurance Group v. D. & R. G. W. R. Co.*, 329 U.S. 607, 617, n. 6. The range of market values is shown in Appendix D; rarely have they reached the values assumed by the plan. Petitioners now propose to further reduce the assets of these creditors, now stockholders, by $17,201,739. Nothing could be more inequitable. Nothing could be more inconsistent with the fiduciary obligation owing from the Corporation to those creditors. Nothing could more plainly violate the settled principle that creditors have an absolute priority over stockholders. *Northern Pacific Ry. v. Boyd*, 228 U.S. 482, 504; *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 129. Nothing could be more radically at odds with this Court's doctrine that the claim of a holding company in the reorganization of its subsidiary must, whatever its technical status, yield to the necessity of doing justice to the creditors of that subsidiary. *Taylor v. Standard Gas Co.*, 306 U.S. 307.

II. The Bar of Reorganization

Petitioners failed to present their claim to the reorganization court while it was open for the purpose and as a result it is barred by the reorganization.

If a proceeding under Section 77 (11 U.S.C. Sec. 205) is to be effective in rehabilitating the debtor two things are required.

First, the reorganization court must consider and act upon all possible claims which might be asserted against the reorganized company. Chunks of the problem are not left to other tribunals, *Gardner v. New Jersey*, 329 U.S. 565, 577. To accomplish this purpose Congress has provided that claims which are not provable in an ordinary bankruptcy can be presented in a reorganization, Sec. 77(b); *Gardner v. New Jersey*, 329 U.S. 565, 572; *Foust v. Munson SS Lines*, 299 U.S. 77, 82.

Second, the reorganization must put an end to all claims, so that the reorganized company shall not be hampered or perhaps overwhelmed with holdover obligations that defeat the prime object of the proceeding, and so that all persons dealing with it or in its securities may act in reliance upon the reorganization as definitive and settled.[46]

Petitioners propose to flout these settled purposes of a reorganization. They ask the Court to declare that the reorganized company did not emerge from the reorganization proceeding with its liabilities defined; that on the contrary and in spite of efforts extending over a period of eleven years by the Interstate Commerce Commission and the courts, the Company emerged from reorganization with an undefined and undisclosed liability of $17,201,739, a liability,

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[46]See the following: The Erie reorganization cases, *Duryee v. Erie R. Co.*, 175 F.2d 58 and *Beckley v. Erie R. Co.*, 175 F.2d 64; *McColgan v. Maier Brewing Co.*, 134 F.2d 385, cert. den. 320 U.S. 737; *Black v. Richfield Oil Corp.*, 146 F.2d 801, cert. den. 325 U.S. 867; *In re Colorado & S. R. Co.*, 84 F. Supp. 134, cert. den. 338 U.S. 847; *Standard Steel Works v. American Pipe & Steel Corp.*, 111 F.2d 1000; *North American Car Corp. v. Peerless W. & V. Mach. Corp.*, 143 F.2d 938; *In re Peyton Realty Co.*, 148 F.2d 771; *Mohonk Realty Corp. v. Wise Shoe Stores*, 111 F.2d 287.

moreover to be paid in cash by a reorganized company whose first mortgage bond issue was limited to $10,000,000 and which was permitted to have no other fixed interest charge. This suggestion, if accepted, would render ridiculous the efforts in the reorganization to define the liabilities of the new company.

A. THE CLAIM IS A CLAIM AGAINST THE TRUSTEES IN REORGANIZATION, AND IS INVALID BECAUSE IT HAS NEVER BEEN APPROVED BY THE REORGANIZATION COURT.

During 1942, 1943 and the first four months of 1944, the trustees earned large incomes from the railroad properties. The tax liability on these incomes was a liability of the trustees, *Reinecke v. Gardner*, 277 U.S. 239, and the tax, if any, was a cost or expense of administration, *Michigan v. Michigan Trust Co.*, 286 U.S. 334, 344. Petitioners' claim, based upon an alleged saving of these taxes, would, if paid, also have been a liability of the trustees and an expense of administration.[47]

As such, it was the concern of the bankruptcy court and was within its jurisdiction, Sec. 77(e); *Brown v. Gerdes*, 321 U.S. 178, 183-4.

The reorganization trustees, as court officers, had no power to incur any liability to the holding company for a "tax saving" payment or otherwise except by express authorization of the reorganization court. This is settled.

> "The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court

[47] Cf. the Corporation's supplemental complaint (R. 208), alleging that the obligation to account for the tax savings and pay them to the holding company "was an obligation incurred by the Trustees in their operation of the debtor's estate" (R. 224).

under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities—like the one in question—must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust." (*Chicago Deposit Vault Co. v. McNulta*, 153 U.S. 554, 561.)[48]

This principle requiring court sanction to create a liability of the estate was approved by Congress for railroad reorganizations. Section 77(e) says that the reorganization plan must provide "*for the payment of all costs of administration and all other allowances made or to be made by the judge.*" And it was expressly recognized in the Western Pacific proceeding. The reorganization court authorized the debtor to continue its railroad business and provided:

"The authority given by the foregoing shall not include authority to incur expense, other than such as is necessary in the course of the usual and ordinary maintenance and operation of the debtor's property. *Any extraordinary expense* and expense incident to reorganization of the debtor *shall be subject to the prior approval of the Court.*" (R. 1910) (Emphasis supplied.)

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[48]The rule is strictly applied. In *Northern Finance Corp. v. Burns*, 5 F.2d 11, a receiver without prior authority borrowed funds to pay taxes due from the estate. The claim of the lender for the amount of the loan was denied. In *Byrnes v. Missouri National Bank*, 7 F.2d 978, a receiver, authorized to borrow $150,000, borrowed an additional $2,000. A claim for the $2,000 was disallowed. In *In re Erie Lumber Co.*, 150 Fed. 817, merchants furnished goods to a receiver who had no court authority to buy. They were denied compensation. In *Union Trust Co. v. Illinois Midland R. Co.*, 117 U.S. 434, this Court invalidated claims for $54,000 and $32,000 created by a receiver without prior court approval.

This provision was affirmed in the order appointing the reorganization trustees and transferring the railroad properties to them (R. 1187, 1923).

An unprecedented liability of $17,201,739 would certainly be an "extraordinary expense." As such, it could not be incurred without "the prior approval of the Court." No such approval was sought or obtained. Accordingly, petitioners' claim never became a valid obligation of the trustees or the estate. To obtain strict judicial supervision of all expenses connected with a reorganization was one reason for substituting Section 77 for the traditional equity receivership. *Leiman v. Guttman*, 336 U. S. 1. The policy is extremely rigid—so much so that it has been extended to fees and allowances which are not to be paid from the assets of the estate. *Leiman v. Guttman*, supra. Petitioners ask the Court to repudiate this firm policy.

B. UNALLOWED CLAIMS FOR EXPENSES OF ADMINISTRATION WERE BARRED AND EXTINGUISHED IN THE WESTERN PACIFIC REORGANIZATION.

After the plan of reorganization had been confirmed, the bankruptcy court vested the property in the reorganized company, discharged the trustees, and made a final order terminating the proceedings and ending the reorganization. In all this the court followed the mandate of Section 77 and its orders have long since become final.

In the course of these proceedings the court effectually adjudicated that petitioners' claim was invalid and barred its assertion against the reorganized company. Such adjudication and bar are none the less effective because the claim is rejected *in toto*, *Gardner v. New Jersey*, 329 U.S. 565, 574,

or is denied recognition because of the failure to present it, *New York v. Irving Trust Co.*, 288 U. S. 329.

The adjudication and bar were perfected by the revestment order and the final order terminating the Western Pacific reorganization.

Long before March 15, 1944, the Corporation could have presented its claim to the bankruptcy court.[49] The revestment order was made November 27, 1944. Under its terms the reorganized company was required to assume only such unpaid expenses of administration as the bankruptcy court had theretofore approved or should thereafter approve[50] (R. 50).

In its order the court reserved jurisdiction to approve costs and expenses of administration after revestment. Thus the holding company had further time after revestment within which to present its claim.

Some fifteen months after revestment, the Court made its final order terminating the proceeding. This order operated as a termination of its reserved jurisdiction to approve expenses of administration and effectively closed the proceeding against the subsequent presentation of such claims.

The text of the orders leaves no room for doubt that the statutory mandate was executed.

The revestment order (R. 36, 498, 1711) vested the properties in the reorganized company

> "free and clear of all rights, claims, liens and interests of said Trustees, the former stockholders and creditors

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[49]March 15, 1944, was the date on which tentative consolidated returns for 1943 were filed. On petitioners' theory that the tax savings are referable to separate return tax computations beginning with the 1942 returns (this brief, p. 114), the date would have been December 31, 1942.

[50]Except tax liability to the United States for which court approval was not required; cf. Sec. 77(f) (11 U.S.C. Sec. 205(f)).

of the debtor; *and of all other persons, firms and corporations whatsoever,* except as otherwise provided in this order, * * *" (R. 51-2) (Emphasis supplied.)

This was a judgment *in rem* against the world pronounced by a court of competent jurisdiction, *Tilt v. Kelsey,* 207 U. S. 43, 54; *Local Loan Co. v. Hunt,* 292 U. S. 234, 241; and is *res judicata* against the holding company, which was a party to the proceeding, *Stoll v. Gottlieb,* 305 U. S. 165; *Chicot County District v. Baxter State Bank,* 308 U. S. 371.

The revestment order specified the obligations to be undertaken by the reorganized company. As respects costs and expenses of administration, paragraph 20 of the order provided that

"this Court expressly reserves jurisdiction to determine all costs and expenses of administration"[51] (R. 62).

The effect of the revestment order is clear. It barred all claims against the reorganized company on account of costs and expenses of administration, other than those which had theretofore been approved or might thereafter be approved by the court under the jurisdiction reserved for the purpose.

The reorganization proceeding was not closed until March 28, 1946 (R. 1219, 2013), long after the last of the tax returns in issue here had been filed. Petitioners never took advantage of the opportunity to present their claim. Accordingly and in due course the court by its final order terminated the reorganization and permanently enjoined the as-

[51] Paragraph 20 is not limited to claims perfected before revestment. It contains no reference to any date. Petitioners are inadvertently mistaken in saying that the court did not reserve jurisdiction "to supervise claims arising after the revesting." (Corp. brief, p. 132).

the judgment must be presented for proof and allowance. *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 144. When on March 28, 1946, that court barred all administration claims not theretofore allowed, the time for proof and allowance was gone.

8. Petitioners refer to *Callaway v. Benton*, 336 U.S. 132, and argue that the reorganization court was without power to order the holding company to join in the returns. We have shown that it had the power, and that *Callaway v. Benton* is not a holding *contra* (this brief, p. 66). In any event, the mooted want of power has no bearing on the finality of the orders in the reorganization proceeding.

9. Petitioners have not argued that duality takes their claim out of the bar, nor could they. A final judgment can be attacked collaterally only for want of judgment in the court that pronounced it, or upon a showing that the party attacking it was prevented by some fraud practised directly upon him from presenting his case to the court that pronounced the judgment, *United States v. Throckmorton*, 98 U.S. 61; *Stoll v. Gottlieb*, 305 U.S. 165. Nothing of the sort occurred here.

The holding company was a party to the proceeding, represented by Judge Sloss, formerly a Justice of the highest California court (R. 1599). No one questions his independence. The dualities could have been severed any time at the will of the holding company. They ended with revestment, fifteen months before the final order (this brief, p. 17). The Corporation's general counsel thought of the claim in 1944, but concluded after consulting expert tax lawyers that it had no value then, and spoke to no one about it (R. 1060-7). The dualities existing during trustee operations

were permitted by the statute (Sec. 77(c)(1)), the general orders (Order 44) and the court's order (R. 1187-91, 1923). If dualities thus authorized open the finality of railroad reorganizations to attack by holding companies which created the dualities, the purpose of the statute will be subverted.

E. THE REORGANIZATION BAR HAS SPECIAL MERIT AGAINST PETITIONERS.

The defense is meritorious, as applied to everyone, even those who have had no actual notice, whose claims are plain and just, and who have not presented them because of excusable ignorance or blameless misfortune.

Here the defense has special and overwhelming merit. The Corporation had complete notice, and was assiduous and persistent in pursuing its claims (R. 1051-2, 1056-64). Here it is not the notice of approaching bar and judgment that was lacking. The thing that was missing was presentation of the claim. General counsel for the holding company considered the claim and for reasons satisfactory to himself abandoned it (R. 1060-7). The actors in the transaction, namely, the court, the trustees, and the officers who filed the returns, acted in the belief that the tax reduction was the trustees' concern.

We submit that Section 77 does not sanction but forbids the survival of such a claim.

III. The Defenses of Limitations, Laches and Estoppel

The claim for 1943 is barred by the statute of limitations. The 1943 returns took advantage of the loss of the Corporation (Exs. P. 4A/B, R. 491, D. 40, R. 1517). They were filed July 15, 1944 (Ex. P. 4A/B). This action was filed more than two years thereafter (R. 5). California law de-

sertion by petitioners or anyone else of any such claim as here presented (R. 1219, 2017-18).

The final order terminated the proceedings. It operated as a termination of reservations of jurisdiction[52] and ended the reorganization. No appeal having been taken, it is now conclusive and operates as a bar and as *res judicata* upon petitioners' claim.

The Assumption Agreement Does Not Provide for Payment of the Holding Company's Claim.

At this point we stop to examine petitioners' contention that by the assumption agreement the reorganized company assumed the liability of the trustees for their "tax savings."

The assumption agreement is an exhibit to the revestment order, and is one of the instruments which, by that order, the reorganized company was directed to execute. Its text appears at R. 76-81.

The particular clause on which petitioners rely reads as follows:

> "2. Assume * * * any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business, * * *". (R. 78)

Since all assets of the estate were to be transferred to the new company, some provision had to be made to find funds for the actual payment of the approved and outstanding obligations of the trustees. Under such circumstances it is conventional for the new company to provide the funds

[52]Except those reserved in the final order, which have no application here.

required to pay the trustees' recognized debts and the reorganization court directed the execution of an agreement so providing. The language was broad in order to give the trustees full protection against personal liabilities after they had completed their duties and received their discharge. Petitioners contended in the courts below that the obligation to make "tax savings" payments was "an obligation incurred by the Trustees in their operation of the debtor's estate and was an obligation assumed by the defendant * * *" (Supp. Compl. par. Eleventh, R. 224). They argued in their trial briefs that the assumption agreement relieved them of the necessity of presenting their claim to the reorganization court. The suggestion is not repeated. In any event, it has no validity. There are many reasons.

First. The purpose of the assumption agreement was to provide money for the discharge of recognized debts and to provide the trustees with personal protection. It was not to undo all the work of the reorganization by giving validity to an undisclosed claim for $17,201,739.

Second. The reorganization court, in directing the execution of the assumption agreement, did not eliminate the necessity that expenses of administration be approved by the court. On the contrary it expressly reaffirmed that requirement in Paragraphs 10 and 20 of the revestment order (R. 50-1, 61-2). It is incredible that the court, which from the beginning had forbidden its trustees to incur any extraordinary expense without its approval (this brief, p. 92), should have intended to saddle any such unapproved expense on the new company.

Third. Petitioners' argument is, in effect, that the reorganized company agreed to assume and discharge *all* obliga-

tions of the trustees. The reorganization court made it clear, however, that the assumption agreement should not be so understood. In directing the execution of the agreement the Court described it as follows:

> "(a) agreement providing for the assumption of *certain* obligations, liabilities, contracts, agreements and leases of the debtor and the debtor's Trustees, * * *" (R. 46).

and went on to say:

> "* * * and said Railroad Company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's trustees * * *" (R. 50).

The references in the order to "*certain* obligations" of the trustees and to "the *valid* and *outstanding* obligations" of the trustees make it clear that it was never intended that the assumption agreement should obligate the reorganized company to pay *all* obligations of the trustees.

Fourth. Assumption presupposes an obligation to be assumed. Since the result of petitioners' failure to obtain court approval of their claim is that the claim never became an obligation of the trustees (this brief, pp. 91-3), petitioners could not recover even if the assumption agreement were construed to refer to all trustee obligations.

Fifth. The reorganization court had no power and it did not intend by the assumption agreement to eliminate the requirement of Section 77(e) that costs of administration be approved by the court.

An assumption agreement in a reorganization proceeding has a limited and well understood purpose. It operates within and not beyond the framework of the reorganization.

It does not give validity to claims otherwise invalid or give vitality to claims which have been barred.

We return to our argument.

C. THE REORGANIZATION BAR IS FINAL AND CAN NEITHER BE OPENED NOR AVOIDED.

The reorganization is a complete and insurmountable bar to any recovery by petitioners in this action. It is a bar because the survival of claims that have not been brought to the reorganization court's notice is contrary to Section 77. It is a bar because of the settled rule that a claim for payment of an expense of administration which is not allowed by the court in charge of the estate has no validity. It is a bar because the reorganization court by specific decree has vested the property in the reorganized company free and clear of unallowed claims and has enjoined the assertion of any such claim.

Petitioners' failure to present their "tax saving" claim in the reorganization proceedings also bars the claim, under principles of *res judicata*. The order vesting the property in the reorganized company free and clear of all administration claims not allowed by the court, i.e., free and clear of petitioners' claim, is a judgment that extinguished the petitioners' claim when the final order was made.[53] A litigant who asserts claims against an estate in the hands of a court must in the first proceeding assert all of his claims or be forever foreclosed. *United States v. California & Ore. Land Co.*, 192 U. S. 355; *Northern Pacific Railway Co. v. Slaght*, 205 U. S. 122; *Montezuma Canal v. Smithville Canal*, 218

[53] By virtue of its terms the revestment order barring unallowed claims did not operate to bar claims thereafter allowed under the reserved jurisdiction.

U.S. 371; *Estate of Bell*, 153 Cal. 331, 95 Pac. 372; *Krier v. Krier*, 28 C.2d 841, 172 P.2d 681.

D. REPLY TO PETITIONERS' CONTENTIONS.

We turn to the arguments by which petitioners seek to open or to avoid the bar, beginning with those which were considered in the dissenting opinion in the Court of Appeals.

1. In its supplemental complaint the holding company applies for a modification of the final order (R. 229-30). The law is settled against this suggestion. This is a suit in equity. It is not a proceeding in the bankruptcy court. *Naylor v. Cantley*, 96 F.2d 761, 763. The court sitting in equity cannot modify a bankruptcy order. *In re Watts and Sachs*, 190 U. S. 1, 27; *Isaacs v. Hobbs Tie & T. Co.*, 282 U. S. 734, 739. The petitioners' application for modification must be denied for want of jurisdiction to entertain it. The courts below and this Court are bound to accord to the bankruptcy orders the force of final bars and judgments.

2. Petitioners suggest that they have an independent claim against the new company as to the tax savings for 1942 and the first four months of 1944. But no matter how it is stated, the claim is based upon an alleged contribution to the reduction of the trustees' taxes, and that claim has been disallowed.[54] The final order in reorganization was an effective disallowance and is binding upon the Corporation and upon the reorganized railroad company.

Moreover, petitioners predicate their claim on events which took place during trustee operations, an appropriation of the holding company's loss in the returns filed July

[54] *Seaboard Air Line R. Co. v. Savannah Union Station Co.*, 181 F.2d 267, cited by the Corporation (its brief, p. 131), did not involve a claim for an expense of administration.

15, 1944, and on dualities which terminated with the end of trustee operations. Petitioners thus relate their claim to the period of trustee operation.

In support of their argument petitioners refer to the fact that the returns for the first four months of 1944 were not filed until March 15, 1945,[55] that is to say, after revestment, and that the holding company filed the claim for refund of 1942 taxes on March 9, 1945. They contend that these were acts done to assist the new company, not the trustees. The distinction has no substance. The acts were performed to reduce the trustees' taxes, and the claim for compensation was, of course, a claim to a cost of administration. Under the mandate of the statute and the orders of the reorganization court, the claim could not have validity nor become a charge against the new company, without the approval of the reorganization court.

Petitioners, and the dissenting judge, also suggest that a new claim arose after the final order in reorganization was made. In the dissenting opinion it is said that the holding company

> "at the request of defendant long after the reorganization had been closed, entered into a settlement with the United States, whereby its losses were used to obtain a benefit of $17,000,000 for defendant." (R. 2247)

The opinion suggests that this was co-operation which gave rise to a new *quantum meruit* claim against the new

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[55]The date the tentative returns were filed; final returns were filed June 15, 1945. The consents to the returns so filed, though executed in the name of the reorganized company, were the trustees' consents, I.R.C. Sec. 52, Treas. Regs. 104, Sec. 23.15(b), G.C.M. 12208, Cum. Bull. XII-2, p. 87; 415 South Taylor Building Corp., 2 T.C. 184.

company. This action was then pending, so that the "co-operation" could hardly be more than a joint act by which, without either adversary giving aid or comfort to his opponent in the controversy between them, the subject matter in controversy was realized.[56] Moreover, an express agreement on the subject of the settlement was made between the Corporation and the new railroad company. This was the stipulation (R. 492, 1658) wherein it was agreed that the settlement should not prejudice the claims or defenses of the opposing parties,[57] except to the extent that it operated to reduce the amount of the tax savings in controversy. The stipulation was, of course, voluntary. No *quantum meruit* claim can be predicated on co-operative acts performed under an express agreement, *Restatement of Restitution*, Sec. 107; *Ullman v. May*, 147 Ohio 468, 72 N.E. 2d 63.

Petitioners also suggest that their claim did not mature until 1947, but this, if correct, did not prevent its presentation in the reorganization while it was contingent, *City Bank v. Irving Trust Co.*, 299 U.S. 433; *Brown v. Gerdes*, 321 U.S. 178, 181. The dissenting opinion characterizes the right claimed by petitioners, namely, the alleged right to file returns of its own choice, as a right appurtenant to the stock, which accrued before the returns were filed. A

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[56]The Corporation understood this. Its directors considered rejection of the settlement unless respondents would waive their defenses of the reorganization bar and the statute of limitations (R. 1007-8).

[57]The acceptance of the settlement with the Government "shall be without prejudice to the interests, claims or defenses asserted by the parties," and "none of the parties waives any of its interests, claims or defenses" and nothing in the stipulation is "a recognition or admission * * * of the validity, merit or equity of the claims," or a waiver of defenses "in any manner or to any extent" (R. 1659-60).

claim of this right and for compensation on account of its exercise was presentable to the reorganization court before the returns were filed. The holding company had the necessary information as early as May, 1943, nearly three years before the final order was made (R. 591, 1757).

3. Petitioners contend, and the dissent seems to agree, that Section 77 proceedings bar only claims against the debtor, i.e., claims existing at the time the petition is filed. They suggest that administration claims remain at large, so that a field day of litigation over unpresented claims is permitted in all the courts after the reorganization is completed. We have answered this (this brief, pp. 91-6). In support of this contention they refer to *Texas and Pacific Railway Co. v. Johnson*, 151 U.S. 81, and *Texas and Pacific Railway Co. v. Bloom*, 164 U.S. 636. These cases arose out of a single railroad receivership in which it was held that the railroad company was responsible for the receiver's debts. The decisions are readily explained by the fact that the proceeding was a friendly one and the properties were returned to the company without any reorganization taking place.

Petitioners suggest some further arguments which are not mentioned in the dissenting opinion.

4. It is argued that a recovery by petitioners would not impair the plan of reorganization, and that the plan did not contemplate the increase in the estate which resulted from the trustees' tax savings (Corp. brief, pp. 49-56, Int. brief, pp. 90-2). The argument is incorrect in this, that the plan intended the secured creditors to have the chance of gain as well as the risk of loss attendant upon the enforced reduction of their secured claims to junior securi-

ties. *D. & R. G. W. Co. v. Reconstruction Finance Corporation,* 328 U.S. 495, 517, 522. It is immaterial to the bar of reorganization whether or not the plan would be frustrated (as plainly it would in fact) if the Corporation should obtain a $17,201,739 judgment. Unallowed administration claims were barred and extinguished. This was prescribed by Section 77, and nothing in the plan requires, or could require, a different conclusion.

5. It was suggested on brief below that by its order approving the reserve fund for contingent tax liability, the Court imposed on its trustees an obligation to account to the holding company for the use of the loss. Obviously the Court had no such intention; its purpose was to approve the reserve fund for contingent tax liability to the United States Government, and manifestly the court considered the potential tax reduction was for the trustees' advantage, not the corporation's (R. 1270-4, 2023). The argument is, in effect, that the Court's implied approval of the returns as beneficial to the bankruptcy estate was an order approving the holding company's claim to the benefit though the Court intended otherwise. The statute and the Court's orders required that administration claims be approved by the Court. The requirement is not satisfied by an order that was made without notice of the claim and that displayed a purpose inconsistent with it.

6. Petitioners say they were not given notice to present their claim. But they had notice: the holding company was a party to the proceeding; the statute and the revestment order gave notice of the necessity for Court approval; and fifteen months after revestment, and three years after the claim was presentable, was adequate time to present the

claim. Moreover, as a party to the proceeding, the Corporation did receive notice of the petition for the final order and also received notice that it had been made (R. 109, 1218, 2011). The statute required no further notice and authorized the final order upon the notice that was given. Cf. *Hanover National Bank v. Moyses*, 186 U.S. 181, 182; *Mohonk Realty Corp. v. Wise Shoe Stores*, 111 F.2d 287, 290.

7. Petitioners suggested on briefs below that the holding company might have sued the trustees in another court under the authority of 28 U.S.C. Sec. 959, and *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, was cited. The statute (formerly Judicial Code Sec. 66) authorizes suits against court trustees without leave of the court that has appointed them. The suggestion does not reach the bar nor affect the finality of the judgment in reorganization. The trustees were discharged seventeen months before this suit was filed, and are not parties, so that this is not a suit under the statute and no suit could have been maintained under the statute after they were discharged. But the reorganization court was open to hear the claim for ten months after the discharge of the trustees. Moreover, since in this suit the petitioners seek modification of the final order (R. 229-30)[58] and the claim is founded upon complaints concerning conduct and dualities in the administration of the estate, it is apparent that it is not a case which the statute permits to be brought outside the bankruptcy court. Cf. *U. S. Fidelity and Guaranty Co. v. Bray*, 225 U.S. 205, 217. Finally all cases under the statute lead to the reorganization court, to which

[58]Even in the bankruptcy court, the order could not be modified without being preceded by an order reopening the reorganization. *Mohonk Realty Corp. v. Wise Shoe Stores*, 111 F.2d 287; *In re Peyton Realty Co.*, 148 F.2d 771.

visional the decisions of the court in 98 per cent or more of the cases that come before it. On petition of a dissatisfied party its decisions would automatically be subject to a species of horizontal appeal which would completely nullify the prime statutory objective of effecting a division of the court's work." (R. 2295)

Judge Pope states that this was his reason for joining in the opinion below:

> "As I understand the majority opinion, it went no further than to hold that a disappointed litigant in the position of the appellant in that case, could not, by filing a petition for rehearing in banc, require all the judges of the court to consider and pass upon that petition. I concurred in that opinion because in my mind a contrary holding would mean that the court would, as a practical matter, lose the opportunity which it now has to expedite its disposition of cases through the hearing of matters before divisions."
>
> (*Bradley Mining Co. v. Boice*, 198 F.2d 790, 791, n. 2.)

So the established practice in the Ninth Circuit is that, in the absence of an order by a majority of the acting circuit judges for a rehearing in banc,[64] the original order assigning the appeal to a division stands and, that being so, the petition for a rehearing is in law addressed to it and will be passed upon by it. What the opinion makes clear is

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[64]The majority clearly were not holding that they were without power to order a rehearing in banc, for they expressly ruled that the composition of the court in any particular case is an administrative and intramural matter for the court alone to determine (R. 2295). They further held, in passing upon and denying petitioners' motion for leave to file a motion to vacate the order striking their petition for a rehearing in banc, that in this instance they did not want to take the case out of the hands of the division to which, by prior order, it was regularly assigned. Clearly, they had the right to decide that they would not interfere with the original assignment. This being so, petitioners were not aggrieved by the striking of their petition for a rehearing in banc.

that the Ninth Circuit has no rule or practice giving a party who has lost its appeal the right to petition the rest of the court for a rehearing.[65] Certainly the court is entitled to protect itself against having to re-do the work of its divisions at the behest of each disappointed litigant.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed with costs to the respondents.

Dated: December 5, 1952.

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[65]Petitioners suggest (Corp. brief, pp. 152-4) that because a majority of the active circuit judges have the power to order a rehearing in banc a dissatisfied litigant has the right to petition for a rehearing in banc, including the right to have at least a majority of the active circuit judges entertain and pass upon such a petition. This, as we have shown, is not so. If the Ninth Circuit were to adopt a formal rule that petitions for rehearing in banc will not be entertained or granted unless a majority of the division that originally heard the appeal so request and a majority of the active circuit judges concur, such a rule would clearly be valid. (Cf: Rule 33 of this Court.) This, in effect, is the practice in the Ninth Circuit, as is made clear by the opinion of six of the seven active circuit judges (R. 2288) and if a rule would be valid the equivalent practice is equally valid. This practice is none the less valid because a different practice prevails in the Third Circuit and in the Court of Appeals for the District of Columbia.

cides the applicable period of limitation, *Guaranty Trust Co. v. York*, 326 U.S. 99; and since this is an unjust enrichment claim the two-year statute, Sec. 339, Subd. 1, California Code of Civil Procedure, is applicable. *Richter v. Henningsan*, 110 Cal. 530, 537, 42 Pac. 1077, 1079; *Bray v. Cohn*, 7 Cal. App. 124, 93 Pac. 893; *Trower v. San Francisco*, 157 Cal. 762, 767, 769, 109 Pac. 617, 619, 620; *Jacobson v. Mead*, 12 C.A.2d 75, 81, 55 P.2d 285, 288; *Lazzarevich v. Lazzarevich*, 88 C.A.2d 708, 200 P.2d 49. This is true though the action is filed in equity. 16 Cal. Jur. 429; *Williams v. Southern Pacific R. Co.*, 150 Cal. 624, 89 Pac. 599; *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

The petitioners have been guilty of gross laches, barring their claim. *In re Chicago, R. I. & P. Ry. Co.*, 168 F.2d 587, 592, cert. den. 335 U.S. 855; *McColgan v. Maier Brewing Co.*, 134 F.2d 385, 388, cert. den. 320 U.S. 737; *Piedmont Ice & Coal Co. v. American Service Co.*, 130 F.2d 78. In some of these cases the late suitor had not been a party to the reorganization. Here the Corporation was a party, whose general counsel had considered the claim while the reorganization was open and had dismissed it as having no practical value (this brief, p. 17). Meanwhile the world relied upon the consummation of the plan and the finality of the reorganization proceedings.

The petitioners are estopped to present their claim. For upwards of twenty years the holding company settled consolidated return obligations with its subsidiaries by the accepted formula. One who participates in an established course of conduct may not, after the event, attach new consequences to customary activity. See, for example, *Railroad Company v. United States*, 103 U.S. 703, where the railroad

sought a revision of the customary formula for allocating payments for mail carriage; *Stagg v. Insurance Company*, 10 Wall. 589; *County of Los Angeles v. Cline*, 185 Cal. 299, 197 Pac. 67. In each case the claim was denied because it was a departure from the customary practice.

IV. The Amount of the Tax Saving

At the trial expert witnesses for both sides testified and presented exhibits with respect to various methods of computing the amount by which the income taxes of the trustees for the calendar years 1942 and 1943 and the first four months of 1944 were reduced by the returns which were filed. Plaintiff's witness was Robert Buchanan (R. 911-55) who presented three alternative computations in one exhibit (Plaintiff's Exhibit No. 80, R. 919, 1825-9). Defendants' witness was James L. Cockburn, Jr. (R. 1501-85), who presented four alternative computations embodied in Defendants' Exhibits Nos. 41, 43, 44 and 45 (R. 1536, 1541, 1548-9; 2032-9).

Each of these seven computations was based upon different assumptions and arrived at different conclusions as to the amount of the so-called "tax saving" of the trustees during this period. The wide disparity in the views of these expert witnesses, and in the effect of the divergent assumptions adopted by them, is shown by the fact that their computations produced seven different results ranging in amounts from a minimum of $1,034,446 shown by Defendants' Exhibit No. 45 (R. 2038) to a maximum of $17,201,739 indicated by Basis One of Plaintiff's Exhibit No. 80 (R. 1825). The great uncertainty of these computations is

demonstrated even more strikingly by the fact that there was a difference of almost $7,000,000 between the highest (Basis One) and the lowest (Basis Three) of the results obtained by plaintiff's own expert witness (Ex. P. 80, R. 1825, 1829).

While this evidence was being offered the District Court recognized that it was of significance if, but only if, the Corporation should be held entitled to recover (R. 1544). Since the District Court concluded that there should be no recovery, it had no occasion to determine the amount of the tax saving. The opinion of the District Court (R. 257-76) contains no discussion of this subject and no reference to the numerous problems involved in making a computation of the amount of the tax saving. In its recital of the facts of the case, the Court referred to the tax saving in terms of the highest of all of the amounts appearing in the seven alternative computations presented in the exhibits prepared by the expert witnesses, namely, $17,201,739 (R. 262, 264, 267). Similar statements appear in the opinion of the Court of Appeals (R. 2218), which likewise had no occasion to determine the amount of the tax saving. In other words, both courts used this maximum amount as a convenient means of describing the Corporation's claim, without defining it.

Obviously, if either court had decided that the Corporation was entitled to some portion of the tax saving then it would have been necessary to determine the amount of tax which was saved. Such a determination would require that the $4,144,828 tax actually paid by the trustees for this period (R. 266-7) be compared with some imaginary tax which they would have been required to pay under

other circumstances and under different tax returns.[59] This process would require decisions as to what imaginary or hypothetical circumstances should be assumed, what type of returns should be considered as having been filed in lieu of those actually filed, and what answers should be given to the numerous questions involved in the computation of such imaginary taxes. For example, it would be necessary to determine whether the imaginary tax should be computed on a consolidated return basis, with the Corporation's stock loss eliminated as a deduction, or upon a separate return basis. The Corporation's own expert witness presented computations on both bases, differing in result by almost $7,000,000 (R. 1825-9).

This is not the only question involved, however, nor is it the most difficult. If the separate return basis were to be used, it would be necessary to decide what treatment should be given to the operating loss carry-overs and unused excess profits tax credits which the trustees had accumulated in prior years, and what disposition should be made of inter-company interest accruals and other inter-company transactions which were of no consequence in consolidated returns. Separate return computations would also require a consideration of the possible tax effect of the partial worthlessness of a large debt owed to the trustees by one of the operating company's subsidiaries, the Sacramento Northern Railway, which was the subject of testimony of not only Mr. Cockburn (R. 1531) but also Mr.

[59] Compare Securities and Exchange Commission Release No. 53, Accounting Series, In the Matter of "Charges in Lieu of Taxes," Note 23, "* * * The facts are, of course, that there has not been a static or standard or 'normal' tax law or tax status * * *." Excerpts from Release No. 53 are in Appendix B, at p. 10.

Charles Elsey, the president of the operating company and the agent of the trustees during reorganization (R. 1322). In addition there were problems affecting both separate and consolidated return computations, such as the questions arising out of the large claims of the Government for adjustment of freight charges upon war-time traffic, all of which would affect the gross and net income of the trustees during the war years, including the period in question (R. 1289-1306; 1529-31; 1614-25). Of like character are questions as to the proper treatment of accelerated amortization allowances, a subject upon which there was much confusion during the trial (R. 936-9; 1523-7). Finally, it would be necessary to consider the extent to which the trustees might properly have utilized other tax saving methods which were legally available to them and might have been used if the Corporation's huge loss had not been available (R. 934-5).

Each of these is a most difficult and complex problem which would have to be solved before it would be possible to compute the amount of the imaginary or hypothetical tax which would then have to be compared with the tax actually paid in order to determine the amount of the tax saving. Just one of these items alone, the effect of the treatment of the trustees' operating loss carry-overs and unused excess profits credits, would make a difference of nearly $6,000,000 in the amount of the tax saving, as is readily apparent from a brief comparison of Basis One with Basis Two in Plaintiff's Exhibit No. 80 (R. 1825-29). As Mr. Buchanan, the Corporation's expert witness, himself testified (R. 920-4, 933, 951-3) the only difference between these two computations is that in Basis

One the trustees were deprived of the use of their own carry-overs and credits, whereas in Basis Two the trustees were given the benefit of these items. The resulting difference in the trustees' taxes, according to Mr. Buchanan, is $5,773,937.

These carry-overs and credits were not attributable in any way to the operations, activities or status of the Corporation. They were attributable solely to the operations of the trustees in the years prior to 1942. They had nothing whatever to do with the Corporation's stock loss. Mr. Buchanan testified (R. 922) that the reason for the Basis One computation, depriving the trustees of their own carry-overs and credits, was that the regulations of the Commissioner of Internal Revenue (Regs. 110, Sec. 33.31(e) and (f)) then in effect provided that the carry-overs and credits attributable to the members of an affiliated group during a consolidated return period would all inure to the benefit of the parent upon any change from consolidated to separate return tax reporting.[60] These particular carry-overs and credits were accumulated by the trustees in 1940 and 1941 when consolidated returns were filed, so in computing the imaginary tax of the trustees on a separate return basis for 1942 and later years Mr. Buchanan made his two separate computations, one depriving the trustees of their pre-1942 carry-overs and credits and the other giving them the benefit of them.

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[60]On March 13, 1943, the Commissioner of Internal Revenue repealed this obviously unfair rule and replaced it with the proper rule (applicable, however, to only those carry-overs and credits arising after December 31, 1941) that upon a change to separate returns the carry-overs and credits go with the members who created them (T.D. 5244 and T.D. 5245, 1943 Cum. Bull. 439, 801). The latter rule has prevailed ever since and is presently found in Sections 24.31(d) and (e) of Regulations 129.

This entire sum of $5,773,937 is included in the $17,201,739 "tax saving" figure so often mentioned in the briefs of the petitioners. In other words, more than one-third of the amount by which they claim the income taxes of the trustees were reduced through use of the Corporation's loss had nothing to do with that loss, but is instead the amount by which the taxes of the trustees would have been increased through forfeiture of their own operating loss carry-overs and unused excess profits tax credits if the Corporation had refused to join in consolidated returns after 1941. In seeking to collect this $5,773,937 the petitioners are not seeking to recover a "tax saving" at all. They are trying instead to collect retroactively the amount of additional taxes which the Corporation could have forced the trustees to pay the United States by refusing to continue to file consolidated returns during the period in question. This is a potential "tax loss"—not a tax saving. Yet the $17,201,739 figure so frequently and erroneously described in petitioners' briefs as the saving realized by the trustees through use of the Corporation's loss (e.g., in the "Summary Recapitulation of Basic and Incontrovertible Facts" at page 36 of Petitioner's brief in No. 150) includes this very same $5,773,937 as part of the so-called "tax saving." The fact that it does include this item, which is nothing more than the amount of damage the trustees would have suffered if they had not been able to use their own carry-overs and credits after December 31, 1941, clearly shows the extreme character of the claims of petitioners. It also shows that neither the District Court nor the Court of Appeals could possibly have considered that this amount of $17,201,739 really represented a true measure of the

tax saving attributable to the Corporation's stock loss deduction.

The courts below never considered or decided the questions involved in computing the amount of the tax saving. We respectfully submit that those questions need not be decided even now, because petitioners are not entitled to any portion of the tax saving, whatever its amount may be.

V. The Decisions Below Rest Upon Undisputed Facts and on Identical Grounds. There Has Been No Error in Findings or in the Failure to Make Them and the Court of Appeals Made No Findings.

The petitioners said in their brief in the trial court: "The essential facts are not only relatively few and simple, but they are wholly undisputed. Indeed, there appears to be no conflict whatever in the record, and in major part the facts appear from documentary evidence." (Corp. opening brief, p. 1. Interveners joined in this brief.)

Where the facts are undisputed, findings are unnecessary, *Fontes v. Porter,* 156 F.2d 956; *Douds v. Local 1250, Retail etc. Union,* 170 F.2d 695, 699.

The trial court reviewed the facts in its opinion and adopted its opinion as its findings (R. 319). This was proper, F.R.C.P. 52(a). The Court of Appeals made no findings.

The Corporation now argues that the trial court agreed with a *proposed finding* that there was domination (Corp. brief, pp. 29-31) but the record shows that (1) the proposed finding is not included in the record on appeal (R. 277-9), (2) the Corporation applied for such a finding (R. 465, 469-70), (3) respondents opposed it as contrary to the fact (R. 471-4, 485-6), and (4) the trial court refused it (R. 319).

The trial court held, properly, that "the so-called 'duality

of control' " is immaterial (R. 274).[61] The Court of Appeals agreed (R. 2235). Both courts held that the Corporation could not have lawfully acquired the "tax saving" by agreement (R. 274, 2234).

In their specifications of error on appeal (R. 2168, 2173) the petitioners failed to assign any error respecting findings or the failure to make them. Again it was said (Corp. opening brief (on appeal), pp. 30-31) "while the facts are unusual, they are not in dispute."

The trial court found against the equitable validity of petitioners' claim. The Court of Appeals sustained, saying "we agree with the principal holding of the trial court" (footnote 12, R. 2227). The Court of Appeals disapproved only what it recognized as a "dictum" in the trial court's opinion, pointing out that the trial court had itself recognized that its criticisms of the returns and the settlement were nothing other than "dictum."[62]

The Corporation has no standing to exploit the domination theory in view of its express denials of all the interveners' allegations of domination and control (R. 156).

The trial court observed, and no one disagreed, that "everybody was * * * acting completely in the open in the

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[61] Petitioners by reiteration would create the impression that the trial court found domination, e.g., Corp. brief, pp. 48-9; Int. brief, pp. 38-40. It made no such finding. It said "there is a preponderance of evidence in favor of the plaintiff's contention of 'duality of control' " (R. 272) and that "The so-called 'duality of control,' much discussed and emphasized, is not important in resolving the tendered issue" (R. 274). As noted above, when a finding of domination was applied for it was refused.

[62] The Corporation now says, contrary to what it said in the trial court (R. 466-7), that the trial court denied recovery "because respondent defrauded the government." Corp. brief, p. 47. The trial court explicitly stated the contrary—"I am not passing on whether the Bureau * * * were deceived or misled or not." (R. 467.)

matter, nobody was concealing anything from anyone else, the element of fraud or deception, of the kind you refer to, is absent * * * Everybody knew that consolidated returns were being filed * * * Everybody knew that these attorneys were being employed to file this consolidated return. It was done right out in the open * * * So that the defendant railroad company wouldn't have to pay any income tax * * *" (R. 970, 971).

The Court of Appeals approved (R. 2226):

Where two courts below have made concurrent findings, this Court will not again review the facts. *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 213-4.

The Court of Appeals stated (R. 2235) that "the record is barren of evidence to support the contention that Corporation was dominated by the subsidiary, or that there was a breach of duty owed to the Corporation."

The record, a record of *undisputed facts*, fully supports this statement (this brief, pp. 4-18, 21-3). But the Court of Appeals did not rest its decision on that state of facts. On the contrary, it held:

> "Assuming, as we have, that the subsidiary dominated Corporation through control of the dual officers, * * *" (R. 2232).

nevertheless the Corporation's claim was without merit.

Where the factual basis of the decision is clear, additional findings are unnecessary. *Bowles v. Cudahy*, 154 F.2d 891, 894; R. 2236-7.

Findings on rejected contentions are not required. *Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82; *Oedekerk v. Muncie Gear Works, Inc.*, 179 F.2d 821, 823.

A Court of Appeals may properly decide a case on grounds on which the trial court made no findings where the record is clear and no genuine issue of fact is presented. *Muncie Gear Co. v. Outboard Co.*, 315 U.S. 759; *Hazeltine Research, Inc. v. General Motors Corp.*, 170 F.2d 6, cert. den. 336 U.S. 938; *Burman v. Lenkin Construction Company*, 149 F.2d 827.

VI. In Disposing of the Petitions for Rehearing the Court of Appeals Has Not Departed from the Accepted and Usual Course of Judicial Proceedings.

The appeal to the Court of Appeals was assigned to and heard by a panel of three judges consisting of one circuit judge and two district judges sitting by special assignment. Petitioners did not object to the composition of the panel and, when the appeal was heard, made no request or suggestion that it should be heard in banc. It is not contended nor could it be contended that there was any error here.

When petitioners' appeal failed they asked for a rehearing and that the rehearing be before the Court of Appeals in banc. In accordance with the established practice of that Court these petitions were referred to the panel that heard the appeal and the petitions for rehearing were denied and, insofar as they sought a rehearing in banc, they were ordered stricken as being without authority in law or in the rules or practice of the Court of Appeals (R. 2259, 2260), Judge Fee dissenting (R. 2261) as he had on the original appeal (R. 2239). Thereafter petitioners petitioned for leave to file "Motion to vacate order striking appellant's petition for rehearing en banc and reinstating such petition" (R. 2267), which petition was considered by

the full court of seven circuit judges and was denied in an opinion by Judge Healy concurred in by five other circuit judges (R. 2288), Chief Judge Denman dissenting (R. 2296).

There is no contention that the panel that heard the appeal could not deny a petition for a rehearing insofar as it was an ordinary petition for rehearing. Petitioners contend, however, that they were entitled *as of right* to have their request for a rehearing in banc considered and acted upon by all seven of the active circuit judges. The question here is not whether a majority of the active circuit judges *may* order a rehearing in banc without the request of a majority of the judges who heard the appeal in division, but whether a losing party may *compel* all of the active judges to entertain and pass upon its petition for a rehearing in banc. Six of the seven active judges of the court below have held that they cannot be compelled to entertain such a petition, their ruling being that whether a rehearing in banc shall be granted is a matter of administrative and intramural concern and that the composition of the court that is to determine an appeal, either on original hearing or on rehearing, is outside the province of the parties. It is submitted that this position is entirely sound.

Petitioners read the opinion of Judge Healy (R. 2288) as holding that a majority of the active circuit judges have no power to order a rehearing in banc unless a majority of the three-judge division which originally heard the appeal approves (Corp. brief, pp. 148-52). This, we submit, is a misconception of what the majority decided.

Under Section 46(c) of Title 28 U.S.C. a majority of the active circuit judges may, in their discretion, order a re-

hearing in banc and this either with or without concurrence of the division that originally heard the appeal.[63] Inasmuch as no such rehearing had been ordered by a majority of the active circuit judges that question was not presented nor

[63] This is clear in view of the history of Section 46. Before the Judicial Code was revised in 1948, Section 117 of that code (then 28 U.S.C. Sec. 212), the predecessor of Section 46, provided that in each circuit there should be a Circuit Court of Appeals consisting of three judges, two of whom would constitute a quorum. This presented a question whether, in a circuit having more than three circuit judges, all of the judges could sit in banc. In *Textile Mills S. Corp. v. Commissioner*, 314 U.S. 326, this Court resolved the conflict on this point between the Third Circuit in the *Textile Mills* case itself, 117 F.2d 62, and the Ninth Circuit in *Lang v. Commissioner*, 97 F.2d 867, holding with the Third Circuit that a circuit court of more than three circuit judges could sit in banc. This was followed in *U. S. ex rel. Robinson v. Johnson*, 316 U.S. 649, where this Court, in remanding the case to the Ninth Circuit for further proceedings because of a conflict between two divisions of the Ninth Circuit and so that consideration could be given to the court's decision in *Waley v. Johnson*, 316 U.S. 101, suggested that leave be granted to petitioner to apply for a hearing in banc.

The Court's interpretation of the former statute was carried into the revision and 28 U.S.C. Sec. 46(c) now provides:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

According to the reviser's note,—

> "This section preserves the interpretation established by the Textile Mills case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division the decision of the court, unless rehearing in banc is ordered."

The point of importance is that while Section 46(c) and the *Textile Mills* case make plain the power of a Court of Appeals to sit in banc, there is nothing in either of them that even suggests that a disappointed litigant has any right to a rehearing in banc or to demand as of right that his petition for a rehearing be passed upon by all of the active circuit judges of the circuit.

was the majority attempting to pass upon that question. The question before the Court of Appeals was, *absent any order by a majority of the circuit judges that there be a rehearing in banc,* what is the established practice of the court relating to petitions for rehearing in banc? Specifically, does a disappointed appellant, who has lost its appeal in division, have the right to compel all of the active circuit judges to entertain and pass upon its petition for rehearing in banc? That, and only that, was what the majority ruled upon, as clearly appears.

After first pointing out that by ordering the case to be heard in division the court has indicated that a hearing in banc on original hearing is not deemed requisite, the majority go on to state the question before them thus:

> "There remains to inquire whether the losing party in the cause is at this juncture *entitled as of right to have the petition for rehearing considered and ruled upon by a court composed of all the circuit judges.*" (R. 2293) (Emphasis supplied.)

That is all that the court was deciding.

On that issue, what does the court say? It is simply this: "* * * the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc." (R. 2295) And further: "* * * the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties." (R. 2295)

Not only is this entirely sound, but the reason for it, stated by the court, is equally sound.

> "Adoption of the view currently being urged [by petitioners here] would render merely tentative or pro-

Appendix A

Excerpts From Relevant Statutes

I. Section 141, Internal Revenue Code.[1]

(a) *Privilege to file consolidated income and excess-profits-tax returns.* An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making consolidated income and excess-profits-tax returns for the taxable year in lieu of separate returns. The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. The making of a consolidated income-tax return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated returns shall include the income of such corporation for such part of the year as it is a member of the affiliated group. * * *

(b) *Regulations.* The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making consolidated income- and excess-profits-tax returns and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-

(1) 26 U.S.C. Sec. 141.

and excess-profits-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. * * *

(c) *Computation and payment of tax.* In any case in which consolidated income-tax and excess-profits-tax returns are made or are required to be made, the taxes shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under subsection (b) prescribed prior to the last day prescribed by law for the filing of such returns; except that the tax imposed under section 15 or section 204 shall be increased by 2 per centum of the consolidated corporation surtax net income of the affiliated group of includible corporations. * * *

(d) *Definition of 'affiliated group'.* As used in this section, an 'affiliated group' means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

(1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

(2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of at least one of the other includible corporations.

As used in this subsection, the term 'stock' does not include nonvoting stock which is limited and preferred as to dividends. * * *

* * * * *

II. Section 23(g), Internal Revenue Code.[2]

Deductions from gross income. In computing net income there shall be allowed as deductions:

* * * * *

(g)(2) *Securities becoming worthless.* If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.

* * * * *

(4) *Stock in affiliated corporations.* For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purposes of this paragraph a corporation shall be deemed to be affiliated with the taxpayer only if:

"(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; * * *

* * * * *

III. Section 7(b), Bankruptcy Act.[3]

Sec. 7(b) Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this Act.

IV. Section 77, Bankruptcy Act.[4]

Sec. 77(a) * * * If the petition is so approved, the court in which such order is entered shall, during the pendency of

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(2) 26 U.S.C. Sec. 23(g).

(3) 11 U.S.C. Sec. 25(b).

(4) 11 U.S.C. Sec. 205.

the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. * * *

Sec. 77(c) * * * Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided,* That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

Sec. 77(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: * * * (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, * * *

Sec. 77(f) * * * Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. * * *

Sec. 77(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

Appendix B

Material Relating to Allocation of Taxes by Corporations Filing Consolidated Returns

I. MATERIAL FROM THE FEDERAL TRADE COMMISSION

A. Report of the Federal Trade Commission on Public Utility Holding Companies.[1]

The Public Utility Holding Company Act of 1935 resulted in part from an investigation of the practices of public utility holding companies by the Federal Trade Commission. The report of the Commission reads, in part, as follows:

Income of holding companies due to methods of handling Federal income-tax payments. — Some holding companies have collected from their respective subsidiary companies funds with which to pay Federal income tax for all the

(1) Summary Report of the Federal Trade Commission to the Senate of the United States, pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., on Economic, Financial and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, Part 72-A, Sen. Doc. No. 92, 70th Cong., 1st Sess.

companies in a group. The total amount of funds collected by the holding companies from the subsidiaries usually exceeded the amounts actually paid by the holding companies. This practice has resulted in an unusual, if not unjustifiable, means of income to those holding companies engaging in this practice.

During 1923 to 1929, inclusive, The North American Co., from this practice, recorded 1.6 percent of its total income, and Associated Gas & Electric Co. recorded 3.3 percent of its total income. While New England Power Association, in effect, followed this practice, it added the excess amounts so collected to a suspense account and not to income. Cities Service Co. added the amounts collected in following this practice to surplus and related accounts.

Some State commissions engaged in the regulation of gas and electric public-utility companies have permitted operating companies to add the estimated amounts of Federal income tax to operating expenses. These estimated amounts are then, in many cases, paid to a holding company, which, in turn, files a consolidated Federal income-tax return. Any saving in tax accomplished through the consolidated return accrues to the gain of the holding company and is retained.

The fact that holding companies retain the difference between the amounts collected from subsidiaries and the amounts paid as income tax indicates that holding companies have not tried to pass on to their subsidiaries the savings which evolve from the corporate structure of holding-company groups. Instead of subsidiary operating companies having this saving, the operating expenses of those companies are inflated by such amounts. The original amounts charged to subsidiary companies were estimated on a basis of what those companies would have had to pay if individual income-tax returns had been made. Inasmuch as the amounts for Federal income tax should never have

were added to operating expenses in the first place and were only estimated amounts, anyway, and also, since the amounts were in excess of the Federal income-tax requirements of the group, it would seem that due to this practice there is an inaccurate recording of the true cost of operations of the electric and gas operating companies following this procedure.

In order to emphasize the extent of collections of estimated amounts for Federal income-tax payments from subsidiary companies, by certain holding companies, over the amounts of Federal income tax paid by those holding companies, some illustrations are given.

One illustration of this procedure appears in the report on New England Power Association. During 1928 and 1929 the subsidiary companies paid to New England Power Association, on the basis of individual Federal income-tax returns, $376,971.36 in excess of the amount of Federal income tax paid by the holding company on the basis of consolidated income-tax returns.

During the years from 1926 to 1929, inclusive, Associated Gas & Electric Co. recorded a gain, due to this procedure of handling Federal income tax, of $2,938,513.12. It is significant to note that Associated Gas & Electric Co. paid no Federal income tax whatever during the years from 1926 to 1929, inclusive, although, of course, Associated Gas & Electric Co. may be subject to assessments in subsequent years for the said period. Also, New England Gas & Electric Association, affiliated with Associated Gas & Electric Co., recorded during 1927 to 1929, inclusive, as income $514,662.99 on the basis of the plan explained above, but no Federal income tax was paid by New England Gas & Electric Association to the United States Government.

An outstanding illustration of this procedure is shown in the report on Cities Service Co. During the years from 1922 to 1930, inclusive, Cities Service Co. collected from its

subsidiaries $11,611,601.35 for Federal income taxes. During this period, Cities Service Co. paid Federal income taxes on the basis of a consolidated income-tax return in the sum of $1,745,220.98. The excess amount collected over the amount paid by Cities Service Co. was $9,866,380.37.

As a further illustration, The North American Co. recorded as income $324,915.17 in 1927, $675,000 in 1928, and $275,000 in 1929, or a total of $1,274,915.17 in the 3 years, from handling Federal income-tax payments in the manner previously described.

This Commission considers that there should not be added to operating expenses of electric and gas utility companies any amounts paid as Federal income tax. The amounts paid as Federal income tax should be deducted from the net income on which the tax was calculated.

Holding companies are not justified in recording as income the savings from this procedure of handling Federal income-tax payments. The subsidiary companies in a holding-company group are entitled to the benefit of any savings to the group due to filing a consolidated income-tax return. Only the amount of Federal income tax paid by a holding company on the basis of a consolidated return should be borne, in proportion to the taxable income, by those companies having taxable income, for which companies a consolidated return was filed. Stated differently, each company in a holding-company group should pay only its pro-rata share of the tax paid for the group. There no gain from this source would be derived by holding companies.

The pro-rata amount of the total Federal income tax, paid by an operating subsidiary company, should be properly treated on the books of the operating companies. These amounts are not a part of the costs of producing and distributing electric energy or gas (pp. 477-479).

The Commission further stated:[2]

(2). *Direct Statutory Inhibitions*

The more usual and long-established method of legislation which directly and specifically prohibits certain practices, with proper penalties, cannot be overlooked in discussing remedies for the present utility holding company situation. This means that a separate statute should be drawn which makes felonies or misdemeanors of the disclosed abuses so far as they may be reached under Federal jurisdiction. That is to say, it would apply to all utility corporations or their holding companies and affiliates or subsidiaries which are engaged in interstate commerce or which directly affect such commerce. It is believed such legislation can be made to cover situations where a holding company controls in any degree the acts and policies of corporations in different States although no one of them operates in more than one State. The privilege of the mails may also be denied as to all matter and transactions intended to promote or carry on the enumerated abuses.

The recommendations immediately following relate primarily to protection of the rate-paying public.

* * * 5. A proper amendment to the Federal income-tax law to prevent collection of anticipated income taxes from operating subsidiaries by holding companies and nonpayment to the Government; also to prevent evasion of such taxes through various forms of so-called "reorganizations", carried on largely within the holding company groups and often primarily for the purpose of such avoidance. In a single instance such avoidance involved a cash profit of over $9,000,000 (pp. 69-70).

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(2) Summary Report of the Federal Trade Commission to the Senate of the United States, pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., on Holding and Operating Companies of Electric and Gas Utilities, Part 73-A, Sen. Doc. No. 92, 70th Cong., 1st Sess.

II. MATERIAL FROM THE SECURITIES AND EXCHANGE COMMISSION

A. Excerpts from Securities and Exchange Commission Release No. 53, Accounting Series:

For Release in MORNING Newspapers
of Friday, November 16, 1945.

SECURITIES AND EXCHANGE COMMISSION
Philadelphia

Securities Act of 1933
Release No. 3100

Securities Exchange Act of 1934
Release No. 3750

Public Utility Holding Company Act of 1935
Release No. 6200

Accounting Series
Release No. 53

IN THE MATTER OF "CHARGES IN LIEU OF TAXES"

* * * * * * *

VI

THE TREATMENT OF "TAX SAVINGS" IN FINANCIAL STATEMENTS FILED WITH THIS COMMISSION

Cases involving the treatment of so-called "tax savings"[23]

(23) We think it undesirable in principle and possibly misleading to refer to this problem as involving "tax savings" although due to the general use of the term in this sense we have adopted that nomenclature here. It seems to us that the term "tax saving" is apt to connote some sort of standard or normal tax law and a standard or normal earnings year to which that law applies. The facts are, of course, that there has not been a static or standard or "normal" tax law or tax status; nor has it been possible except in most unusual cases to characterize any particular fiscal year of a company as a "normal earnings" year, from which all others are to be regarded as departures. Under such conditions, each year's tax is whatever happens to result from the application of the computation formula, provided by the tax law of that year, to the sum total of taxable transactions and tax deductions resulting from whatever business may have been done in that particular year. Moreover, the past few years during which the term and the problem of "tax savings" appeared have clearly been unusual in nearly every respect. Finally, if the phenomenon in question is to be described as a "tax saving" it would seem necessary to describe as a "tax loss" the failure to carry through a transaction which it can be said would have resulted in a "tax saving." And if taxes in one year are higher should not that increase itself be considered to be a "tax loss." Our strong preference is to describe the problem as involving "tax reductions."

in financial statements have arisen with increasing frequency in recent months. For that reason, as stated earlier, we feel it desirable to state our views as to the treatment to be accorded such items in statements filed with us and to point out the reasons which have led us to those conclusions.

* * * * * * *

We now examine the contention that income taxes should be allocated "as other expenses are allocated." The accountants who appeared before us cited to us no other expense which, for general accounting purposes, is allocated in the manner proposed for income taxes, nor have any such instances otherwise come to our attention. We note, moreover, that in a dissent to the bulletin mentioned earlier it was stated:

> "No expense other than federal income and profits taxes is allocated on the basis of applying to a given transaction so much of the expense as would not have occurred if the transaction to which the expense is attributed had not taken place. The usual method is to allocate a total expense ratably to given accounts or transactions on a consistent basis."

The illustrations of expense allocation cited to us by the certifying accountants in this case appear to us to support the above statement. In each case cited there was an expense actually incurred that was first allocated to the period under the usual accrual principles and then distributed over a number of accounts. In no case was there an estimate made of what the expense would have been under other conditions. In no case cited, was there a distribution of an expense to several accounts by means of what can be termed an algebraic formula in which a negative sum is credited against one item to offset the positive charge to another item of an amount in excess of the actual expense. We do not regard such a treatment as an appropriate means of allocating in-

come taxes in financial statements which purport to reflect the actual results of operations. We have doubt indeed that such a method can properly be termed an allocation at all, as that term is customarily used.

We note, in passing, moreover, that in the examples of expense allocation cited to us there existed a direct, almost physical association between the item being allocated and the item to which it was charged. For example, in the case of real estate taxes allocated to construction the tax item is directly and closely related to the construction. Likewise, in the case of brokerage fees, and stamp or transfer taxes, the tax item is closely and directly related to the specific transaction. *In both cases, moreover, the tax is independent of any other transactions of the company.* Nor is there any attempt made to increase in the course of the allocation the amount of such taxes to an estimated sum. We feel therefore that such illustrations can not properly be cited in support of the proposed treatment for income taxes.

It is also sometimes pointed out that "cost" in the case of securities or property acquired is generally considered to be the sum of the purchase price plus incidental costs such as brokerage and any specific taxes paid by the buyer and that on sale the proceeds are computed as the selling price less incidental deductions such as commissions or any specific taxes paid by the seller. By analogy and in justification of the proposed treatment of income taxes it is frequently urged that a so-called "tax saving" must be allocated or attributed to or ultimately associated with particular losses or expenses because the tax consequences of the transaction involving the loss or expense were a motivating factor in arriving at the decision to consummate it. Thus, it is claimed that a property would not have been sold but for the "tax saving" thereby effected and that for this reason it is proper to consider that the true "loss" on the sale is not the excess of cost over selling price but is equal

instead to the difference between cost on the one hand and selling price *plus* "tax saving" on the other. We do not believe such an analogy is sound and we cannot accept that analysis as a basis for reporting the results of actual operations. It is undoubtedly true that the tax consequences of selling a property often are an important consideration in arriving at the decision to sell, and may in some cases have been a deciding factor. However, tax consequences undoubtedly play an important role in the making of a great variety of decisions involving the incurrence and amounts of purely operating expenses such as advertising, wage rates and bonus plans. Yet it can hardly be argued that wages or bonuses or advertising are to be reported as less in amount because income taxes would have been higher if the amounts spent on such items were less. We see no basis for adopting a different approach in figuring the "loss" involved in a sale of property. We feel instead that there has been a loss of the full difference between cost and selling price coupled with a tax benefit which is properly reflected in the lower taxes actually paid. We feel that the proposed treatment of income taxes tends to obscure these facts and that the treatment of income taxes required by our rules and heretofore almost universally followed clearly discloses what has taken place. Where the tax paid for the year is unusual in amount because of unusual conditions, an appropriate explanation would be called for as is now required in the case of other unusual events.

As to this last principal contention urged by the certifying accountants (that income taxes are an expense that should be allocated as other expenses are allocated) we feel, first, that there is grave doubt whether income taxes can properly be considered as an expense in the same category as the cost of materials or wages, and, second, that the treatment proposed does not result in the allocation of income taxes "as other expenses are allocated." We feel instead that the proposed treatment is purely an effort to have items shown in

the income statement at what is considered to be a "normal" amount. We note that this objective is clearly expressed as a prime purpose of the method in the bulletin referred to earlier which states at p. 185:

> "As a result of such [unusual] transactions the income tax legally payable may not bear a *normal* relationship to the income shown in the income statement and the accounts therefore may not meet a *normal* standard of significance." (Emphasis supplied)

There are, finally, a number of difficulties involved in the proposed treatment of income taxes that deserve mention even though they are not directly related to the specific contentions put forward by the certifying accountants in the case.

The first involves the preparation of general statistical data from financial reports. Under the method proposed, it is permissible to show, as taxes, an amount in excess of the taxes payable. If such items are totalled for a period of years or for groups of companies, they may well be used as evidence of the aggregate amount of taxes paid by the company or by the industry. Obviously any such representation is erroneous and will misstate, often very materially, the underlying facts. We feel that we should not permit the filing with us of income statements which readily permit, if they do not actually invite, such misuse. Even a "charge in lieu of taxes" may result in distorted overall statistics since it operates to reduce net income after taxes and so affects the ratio of actual taxes to net income. If the offsetting credit is netted against a surplus charge the distortion may be permanent.[35]

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(35) Under one variant of the practice no change is made in *final net income*. In the statements originally filed in the instant case, for example, part of the amount included as a charge among the operating expenses represented a $609,949 reduction in income taxes due to the taking for tax purposes of accelerated amortization of emergency facilities at the rate of 20% a year while in the finan-

The second and somewhat technical problem is the difficulty of the computation. It is usual in contemplating the tax consequences of a proposed transaction to treat it as an incremental or marginal item. Where tax rates are graduated, this results in associating the marginal income or expense with the highest tax bracket. It is questionable, whether such a principle is realistic when applied to the results of operations for a completed year. Net taxable income is a composite of all taxable income and all deductible items applicable to the period. The propriety of singling out any specific item as the item which is taxed in the highest tax bracket, is doubtful. Moreover, in applying the theory to losses and expenses it would appear that the existence of a reduction in taxes is due not only to the expense but is equally dependent on the existence of taxable income to offset the expense. It would appear possible that some part of the benefit from the "reduction" ought to be attributed to the existence of income.[36] Even if this

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cial statements only normal depreciation was being accrued. See p. 11 *supra* and Exhibit A. In the original statements this $609,949 was added back as the last item in the account. This internal in-and-out treatment appears to us to suffer from all of the difficulties we have discussed even though no change results in the amount of "net income." In our opinion, an overstatement of operating expenses is not corrected by "adding back" the amount of the overstatement at a later point in the income statement. Such treatment is in our view artificial and deceptive to all but the most experienced reader. While there may be some grounds for crediting such reductions in taxes to a special amortization reserve there is none for the equivocal practice here followed.

(36) We note the customary solution of a somewhat similar problem that arises when a group of companies files a consolidated tax return. In assigning to each constituent its fair share of the consolidated tax paid by the group it is usual to divide the actual tax among the companies who would have had to pay a tax on an individual basis. If one of the included companies operated at a loss, the consolidated tax is of course reduced, but *no* part of the "saving" is ordinarily paid over to the loss company by the other members of the group. Instead, only those *contributing* income to the consolidated return share directly in the benefit of the current reduction. This principle is incorporated in our Rule U-45 under the Public Utility Holding Company Act.

point be waived, however, there has been no satisfactory analysis presented of the effect to be given to the carry-back, carry-forward provisions of the present income tax law. Without exploring all of the possible difficulties, one case may be cited. Suppose that a loss has been charged to surplus but is deductible for taxes. Suppose further that in accordance with the present proposal there is charged to income, as provision for taxes, the amount of $200,000 although the actual tax amounts to only $50,000. If in the next year the company suffers an operating loss of $500,000, then in view of the carry-back provisions the reader of the two income statements would reasonably expect to find a carry-back refund of $200,000—the amount shown as taxes in the first year. However, obviously no more than $50,000 would actuallly be refundable. The question arises whether having overstated taxes in the first year it is not necessary, to be consistent, to overstate the refund in the second year. Finally, there are the permutations in the computation where a company pays taxes as a member of a consolidated group. In addition to the allocation of the actual tax paid among the several companies in the group, the proposed treatment raises the difficult question of whether the amount of the so-called "saving" is to be computed on the basis of a company's individual status or on that of the consolidated group and, once this is decided, of whether to allocate this "saving" as between the several companies or attribute it solely to the company having the deduction—even though perhaps it itself contributed no taxable income!

The third difficulty is the propriety of singling out the income tax item for adjustment on the ground that it does not bear a "normal" relationship to the income reported. Particularly, under conditions like the present, many if not most of the income and expense items bear unusual relationships to each other. Under the influence of the war sales volumes are often very high. Maintenance may be

very high due to continuous operation of the plant, or very low because of the inability to obtain materials and labor, or very high because of the use of inexperienced labor and the inability to get new machinery, or very low because operations cannot be stopped long enough to make thorough-going maintenance possible. Selling costs may be very low because of the volume of war business or very high because of the use of advertising to keep restricted products in the public's mind. With many items of income and expense apt to be out of line, there appears to be little justification and a good deal of danger in singling out one item for adjustment.

III. MATERIAL FROM THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS

A. Excerpts from the 1943 Report of the Committee on Accounts and Statistics of the National Association of Railroad and Utilities Commissioners.

The subject of federal income and excess profits taxes has reached an importance in utility regulation requiring our constant consideration.

It has come to our attention that some utilities are including in the expense accounts for taxes, as a part of the accrual for federal income and excess profits taxes, amounts which they do not pay because of advantage gained by them from certain statutory deductions. We wish to call to your attention the fact that only the amount which it is anticipated will actually be payable for federal income and excess profits taxes can be included in the expenses of a public utility under the systems of accounts now in effect. The so-called "provision in lieu of taxes" may not be entered as an expense of the utility, nor may the amount of taxes which would have been payable, had certain statutory deductions not been available, be recorded as the tax expense.

In view of the importance of such taxes, the Committee has endeavored to prepare a report form that will present

to the regulatory commissions such information as it must have for an adequate understanding of the impact of federal income taxes. Our endeavor is to prepare a form that will not involve substantial additional work and still will provide the necessary information. A draft of such form was prepared by the conferee representing the Michigan Commission (Mr. C. R. Angell) and the said draft has been discussed at our meetings. Such discussion has brought out certain difficulties which it is hoped will soon be overcome. After the said report has been prepared to the satisfaction of the Committee, it will be circulated among all of the member commissions for their attention (pp. 255-56).

B. Excerpts from the 1945 Report of the Committee on Accounts and Statistics of the National Association of Railroad and Utilities Commissioners.

FEDERAL INCOME AND EXCESS PROFITS TAXES

In the 1943 and 1944 reports of the Committee, attention was directed to the problem of accounting for federal income and excess profits taxes by utility companies. Since the beginning of the period of high wartime taxes it has been the practice of many utilities to include in their tax accounts or in unprescribed accounts, such as "charges in lieu of taxes," amounts which do not represent taxes actually payable. Specifically, these amounts represent reductions in taxes otherwise payable except for extraordinary transactions such as a refunding of bonds, losses on sales of non-operating property, and of statutory provisions permitting amortization for tax purposes over a five-year period of certain facilities which qualify under the tax law as emergency facilities. The whole question, however, is complicated by a multiplicity of circumstances whereby there is non-conformity of taxable net income and financial net income reflected by a utility's books of account.

Extensive study also has been given to this question by the staff of the Securities and Exchange Commission, who

furnished considerable material to aid the Committee in its consideration of the question. At the May, 1945 meeting, the Committee culminated its study of the problem by concurrence in the following points:

(1) Income tax expense accounts should be charged with no more than the actual tax liability or a reasonable estimate thereof.

(2) A caption, "charges in lieu of taxes" or similar title should not be used.

(3) When charges to income measured by tax savings are made, they must be made to the proper account for the item to be charged off and must be adequately described.

(4) In assigning income taxes to departments and non-utility operations and transactions, the distribution should be to those departments, etc., which show net profits or income; it is not permissible to assign negative amounts to departments, etc., which show net losses.

An interpretation in accord with the foregoing is included with this report.

* * * * * * *

The Chairman of your Committee canvassed the views of the members and conferees and submitted the question for further discussion at the meeting in May, 1945. On the basis of this interchange of views, the Chairman was authorized to issue the following statement:

* * * For accounting purposes no charge can be permitted in operating expenses except for expenses actually incurred during the period for which the income statement is prepared. Provisions for future expenditures made during a current period must be made by means of an appropriation of net income.

With respect to the rate-making treatment, the following should be observed:

(a) The inclusion as an operating expense of any portion of tax savings, regardless of how they are described or of what they are to cover, is entirely unwarranted. (pp. 458-460)

IV. MATERIAL FROM THE TREASURY DEPARTMENT

A. I.T. 3637 [1944 Cumulative Bulletin 258]:

Section 29.115-3: Earnings or profits.

INTERNAL REVENUE CODE.

For the purpose of determining the earnings and profits of each member of an affiliated group of corporations for the taxable year 1942 in order to ascertain the amount of earnings and profits of each member of the group which is available for dividends, the consolidated income tax for that year should be apportioned between the members of the group in consonance with the ratio of each corporation's normal-tax net income to the consolidated normal-tax net income, and the consolidated excess profits tax should be apportioned between the members of the group on the basis of the adjusted excess profits net income.

Advice is requested as to the proper method of allocating consolidated income and excess profits taxes for 1942 in the case of an affiliated group of corporations for the purpose of determining the amount of the earnings and profits of each member of the group which is available for dividends.

Authority for the filing of consolidated income and excess profits tax returns for the year 1942 is found in section 141(a) of the Internal Revenue Code, as amended by section 159(a) of the Revenue Act of 1942. Section 141(b) of the Code, as amended, delegates to the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the right to prescribe such regulations as he may deem necessary "in order that the tax liability of any affil-

iated group of corporations * * * and of each corporation in the group * * * may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income- and excess-profits-tax liability * * * and in order to prevent avoidance of such tax liability." In so far as they are pertinent to the present inquiry, Regulations 104, the consolidated income tax regulations, and Regulations 110, the consolidated excess profits tax regulations, are substantially identical.

Section 33.12(a) of Regulations 110 provides that the consolidated return shall be filed by the common parent corporation for the affiliated group. Section 33.12(b) prescribes that each subsidiary must prepare a certain statement consenting to Regulations 110 and authorizing the common parent corporation to make the consolidated return. Section 33.15(a) of Regulations 110 prescribes that "Except as provided in paragraphs (b) [liability of a corporation in bankruptcy or receivership] and (c) [liability of a subsidiary after withdrawal from the group], the common parent corporation and each subsidiary * * * shall be severally liable for the tax * * *." Section 33.16(a) of Regulations 110 reads in part as follows:

> The common parent corporation shall be for all purposes [except where a subsidiary has withdrawn from the group and except where the common parent corporation is dissolved] * * * the sole agent, duly authorized to act in its own name in all matters relating to such tax, for each corporation * * * of the affiliated group. The corporations, other than the common parent, shall not have authority to act for or to represent themselves in any such matter. For example, all correspondence will be carried on directly with the common parent; notices of deficiencies will be mailed only to the common parent * * *; the common parent will file petitions and conduct proceedings before the Board of Tax Appeals [now The Tax Court of the

United States] * * *; the common parent will file claims for refund or credit; refunds will be made directly to and in the name of the common parent * * *; and the common parent in its name will give waivers, give bonds, and execute closing agreements * * * and all other documents, and any waiver or bond so given * * * or any other document so executed, shall be considered as having also been given or executed by each such corporation.

For the year 1941, except in the cases of affiliated railroad corporations and Pan-American trade corporations, consolidated returns were not permitted for Federal income tax purposes, such returns being allowed only in connection with the excess profits tax. With respect to the year 1941, section 23(c)(1)(B) of the Internal Revenue Code, prior to its amendment by section 105(c)(1) of the Revenue Act of 1942, permitted the excess profits tax as a deduction in determining normal-tax net income. In this connection, Treasury Decision 5086 (C.B. 1941-2, 38, at page 46), amending Regulations 103 to conform to the Revenue Act of 1941, added section 19.23(c)-4, relating to deductibility of the excess profits tax imposed by Sub-chapter E of Chapter 2 of the Code. Paragraph (d) of section 19.23(c)-4 of Regulations 103, as so added, provides as follows:

> The deduction allowable to a taxpayer which is a member of an affiliated group filing a consolidated excess-profits tax return is an amount which bears the same ratio to the excess-profits tax of the group as the normal-tax net income of the taxpayer, computed without a deduction for excess-profits tax, bears to the sum of the normal-tax net incomes of the several members of the group, computed without a deduction for excess-profits tax.

As shown above, in the case of a consolidated return, each member of the affiliated group is severally liable for both the income tax and the excess profits tax. It has also been shown that all tax matters are handled solely by the common parent corporation. That is for administrative reasons; each legal entity is still preserved. It was stated in Senate Report No. 960, Seventieth Congress, first session (C.B. 1939-1 (Part 2), 409, at pages 418, 419), in connection with the revenue bill of 1928:

> The advisory committee of the Joint Committee on Internal Revenue Taxation, the members of which worked most of the summer in preparing suggestions for the simplification of the revenue laws and their administration, reached the conclusion that, because of the difficulties encountered in administration, there should be a substitute for the consolidated returns provision. It should be emphasized that this conclusion was reached, not upon the ground that consolidated returns were unsound, that additional revenues would be received by the elimination of the consolidated returns provision, but solely upon the ground that the administration of the law would be simplified.
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> * * * * * * *
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> The permission to file consolidated returns by affiliated corporations merely recognizes the business entity as distinguished from the legal corporate entity of the business enterprise.
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> * * * * * * *
>
> * * * The committee believes it to be impracticable to attempt by legislation to prescribe the various detailed and complicated rules necessary to meet the many differing and complicated situations. Accordingly, it has found it necessary to delegate power to the Commissioner to prescribe regulations legislative in character covering them.

The Bureau is not concerned with arrangements made between affiliated companies as to the payment of the tax. The regulations look to payment being made by the parent corporation only, as such corporation is the only member of the group which can transact negotiations with respect to the tax. As a matter of fact, one of the affiliates may make all of the tax payment via the parent corporation, but if there is an overpayment, the refund is made to the parent corporation. (See section 33.16(a), Regulations 110, supra.)

In determining the amount of earnings and profits of each member of the affiliated group which is available for dividend purposes, it is necessary that each company's earnings be separately ascertained. One of the factors in determining earnings and profits for any taxable year is the amount of income and excess profits taxes due for such year. In a consolidated return case, the consolidated taxes should be allocated, as set forth below, to each member of the affiliated group. The fact that the parent corporation pays all of the tax should not militate against such an allocation. As heretofore indicated, such tax is paid by the parent as agent for the subsidiaries.

Accordingly, it is held that for the purpose of determining the earnings and profits of each member of an affiliated group of corporations for the taxable year 1942 in order to ascertain the amount of earnings and profits of each member of the group which is available for dividends, the consolidated income tax for that year should be apportioned between the members of the group in consonance with the ratio of each corporation's normal-tax net income to the consolidated normal-tax net income. The consolidated excess profits tax should be apportioned between the members of the group on the basis of the adjusted excess profits net income.

B. I.T. 3692 [1944 Cumulative Bulletin 261]:

Section 29.115-3; Earnings or profits.

INTERNAL REVENUE CODE.

Method of determining the earnings and profits of each member of an affiliated group of corporations filing consolidated Federal income and excess profits tax returns for 1942 and subsequent taxable years, in order to ascertain the amount of earnings and profits of each member of the group which is available for dividends.

I.T. 3637 (page 258, this Bulletin) amplified.

Request is made for an amplification of I.T. 3637 (page 258, this Bulletin), relating to the method of determining the earnings and profits of each member of an affiliated group of corporations filing consolidated Federal income and excess profits tax returns for the taxable year 1942 in order to ascertain the amount of earnings and profits of each member of the group which is available for dividends.

For the purpose of determining the earnings and profits of each member of an affiliated group of corporations for the taxable year 1942 and subsequent years in order to ascertain the amount of earnings and profits of each member of the group which is available for dividends, the consolidated income tax (line 41, page 1, Form 1120) should be apportioned between the members of the group in accordance with the ratio of that portion of the consolidated normal-tax net income attributable to each member of the affiliated group to the consolidated normal-tax net income (line 40, page 1, Form 1120), leaving out of consideration any member of the group having no net income. The consolidated excess profits tax (line 18(c), page 1, Form 1121) should be apportioned between the members of the group in accordance with the ratio of that portion of the consolidated adjusted excess profits net income attributable to each mem-

ber f the affiliated group to the consolidated adjusted excess profits net income (line 8, page 1, Form 1121), leaving out of consideration any member of the group having no net income. The taxes thus determined should be (a) decreased by the amount of the consolidated credit for debt retirement (line 21, page 1, Form 1121) attributable to each company; (b) increased or decreased, as the case may be, by the amount of any section 734 adjustment (line 23, page 1, Form 1121) attributable to each company; and (c) decreased by the amount of the consolidated credit for foreign taxes attributable to each company (line 19, page 1, Form 1121). In the event that the income taxes paid to a foreign country or United States possession are in excess of the amounts allowed as credits, the excess should be taken into consideration in arriving at the earnings available for dividends.

C. I.T. 4085 [1952-1 Cumulative Bulletin 68]:

SECTION 29.115-3; Earnings or profits. 1952-12-13836
(Also Section 141, Section 29.141-1.) I.T. 4085

INTERNAL REVENUE CODE

Method of apportioning the income and excess profits tax of an affiliated group of corporations filing consolidated Federal income and excess profits tax returns for taxable years ending after June 30, 1950, in determining the earnings and profits of each member of such group.

Advice is requested as to the method of apportioning the income and excess profits tax of an affiliated group of corporations filing consolidated Federal income and excess profits tax returns for taxable years ending after June 30, 1950, in determining the earnings and profits of each member of such group.

The excess profits tax for taxable years ending after June 30, 1950, as in the case of normal tax and surtax, is imposed as a part of the income tax on corporations under chapter 1 of the Internal Revenue Code, whereas for taxable years beginning after December 31, 1939, and before January 1, 1946, the excess profits tax was imposed as a separate tax under subchapter E of chapter 2 of the Code. In this regard, section 40.0(b) of Regulations 130 states that the normal tax, surtax, and excess profits tax on corporations are reported on the corporation income tax return, and are treated as one tax for all purposes, including assessment, collection, payment, period of limitations, and the consolidated return privilege.

Notwithstanding the fact that the excess profits tax for taxable years ending after June 30, 1950, is imposed as a part of the income tax under chapter 1 (subchapter D) of the Internal Revenue Code, separate calculations apportioning the income tax and the excess profits tax of an affiliated group of corporations are deemed necessary in computing the earnings and profits of each member of the affiliated group because of (1) adjustments to the consolidated normal-tax net income required in determining the consolidated excess profits net income and (2) allowance of a consolidated excess profits credit in computing the consolidated adjusted excess profits net income.

Accordingly, it is held that in determining the earnings and profits of each member of an affiliated group of corporations filing consolidated Federal income and excess profits tax returns for taxable years ending after June 30, 1950, the consolidated normal tax and surtax imposed under subchapter B of chapter 1 of the Internal Revenue Code should be apportioned among the members of the group in accordance with the ratio of that portion of the consolidated normal-tax net income attributable to each member of the affiliated group to the consolidated normal-tax net income, leaving out of consideration any member of the group

having no net income. The consolidated excess profits tax imposed under subchapter D of chapter 1 of the Code should be apportioned among the members of the group in accordance with the ratio of that portion of the consolidated adjusted excess profits net income attributable to each member of the affiliated group to the consolidated adjusted excess profits net income, leaving out of consideration any member of the group having no net income. The taxes thus determined should be (*a*) increased or decreased, as the case may be, by the amount of any section 452 adjustment attributable to each company, and (*b*) decreased by the amount of the consolidated credit for foreign taxes attributable to each company. In the event that the income taxes paid to a foreign country or United States possession are in excess of the amounts allowed as credits, the excess should be taken into consideration in arriving at the earnings and profits. (For similar method under prior law, see I. T. 3637, C. B. 1944, 258, and I. T. 3692, C. B. 1944, 261.)

D. Excerpts from T.D. 5086, Amendments to Regulations 103 [1941-2 Cumulative Bulletin 46]:

PAR. 21. There is inserted immediately after section 19.23(c)-3 the following:

SEC. 19.23(c)-4. *Excess-profits tax under Subchapter E of Chapter 2 of the Internal Revenue Code.*—The deductibility of the excess-profits tax imposed by Subchapter E of Chapter 2 of the Internal Revenue Code is subject to the following special rules:

* * * * * * *

(d) The deduction allowable to a taxpayer which is a member of an affiliated group filing a consolidated excess-profits tax return is an amount which bears the same ratio to the excess-profits tax of the group as the normal-tax net income of the taxpayer, computed without a deduction for excess-profits tax, bears to the sum

of the normal-tax net incomes of the several members of the group, computed without a deduction for excess-profits tax.

V. TABULATION OF CONGRESSIONAL MATERIAL RELATING TO CONSOLIDATED TAX RETURNS

Senate Finance Committee Reports on the Revenue Bills of 1918, 1921, 1928, 1932 and 1934.

House Ways and Means Committee Reports on the Revenue Bills of 1921, 1928 and 1934.

Memorandum of the Senate Finance Committee on the 1918 Revenue Act.

Report of the Joint Committee on Internal Revenue Taxation (1926).

Hearings before the Senate Finance Committee on the Revenue Act of 1928.

Preliminary Report of Sub-Committee of the House Ways and Means Committee on Prevention of Tax Avoidance (1933).

Hearings before the House Ways and Means Committee on the Revenue Revision of 1934.

Hearings before the Senate Finance Committee on the Revenue Act of 1934.

Joint Hearings of the House Ways and Means Committee and the Senate Finance Committee on Excess Profits Taxation (1940).

Hearings before the Senate Finance Committee on the Revenue Act of 1940.

Hearings before the House Ways and Means Committee on Revenue Revision of 1942.

Appendix C

Petition and Order "In the Matter of Missouri Pacific Railroad Company, Debtor," No. 6935

PETITION NO.

In the

DISTRICT COURT OF THE UNITED STATES

Eastern Division, Eastern Judicial District of Missouri

In the Matter of
MISSOURI PACIFIC RAILROAD COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad.
No. 6935.

PETITION

Of Trustee Re: 1946 Income Tax Returns for Gulf Coast Lines and International-Great Northern Railroad Company.

Comes now GUY A. THOMPSON, Trustee New Orleans, Texas and Mexico Railway Company, The St. Louis, Brownsville and Mexico Railway Company, The Beaumont, Sour Lake & Western Railway Company, The Orange & Northwestern Railroad Company, New Iberia & Northern Railroad Company, Iberia, St. Mary and Eastern Railroad Company, Houston and Brazos Valley Railway Company, San Antonio, Uvalde & Gulf Railroad Company, Sugar Land Railway Company, Rio Grande City Railway Company, Asherton and Gulf Railway Company, Asphalt Belt Railway Company, San Antonio Southern Railway Company,

Houston North Shore Railway Company, and San Benito and Rio Grande Valley Railway Company, Debtors; hereinafter referred to as the "Gulf Coast Lines," and the International-Great Northern Railroad Company, Debtor, and respectfully states to the Court:

1. That the New Orleans, Texas & Mexico Railway Company, Debtor, is the parent Company of what is known as the "Gulf Coast Lines" and owns all of the stock, except qualifying shares held by Directors, and all of the bonds of each of the Debtor Companies making up the Gulf Coast Lines; that said New Orleans, Texas & Mexico Railway Company also owns all of the stock, except qualifying shares held by Directors and two shares held by other individuals of the International-Great Northern Railroad Company, Debtor.

2. That during the years of these reorganization proceedings, all of the Debtor Companies included in the Gulf Coast Lines and the International-Great Northern Railroad Company, Debtor, have filed their Federal Income Tax Returns on a consolidated returns basis, as it was considered advantageous for them to do so.

3. Trustee further states that a preliminary return on a consolidated basis for the Gulf Coast Lines and International-Great Northern Railroad Company, Debtor, for the taxable year 1946 was filed in March, 1947, said tentative return showing the Income Tax liability of the group for the taxable year 1946 to be $500,720.00; that a detailed and final Return for 1946 must be filed on or before September 15, 1947; that if separate returns are filed, one for the Gulf Coast Lines and one for the International-Great Northern Railroad Company, Debtor, the tax liability of the Gulf Coast Lines will be approximately $2,572,000.00 and there will be no liability for the International-Great Northern Railroad Company, Debtor. On the basis of these estimates, it appears that the filing of a consolidated return, including all of the Debtor Companies named above, will result in

a saving to the following named Gulf Coast Lines Companies of approximately $2,072,000.00, to-wit:

New Orleans, Texas & Mexico Railway Company;
The St. Louis, Brownsville and Mexico Railway Company;
The Beaumont, Sour Lake & Western Railway Company;
Houston and Brazos Valley Railway Company;
Asphalt Belt Railway Company;
Houston North Shore Railway Company.

4. Trustee further states that since in the event separate returns are filed the International-Great Northern Railroad Company would have no tax liability, it is clear that if a final return for the taxable year 1946 is filed on a consolidated basis that the entire tax liability for that year should be allocated to the Gulf Coast Lines Group hereinabove named; that it also appears that International-Great Northern Railroad Company, Debtor, in consideration of its willingness to join the Gulf Coast Lines Companies in making a consolidated return for the taxable year 1946 is entitled to receive from the Gulf Coast Lines Group certain credits or payments; that International-Great Northern Railroad Company, Debtor, sustained a net loss for the year 1946 of approximately $2,690,000.00; that in view of this fact, if a separate return is filed in behalf of the International-Great Northern Railroad Company, Debtor, for the year 1946, it would be entitled to a refund of 1944 taxes resulting from the carry-back of its net loss from 1946 to 1944 amounting to approximately $1,867,000.00.

5. It thus appears that considering the years 1944 and 1946 together, as they must be considered in view of the carryback provisions of the Income and Excess Profits Tax Laws, it is advantageous to the Debtor Companies, as a Group, to file a consolidated return for the year 1946, since the saving of approximately $2,072,000.00 to the above men-

tioned Gulf Coast Lines Companies from such action is in excess of the detriment of $1,867,000 resulting to International-Great Northern Railroad Company from such action. The net saving to the consolidated Group from the filing of a consolidated return for the year 1946 is estimated to be $205,000.00.

WHEREFORE, Trustee Prays:

(a) That his action in filing a preliminary Income Tax Return on a consolidated basis for the Gulf Coast Lines Companies and the International-Great Northern Railroad Company, Debtor, for the taxable year 1946 be approved, and that he be further authorized and directed to file the detailed and final return for 1946 for said Debtor Companies on a consolidated basis.

(b) That immediately upon the filing of said detailed and final return for 1946, the Gulf Coast Lines Debtor Companies that receive a saving in their 1946 income tax return due to the fact that the International-Great Northern Railroad Company, Debtor, has joined with them in said return, shall pay to the International-Great Northern Railroad Company, Debtor, in proportion to their said saving, the amount which the International-Great Northern Railroad Company, Debtor, would have been entitled to receive as a refund to it on 1944 taxes resulting from the carryback of its net loss from 1946 to 1944.

(c) That when the returns of said Gulf Coast Lines Companies and the International-Great Northern Railroad Company, Debtor, have been finally audited by the Internal Revenue Department, that any adjustments which may be appropriate in the light of the figures contained in the returns so finally audited shall be made by the said Debtor Companies.

.....

Trustee.

.....

Counsel for Trustee.

United States of America
Eastern Judicial District of Missouri
City of St. Louis

GUY A. THOMPSON, being first duly sworn, deposes and states that he has read the foregoing Petition, and that the facts stated therein are true, as he verily believes.

.....

Subscribed and sworn to before me this
21st day of July, 1947.
My Commission expires March 8, 1950.

.....
Notary Public.

In the

DISTRICT COURT OF THE UNITED STATES

Eastern Division, Eastern Judicial District of Missouri

In the Matter of
MISSOURI PACIFIC RAILROAD COMPANY,
Debtor.

In Proceedings for the Reorganization of a Railroad.
No. 6935.

ORDER

Re: 1946 Income Tax Returns for Gulf Coast Lines and International-Great Northern Railroad Company.

The Court having considered the Petition of Guy A. Thompson, as Trustee, New Orleans, Texas and Mexico Railway Company, The St. Louis, Brownsville and Mexico Railway Company, The Beaumont, Sour Lake & Western

Railway Company, The Orange & Northwestern Railroad Company, New Iberia & Northern Railroad Company, Iberia, St. Mary and Eastern Railroad Company, Houston and Brazos Valley Railway Company, San Antonio, Uvalde & Gulf Railroad Company, Sugar Land Railway Company, Rio Grande City Railway Company, Asherton and Gulf Railway Company, Asphalt Belt Railway Company, San Antonio Southern Railway Company, Houston North Shore Railway Company, and San Benito and Rio Grande Valley Railway Company, Debtor, hereinafter referred to as the "Gulf Coast Lines," and the International-Great Northern Railroad Company, Debtor, with reference to the 1946 Income Tax Returns for said Gulf Coast Lines and International-Great Northern Railroad Company, Debtor, and having considered the evidence submitted and the arguments of counsel, and it appearing to the Court that during the years of these reorganization proceedings, all of the above named Debtor Companies have filed their Federal Income Tax Returns on a consolidated returns basis and that a tentative or preliminary return on a consolidated basis for the taxable year 1946 was duly filed for said Companies in the month of March, 1947, and it further appearing to the Court that it will be in the interest of said trust estates for Trustee to cause the detailed and final Income Tax Return for said Companies to be filed on a consolidated basis for the taxable year 1946, and that the filing of such a return on a consolidated basis will result in a tax saving to the Gulf Coast Lines of approximately $2,081,000.00, and it further appearing that in the event separate returns are filed for said Companies for the taxable year 1946, International-Great Northern Railroad Company would have no tax liability and would be entitled to a refund of 1944 taxes amounting to approximately $1,861,555.00 resulting from the carryback of its net loss in 1946 to 1944, and it further appearing from Proof of Notice filed herein by Trustee that all parties to the above entitled proceedings have been duly

served with a copy of said Petition, together with notice of the hearing thereon, and the Court being fully advised in the premises:

IT IS ORDERED:

1. That the action of Debtor Trustee in causing a tentative or preliminary Income Tax Return for the Gulf Coast Lines and the International-Great Northern Railroad Company, Debtor, to be filed on a consolidated basis for the taxable year 1946, be and the same is hereby approved.

2. That said Trustee be and he hereby is further authorized and directed to file the detailed and final return for 1946 for said Debtor Companies on a consolidated basis.

3. That, forthwith, upon the filing of said detailed and final return for the taxable year 1946, such of the Gulf Coast Lines Companies as receive a saving in their 1946 Income Tax by reason of the fact that the International-Great Northern Railroad Company, Debtor, has joined with them in a consolidated return, shall pay to the estate of the International-Great Northern Railroad Company, Debtor, in proportion to their said saving the amount which the estate of said International-Great Northern Railroad Company, Debtor, would have been entitled to receive as a refund to it on 1944 Income Taxes resulting from the carryback of its net loss from the year 1946 to the year 1944.

4. That when the returns of said Gulf Coast Lines Companies and the International-Great Northern Railroad Company, Debtor, have been finally audited by the Internal Revenue Department, that any adjustments which may be appropriate in the light of the figures contained in the returns so finally audited shall be made by the said Debtor Companies.

GEO. H. MOORE,
Judge, United States District Court.

Dated: July 29th, 1947.

Filed July 29, 1947. James J. O'Connor, Clerk.

Appendix D

Value of Stock Received by Secured Creditors of the Debtor Under the Reorganization Plan

Under the plan of reorganization, the preferred stock was given an assumed value of $100 per share and the common stock assumed values of $57 and $62 per share. (233 I.C.C. 452)

THE WESTERN PACIFIC RAILROAD COMPANY

Range of Common and Preferred Stock on the New York Stock Exchange

Year	Common		Preferred	
	High	Low	High	Low
*1944	31¾	29¾	66½	65
1945	57⅛	30½	92	64¼
1946	56½	27	101	71
1947	42¼	26½	90	65
1948	36½	25½	74½	58¼
1949	30	20	70¼	53¾
1950	55	28	89	64½
1951	58¾	46½	94¼	84¼
†1952	62	46½	96	89

*From December 29, 1944.
†To November 15, 1952.

Above quotations from THE COMMERCIAL AND FINANCIAL CHRONICLE, WALL STREET JOURNAL *and* STANDARD CORPORATION RECORDS.

IN THE SUPREME COURT OF THE UNITED STA

The Western Pacific Railroad Corporation, et al., Plaintiffs and Petit

v.

The Western Pacific Railroad Company, et al., Defendants and Respor

Metzger, et al., Intervenors and Petitioners,

v.

The Western Pacific Railroad Company, et al., Defendants and Respor

(NOTE: For convenience, the United States District Court for the Northern District of California will be sometimes
The Western Pacific Railroad Corporation will be styled the *"Holding Corp."* and The Western Pacific Railro
reorganization will be styled the *"Debtor"* and following reorganization will be styled the *"Reorganized Company."*)

CHRONOLOGY OF REORGANIZATION PROCEEDINGS

August 2, 1935—
Petition for reorganization pursuant to provisions of Bankruptcy Act filed by Debtor in United States District Court, for the Northern District of California.

September 23, 1935—
Reorganization Trustees appointed by order of Reorganization Court, to be effective as of October 1, 1935, upon ratification thereof by Interstate Commerce Commission.

October 30, 1935—
Order entered by Interstate Commerce Commission ratifying appointment of T. M. Schumacher and Sidney M. Ehrman as Reorganization Trustees.

November 9, 1935—
Order entered by Reorganization Court confirming appointment of T. M. Schumacher and Sidney M. Ehrman as Reorganization Trustees, as appointed by the court and ratified by Interstate Commerce Commission, and directing Trustees to employ Charles Elsey as their Agent.

November 13, 1935—
Surety bonds executed by T. M. Schumacher and Sidney M. Ehrman, as Trustees.

February 8, 1936—
Debtor's plan of reorganization filed.

September 28, 1936—
Institutional Bondholders' plan of reorganization filed.

October 26, 1936—
A. C. James Co. plan of reorganization filed.
(This plan recommended the use of the corporate charter of the Debtor in effecting reorganization.)

T OF THE UNITED STATES

et al., Plaintiffs and Petitioners, } **No. 150**

al., Defendants and Respondents. }

and Petitioners, } **No. 160**

al., Defendants and Respondents. }

trict of California will be sometimes referred to as the *"Reorganization Court."*
rp." and The Western Pacific Railroad Company prior to the consummation of
tyled the *"Reorganized Company."*)

CHRONOLOGY OF TAX RETURNS AND RELATED OCCURRENCES

(These Figures IN Red)

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SUPREME COURT, U.S.

In the Supreme Court of the United States

Office, Supreme Court, U.S.
FILED
DEC 6 1952
HAROLD B. WILLEY, Clerk

OCTOBER TERM 1952

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver, *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 150
MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., *Petitioners,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, et al., *Respondents.*	No. 160

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Supplement to Brief for Respondents

Opinions of the Courts Below

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Respondent.

Assembled and reprinted for convenience of Court and counsel

TABLE OF CONTENTS

		Page
I.	Opinion of September 6, 1949, in the United States District Court, Northern District of California, Southern Division	1
II.	Opinion and Dissenting Opinion of October 29, 1951, in the United States Court of Appeals for the Ninth Circuit	17
III.	Per Curiam Opinion of January 30, 1952, on Appellants' Petitions for Rehearing in the United States Court of Appeals for the Ninth Circuit	53
IV.	Dissenting Opinion of February 18, 1952, of Judge James Alger Fee on Appellants' Petitions for Rehearing in the United States Court of Appeals for the Ninth Circuit	54
V.	Opinion and Dissenting Opinion of July 9, 1952, in Re Petition to File Motion to Vacate Order, etc. in the United States Court of Appeals for the Ninth Circuit	56
VI.	Supplement of September 11, 1952, to Dissenting Opinion of Chief Judge Denman in the United States Court of Appeals for the Ninth Circuit	74

1. Opinion of September 6, 1949, in the United States District Court, Northern District of California, Southern Division.

[258*]

[Title of District Court and Cause.]

OPINION

Goodman, District Judge.

Plaintiff, a former holding company, whose interest in its subsidiary had been finally declared valueless in the subsidiary's reorganization proceeding under § 77 of the Bankruptcy Act, has tendered the novel claim that it should be awarded, in equity, a part, if not all, of the subsidiary's income tax saving while in reorganization, resulting from the filing of consolidated corporate income tax returns.

A somewhat detailed history must be set down [259] in order to properly appraise the unique demand of plaintiff.

Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad company, herein referred to as the "debtor"; defendant, the reorganized subsidiary, is The Western Pacific Railroad Company.

Statement of Facts

Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year

*Figures in brackets refer to pages of Record.

placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission. 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Supreme [260] Court reversed the Circuit Court and affirmed the order of the District Court. (318 U.S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor. (318 U.S. 508, 509.) [1]Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization com-

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[1]See in re Denver & R.G.W.R. Co. 10 Cir. 150 Fed. 2d 28 and R.F.C. v. D. & R.G.R. Co. 328 F.S. 495, where similar holdings upon similar contentions were made.

mittee wherein a modus of revesting was set up. Among other things, the plaintiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actually made until April, 1944, because of an unsuccessful litigative[2] attempt [261] to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was $4,144,828. Later in 1943, after the filing of the 1942 return and payment of the tax, the tax attorneys for defendant "discovered" Section

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[2]Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944.)

123 of the Revenue Act of 1942. (26 USC 23(g)4.)[3] They proposed what they de- [262] noted a "paradoxical" theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some $75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this $75,000,000 loss in 1943, could be "carried back" to 1942 (§ 122(b)(1) of the Internal Revenue Code.) and part could be "carried over" to 1944 (§ 122(b)(2) of the Internal Revenue Code.).

Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some $17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the $75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commissioner [263] whereby, in consideration of the withdrawal of the claim for refund,

[3] "Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset." (Subsection 4 of § 23g). By this subsection, losses resulting from worthlessness of stock of an affiliate became operating losses instead of capital losses as theretofore.

the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.[4]

On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consoli- [264] dated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

On December 17, 1947, plaintiff filed a supplementary bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further

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[4]The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commissioner or Court.

October 26, 1936—
A. C. James Co. plan of reorganization filed.
(This plan recommended the use of the corporate charter of the Debtor in effecting reorganization.)

June 21, 1939—
Order entered by Interstate Commerce Commission approving modified plan of reorganization and finding, *inter alia*, that (1) the unsecured claims of the Holding Corp against the Debtor are "without value" and that (2) the capital stock of the Debtor (owned by the Holding Corp) is "without equity or value, and the stockholders shall not be entitled to participate in the plan."
The order provides that "The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company or by transferring said properties to a new corporation organized for the purpose * * *"
The order recites that "The effective date of said plan shall be January 1, 1939." (233 I.C.C. 409)

September 19, 1939—
Order entered by Interstate Commerce Commission denying the petition of the Holding Corp for modification of the plan of reorganization.

August 15, 1940—
Order entered by Reorganization Court approving the Interstate Commerce Commission's plan of reorganization. (34 F. Supp. 493)

November 28, 1941—
Decision of Circuit Court of Appeals reversing order of Reorganization Court. (124 F.2d 136)

April 27, 1942—
Certiorari granted by Supreme Court of United States.

March 15, 1943—
Decision of Supreme Court of United States, on writ of certiorari, reversing Circuit Court of Appeals and affirming order of Reorganization Court approving plan of reorganization. (318 U.S. 448)

October 11, 1943—
Order entered by Reorganization Court confirming plan of reorganization and approving designation of Reorganization Committee.

November 22, 1943—
Agreement executed between Holding Corp, its secured creditors and Reorganization Committee providing *inter alia* for the transfer of the preferred and common stock of the Debtor to the Reorganization Committee.

December 17, 1943—

March 15, 1943—
Tentative consolidated income
filed by Holding Corp in beh

May 15, 1943—
Final consolidated income an
filed by the Holding Corp in

NOTE: The taxes were paid in qu
the following amounts, respectively:

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*The practice of filing consolidate
1918 and was continued thereafter

March 15, 1943—
Tentative consolidated income and excess profits tax returns for calendar year 1942, showing tax liability of $4,209,948, filed by Holding Corp in behalf of all members of affiliated group.

May 15, 1943—
Final consolidated income and excess profits tax returns for calendar year 1942, showing tax liability of $4,201,821.54, filed by the Holding Corp in behalf of all members of the affiliated group.*

NOTE: The taxes were paid in quarterly installments by the Reorganization Trustees and borne by the members of the affiliated group in the following amounts, respectively:

The Western Pacific Railroad Corporation	None
The Western Pacific Railroad Company (Trustees)	$4,144,828.87
Sacramento Northern Railway	2,847.58
Tidewater Southern Railway Company	53,608.91
The Western Realty Company	None
Deep Creek Railroad Co.	None
Standard Realty and Development Company	None
Delta Finance Co., Ltd.	536.15
	$4,201,821.54

*The practice of filing consolidated returns on behalf of the affiliated group was initiated by the filing of such a return for the calendar year 1918 and was continued thereafter without interruption through the period ending with April 30, 1944.

alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as "duality of control."

In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some $17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

[265] But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff's claim as an equitable demand.

Discussion

The income tax picture presented is bizarre indeed. It is "paradoxical" as the defendant's tax attorneys put it.[5] The

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[5]In a letter dated May 20, 1943 (plff. Ex. 50) addressed to Curry, Vice President of defendant company, tax counsel Polk set

Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of $21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization Court to be valueless. But the tax attorneys for the defendant conceived a "paradoxical" plan. They [266] decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder[6] affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942. (26 USC § 23(g)(4).[7] Thus, part of the lost $75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the

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forth his idea of, using the plaintiff's stock loss in the debtor to offset debtor's profits, saying: "This is commented upon rather than suggested, since it is *paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless.*" (Italics supplied.)

[6] § 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

[7] See footnote #3.

three years in question to the end that no part of the $21,346,567 tax would be paid.

This was more than mere tax "saving"; it amounted to a complete tax "escape." But the debtor had already paid $4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of "carry-back," part of the $75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or "escape" offered for the three years in question, the claim for refund was waived and the Commissioner then accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that [267] the debtor paid $4,144,828 taxes to the United States in order to escape the $21,346,567 previously mentioned, or a net saving or "escape" of $17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (§ 23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid $4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.[8]

How the amendment to the statute, (§ 23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting

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[8]It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss could have been a true factor affecting the tax settlement, inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns.

a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and [268] exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses. 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938.

Research does not disclose any statement of Congressional reason or purpose for the enactment of Section 123 of the Revenue Act of 1942 26 USC 23(g)4. It was not in the original House Bill (H.R. 7378), but was an amendment added in the Senate (S. Rept. 1631, p. 89, 77th Cong. 2nd Sess.) Neither the Senate Report, nor the Conference Report of the Bill, H. Rept. 2586 (Cong. Rec. 77th Cong. 2nd Sess. p. 8401, 8441) state the reasons for the amendment. It is of interest that in the Revenue Act of 1942 (26 USC 117(i).) securities held by banks were accorded the same benefits as Section 123 accorded to affiliated corporations.

While the purpose and intent of Congress has not anywhere been precisely stated, it is a fair and justifiable inference that the intent was to enlarge the general benefits afforded by consolidated or affiliated corporate returns.

[269] It may be briefly stated that the philosophy of the consolidated return is to disregard the corporate entity and to tax as a single business or economic unit, what really is a business unit. This has been found to be sound, equitable and convenient tax procedure. It treats an affiliate group of corporations as one business enterprise, the various affiliates being considered as if they were branch offices of the main business establishment. The income from all units is considered as a single income, and the losses from all units, are treated as a single loss. See the following in this connection: Mertens, Law of Federal Income Taxation, (1942) Vol. 8, § 46.01 and § 46.02: Montgomery's Federal Taxes—Corporations and Partnerships 1948-1949, Vol. II, p. 678; Miller, "The Taxation of Intercompany Income;" Law and Contemporary Problems, 1940, Vol. 7, 301, 306; Commerce Clearing House Standard Federal Tax Reporter, 1949, Vol. 1, paragraph 200C-1. See also statement of the Acting Secretary of the Treasury, regarding the preliminary report of the Special Committee of the Committee on Ways and Means, 1933, p. 13.

In my opinion, it is crystal clear that in enacting Section 23(g)4, the Congress were merely furthering the general purposes and benefits of the statutory provisions allowing the filing of affiliated corporation returns. Obviously it intended by the provision, (23(g)4), to allow a parent company in an affiliated group, if its ownership of stock in a subsidiary becomes worthless, to offset it against other

income of the parent company in any other subsidiaries or [270] subsidiary, in the same manner, as it had been permitted to offset operating losses in one subsidiary as against operating gains in another. To assume however that the Congress intended by 23(g)4 to statutorily authorize what was done in this case, is to attribute plain stupidity to the Congress of the United States—an unthinkable procedure, despite the general habit of criticism, both fair and unfair. But here the inexplicable occurred. For $4,144,828, the United States released $21,346,567 in taxes upon a basis which is completely incomprehensible. The tax "escape" invites a type of scrutiny which this Court is powerless to give it.

Obviously the Court cannot pass judgment upon the validity of the tax compromise and settlement. It is now closed. It is final and cannot be reopened except for fraud.

I am not unmindful of the recognized and approved philosophy that a taxpayer may avail himself of every proper means of reducing his taxes.[9] In every sense of the word, however, there was a real escape from the payment of taxes here. If I had the power, I would not hesitate to set aside the tax settlement. Indeed, if I could, I would order these taxes paid to the United States. That would effectively dispose of the cause.

[271] Perhaps it may be said that it is impertinent for the Court to concern itself with a closed tax transaction and

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[9]U.S. v. Isham, 84 U.S. 496, 506; Jones v. Helvering App. D.C. 71 Fed. 2d 214, 217; Iowa Bridge Co. v. Commissioner, 8 Cir. 39 Fed. 2d 777; Commissioner v. Eldridge, 9 Cir. 79 Fed. 2d 629, 631; Mertens: Law of Fed. Taxation (1948) Vol. 10A § 61.06 at 249. Paul: Studies in Federal Taxation (1937) p. 104.

agreement such as this. But if equity principles are our guide, then this tax settlement is of the web and woof of the issue to be decided. Equity has no precise boundaries, and certainly not in this unique controversy.

If this were an ordinary and more common type of tax saving, there might be impertinence to the Court's concern with it. But this so-called "saving" is inextricably entwined with the equities. Its very nature shapes and molds these equities. It is a "pot of honey equally attractive to principals and advocates."[10] When equity is invoked to divide or distribute the "pot," it cannot be blindfolded as to the origin or nature of the "honey."

It is argued, in effect, by plaintiff that, irrespective of whether or not the tax settlement was in accord with the statute, nevertheless it is a completed transaction and a closed book and should have no place in the determination of the validity of plaintiff's cause of action. It is asserted that tax savings having been made, the only question remaining is whether or not on the record here, the defendant must turn over to plaintiff an amount equal to, or a substantial part of, the tax savings. But in my opinion, the tax escape was erroneous and unjust. It cannot be cured by committing the further inequity of distributing the gain thus made to others.

[272] Debtor, having made good its "escape," now comes plaintiff and prays for a share, if not all, of that which "escaped." Whether there was, or was not, "duality of control" respecting the directorates of the two companies, appears to me to be not too important. True, there is a preponderance of the evidence in favor of the plaintiff's con-

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[10]Breving v. Lloyd Cuarto, 84 Fed. Supp. 33, 35.

tention of "duality of control." Be that is it may, I am compelled to rest decision upon the fundamental issue of the justice and equity of plaintiff's right, if any, to be paid for that which was escaped. Analytically speaking, what the plaintiff seeks is to collect from the defendant an amount equal to all, or a substantial part of, taxes that the debtor did not pay to the United States.

What is the true nature of the claim of plaintiff and of the relief it seeks? What plaintiff really seeks is not all or a share of the so-called tax savings. Rather it is a circuitous way of obtaining something in the nature of equity or value for its ownership, rejected in the reorganization plan. Or put differently, it is an effort to share in the earnings of the debtor during the reorganization period. Essentially a so-called tax saving is but a different name for an earning. Assuming, arguendo, the validity of plaintiff's contention, its right or claim is dependent upon the debtor making earnings. If there were no earnings there could be no so-called tax saving. A "saving" in taxes is a negative concept. It is a benefit to one obligated to pay money, resulting from not having to pay. No benefit could inure [273] from participating in non-payment of an obligation, unless there rested upon the participant an obligation to pay. Absent such obligation, any sharing of that which is not paid out, would be gratuitous. In effect therefore, recognition of plaintiff's claim would be recognition of a right in plaintiff to share in debtor's earnings. As already stated, a demand substantially seeking this end was heretofore asserted by way of opposition to the plan and rejected. Ecker v. Western Pac. Co. 318 U.S. 448.

Not only that, but the philosophy underlying Section 77 of the Bankruptcy Act stands as a barrier against the equitable validity of plaintiff's claim in this cause. Rehabilitation of a debtor by readjusting its financial structure in the interest of the debtor, its creditors and the public, in a fair and equitable plan or reorganization, is the essential purpose of Section 77. If a debtor in fact has an equity, it is and should be recognized. If not, it is disregarded. Above all, Section 77 was devised to provide in the public interest both a speedy and efficient means of resuscitating, among others, sick and ailing railroads.

See: Van Schaick v. McCarthy, 10 Cir. 116 Fed. 2d 987, 992; New England Coal & Coke Co. v. Rutland R. Co. 2 Cir. 143 Fed. 2d 179, 185; In re Denver & R.G.W.R. Co., 10 Cir. 150 Fed. 2d 28, 34; Thompson v. State of Louisiana, 8 Cir. 98 Fed. 2d 108, 110; Craven "The Judicial and Administrative Mechanism of Section 77," 1940, 7 Law and Contemporary Problems 464.

[274] When it was finally determined, after running the full gamut of court and administrative procedure, in the reorganization of the Western Pacific Railroad Company, that the plaintiff's interest was worthless, nothing short of some extraordinary cause justifying reopening the reorganization proceeding could effect a change. To make any award in this cause, under the assumed authority of equity principles, would be in effect to modify the administrative and judicial judgments in the reorganization proceeding. Such a procedure would be an indirect nullification of the purpose of the reorganization statute, in the guise of an afterthought allegedly of equitable persuasion.

What was the actual result of the tax saving agreement by which it was determined that some $21,000,000 in taxes were not due to the United States? Simply that the debtor did not pay taxes. It does not follow at all from this, that an obligation to pay the unpaid tax money, one to another, was thereby created.

The so-called "duality of control," much discussed and emphasized, is not important in resolving the tendered issue. For in the final analysis, plaintiff's hope to succeed here depends upon whether it could have lawfully acquired these unpaid tax monies by voluntary agreement between the directorates of the two companies. In my opinion, it could not. For such a procedure would violate and nullify the reorganization plan and the decree of the Court confirming it. It would permit [275] the plaintiff to share in the earnings of the debtor during the period of reorganization. Equity would aid the creditors of debtor to prevent it. Indeed there is some merit to defendant's contention that a firm obligation rested upon plaintiff to conform and cooperate to the end that the creditors and new owners should be benefited to the fullest.

What would be the result if the contention of plaintiff, that law and equity imposes an obligation upon defendant to pay the whole amount of unpaid tax money over to plaintiff, were sustained? It would mean a court order directing defendant to pay over to plaintiff an amount equal to the taxes the debtor should have paid to the United States. So the plaintiff, which formerly owned and was a failure in operating the debtor, would get from the defendant a sum of money out of debtor's earnings during reorganization equal to the taxes the debtor should have paid to the United

States resulting from its profitable operations. In my opinion, such a whirligig rationale transcends all reasonable concepts of equity and justice.

An array of able counsel on both sides have put forth prodigious and ingenious efforts,[11] one side to retain the benefits of the tax "escape," and the [276] other to obtain them. And all the time the taxes escaped in reality belong to the United States.

The Court cannot cause these taxes to be paid, where they should be paid, to the United States. But, as between the parties, no persuasion of conscience or equity impels me to do otherwise than to leave the parties where they are, the defendant with its amazing and undeserved tax success; the plaintiff, as the reorganization decree left it, without interest in the debtor.

For the reasons stated, judgment will go for the defendant.[12]

Dated: September 6, 1949.

[Endorsed]: Filed September 6, 1949.

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[11]In the preparation for the trial, and to develop the historical facts concerning the controversy and upon the subject of the so-called "duality of control," the depositions of 13 witnesses were taken over a period of many months and cover 6190 pages of transcript. Briefs, on submission of the cause, total 485 printed pages.

[12]Inasmuch as there is little factual dispute pertinent to the issue decided, this opinion may well serve, under the rules, so far as necessary, as findings of fact and conclusions of law. But counsel, if they wish, may submit findings pursuant to the Rules, provided they are limited to the issues involving the essential equitable considerations upon which the decision rests.

II. Opinion and Dissenting Opinion of October 29, 1951, in the United States Court of Appeals for the Ninth Circuit.

[2213] *United States Court of Appeals*
For the Ninth Circuit

[Title of Cause]

[2214] Oct. 29, 1951

Upon Appeal from the United States District Court
for the Northern District of California
Southern Division

Before HEALY, Circuit Judge, and FEE and BYRNE, District Judges

WILLIAM M. BYRNE, District Judge:

OPINION

These are appeals from a judgment denying relief to plaintiffs below, who are seeking to recover approximately $17,000,000 from the reorganized The Western Pacific Railroad Company, defendant and appellee.[1] Appellants are The Western Pacific Railroad Corporation (hereinafter sometimes referred to as "Corporation"), its receiver, and three of its preferred stockholders, who intervened to assert Corporation's claims.

Appellant Coporation, from 1916 until the events which gave rise to this litigation, owned all of the capital stock of The Western Pacific Railroad Company, an operating rail-

[1]There are seven appellees who are an affiliated group. The only one from whom appellants seek a money judgment is The Western Pacific Railroad Company, hereinafter sometimes referred to as the "subsidiary". The term, "subsidiaries", used in the plural number, refers to The Western Pacific Railroad Company and all other members of the affiliated group of which appellant "Corporation" was the parent.

Order entered by Reorganization Court confirming plan of reorganization and approving designation of Reorganization Committee.

November 22, 1943—

Agreement executed between Holding Corp, its secured creditors and Reorganization Committee providing *inter alia* for the transfer of the preferred and common stock of the Debtor to the Reorganization Committee.

December 17, 1943—

Order entered by Reorganization Court approving agreement of November 22, 1943, and authorizing and directing transfer of preferred and common stock of the Debtor to the Reorganization Committee.

May 1, 1944—

Preferred and common stock of Debtor, owned by Holding Corp, transferred to the Reorganization Committee pursuant to agreement of November 22, 1943, and order of Reorganization Court entered December 17, 1943.

September 25, 1944—

Order entered by Reorganization Court approving use of the Debtor in carrying out and making effective the plan of reorganization.

September 25, 1944—

Order entered by Reorganization Court approving and authorizing mortgage indentures, forms of bonds, interest coupons, etc. This order also authorized the making of "adjustment payments" to persons to whom new securities were issuable under the reorganization plan and further provided that, after the making of payments for certain specified purposes, the balance of the available net income of the Debtor and its subsidiaries for the years 1939 to 1943, inclusive, could be applied "to any proper corporate purpose of the reorganized company."

October 24, 1944—

Report and order of Interstate Commerce Commission authorizing the issue of new securities, transfer of property, etc.

(This order requires that both the first mortgage bonds and the general-mortgage income bonds to be issued under the plan "will be dated January 1, 1939" and that the certificates for the shares of both preferred and common stock to be issued under the plan "will be dated January 1, 1944.")

November 27, 1944—

Order of Reorganization Court directing the revesting of properties of the Debtor in the Reorganized Company, authorizing and directing the carrying out of the plan, and fixing December 29, 1944 as "The date for the consummation of the plan of reorganization * * *."

December 29, 1944—

Reorganization plan consummated and title to all business, assets and property constituting the Debtor's estate, and all [illegible] and interest of the Reorganization Trustees vested in the Reorganized Company pursuant to deed of

March 3, 1944—

Order entered by Reorganiza
of $7,100,000 for contingent t

May 1, 1944—

Preferred and common stock
to agreement of November 2
"affiliation," theretofore exist

May 15, 1944—

Order entered by Reorganiza
ment of estimated Federal i
United States Treasury Savi
therefor matures.

July 15, 1944—

Consolidated income and ex
Holding Corp in behalf of a

NOTE: The declaration of worth
certified by the Interstate Comme
greatly exceeded what would othe
and no tax was reported or paid f

March 3, 1944—

Order entered by Reorganization Court authorizing Reorganization Trustees to establish a reserve fund in the amount of $7,100,000 for contingent tax liability for 1943.

May 1, 1944—

Preferred and common stock of Debtor, owned by Holding Corp, transferred to Reorganization Committee pursuant to agreement of November 22, 1943, and order of Reorganization Court entered December 17, 1943. The status of "affiliation," theretofore existing between the Holding Corp and other members of the group, was thereby terminated.

May 15, 1944—

Order entered by Reorganization Court authorizing Reorganization Trustees to invest funds, accumulated for the payment of estimated Federal income and excess profits taxes accruing from month to month during the year 1944, in United States Treasury Savings Notes, Series C, to be used for the payment of such taxes as and when the liability therefor matures.

July 15, 1944—

Consolidated income and excess profits tax returns for the calendar year 1943, showing no taxable income, filed by Holding Corp in behalf of all members of the affiliated group.

NOTE: The declaration of worthlessness of the stock of the Debtor owned by the Holding Corp as provided in the plan of reorganization certified by the Interstate Commerce Commission and confirmed by the Reorganization Court, resulted in a loss to the Holding Corp which greatly exceeded what would otherwise have been the taxable income of other members of the affiliated group for the calendar year 1943 and no tax was reported or paid for that year by any member of the group.

road company. The operating company became financially distressed during [2215] the "depression of the early thirties" and in 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 U. S. C. 205). The court, in that year, placed its affairs in the hands of trustees. In 1939 the Interstate Commerce Commission approved (233 I. C. C. 409) a proposed plan of reorganization, which was thereafter submitted to and approved by the district court in 1940. In the plan it was determined, inter alia, that the capital stock of the subsidiary, owned by Corporation, was without equity or value and therefore was not entitled to participate in the plan. Appeals followed and, after a contrary holding by this court, the Supreme Court considered and rejected the contention of Corporation that it should have the right to participate in the plan because of increased earnings of the debtor while in reorganization, and affirmed the district court on March 15, 1945.[2] Thereafter the plan of reorganization was submitted to the creditors in accordance with the statutory requirement (11 U. S. C. 205(e)), and, following their approval, was confirmed on October 11, 1943 by the district court. On April 30, 1944, with the approval of the court, Corporation transferred all of its stock in the subsidiary to the reorganization committee and this stock was later cancelled. On December 31, 1944, the trustees turned the railroad properties over to the reorganized company, The Western Pacific Railroad Company, appellee here.

This litigation involves a dispute about taxes and [2216] tax savings for the years 1942, 1943 and the first four months of 1944, a period during which the railroad properties were

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[2]Ecker vs. Western Pacific Railroad Corp., 318 U. S. 448.

controlled and operated by the trustees of the bankruptcy court.

During the years in which Corporation was the owner of all the outstanding stock of the pre-reorganization, The Western Pacific Railroad Company, including the years the trustees of the bankruptcy court had possession and control of the railroad properties, Corporation followed the practice of filing consolidated income tax returns in which it reported the earnings of the operating company as well as other affiliated companies.

During the year 1942 the operating company, under the control of the court's trustees, had substantial net earnings. On May 15, 1943, a consolidated return for the calendar year 1942, showing tax liability of $4,201,821.54, was filed by Corporation in behalf of all members of the affiliated group. Corporation, not having had any net earnings during 1942, did not pay any part of the tax.

On July 15, 1944 consolidated income and excess profits tax returns for the calendar year 1943, showing no taxable income, were filed by Corporation in behalf of all members of the affiliated group. The operating company, under the management of the trustees, again made substantial net earnings in 1943, but the loss sustained by Corporation by reason of the declaration of worthlessness of its stock[3] in the operating company (which had cost [2217] Corporation $75,000,000) was utilized as an offset in the consolidated returns and thus resulted in a net loss and no tax obligation

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[3]Section 123 of the Revenue Act of 1942. (26 U.S.C. 23(g)(4)). By this subsection, losses resulting from worthlessness of stock of an affiliate became operating losses instead of capital losses as theretofore.

for any of the affiliated group. In addition, part of the loss was "carried back" to 1942[4] and a claim for refund of the taxes paid under the consolidated return for 1942 was filed with the Commissioner by Corporation on March 9, 1945. A consolidated return in behalf of the affiliated group was filed on June 15, 1945 by Corporation for the first four months of 1944. No tax liability was shown by this return by reason of the "carry forward"[5] of an unused portion of the loss arising from the declaration of the worthlessness of the stock of the subsidiary company owned by Corporation.

The validity of the stock loss offsets was questioned by the Commissioner of Internal Revenue, and after negotiations a tax settlement was made with the Commissioner on August 13, 1947 whereby, in consideration of the withdrawal of the claim for refund of 1942 taxes, the Commissioner accepted and approved the returns for the calendar year 1943 and first four months of 1944. Except for the offset of the capital stock loss of Corporation, the [2218] net earnings of the subsidiaries for 1943 and the first four months of 1944 would have required the payment of some $17,000,000 in income and excess profits taxes.

This suit in equity was instituted October 10, 1946 by Corporation, alleging "consolidated income tax returns were filed by the plaintiff for itself and its affiliates which reported a deductible loss by the plaintiff in an amount sufficient to eliminate all taxable income for the group as a whole" for the periods in question and praying that the

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[4]Section 122(b)(1) of the Internal Revenue Code. (26 U. S. Code)

[5]Section 122(b)(2) of the Internal Revenue Code. (26 U. S. Code)

rights and interests of the plaintiff and the defendants be fixed and determined. A complaint in intervention was filed by three stockholders of Corporation on April 7, 1947. The principal difference between the original complaint and the complaint in intervention is the allegations in the latter pertaining to "duality" or interlocking management and "domination" of the parent by the subsidiary. It is alleged that various directors, officers and counsel of Corporation acted as directors, officers and counsel of the subsidiary with the result that the subsidiary dominated and controlled Corporation; that said officers caused Corporation to file consolidated tax returns when Corporation had "no duty or obligation whatsoever so to do". Corporation filed an answer to the complaint in intervention in which it denied "on its own behalf and on behalf of its officers and directors all allegations . . . of domination and control of the plaintiff, its officers and directors" by the subsidiaries and affiliates, *but six months later* Corporation filed a supplemental bill of complaint [2219] alleging a "duality of control" and, though falling short of intervenors' allegation of "domination", it alleges "at the special instance and request of the defendants and the trustees in the reorganization proceedings acting for the defendants the plaintiff, however, consented to the filing on its behalf of consolidated . . . tax returns with defendants" for the tax periods in question. It is further alleged that plaintiff "does not aver that in so conducting themselves" the officers acting for both corporations "were aware of wrong-doing or consciously disregarded the interests of plaintiff". There is no assertion of actual fraud or specific acts of deceit nor would the record support any such assertion. Corporation's claim appears to

rest on constructive fraud presumed from the intercorporate relationship which it asserts deprived it of its independence and caused it to suffer a loss.

The appellants emphasize that Corporation maintained its offices jointly with those of its subsidiaries and the trustees in New York; that Corporation's officers, who handled the tax transactions, were also employees of the subsidiaries and trustees, and their salaries and the expenses of the office were jointly paid; that because of its impoverished financial condition, Corporation was incapable, as of June 1, 1943, of paying salaries or office expenses and thereafter the subsidiaries paid all of the salaries and office expenses. Appellants refer to this as "duality of management" which they contend created a fiduciary relationship and the subsidiaries' duty to deal fairly with Corporation.

[2220] Many of the cases cited by appellants deal with the duties of trustees, agents and partners and with the granting of restitution for violation of their duties. Clarity of reasoning has suffered because of the failure to distinguish between the several varieties of fiduciaries and the duties imposed on each. Although all trustees are fiduciaries, all fiduciaries are not necessarily trustees.

> "A person in a fiduciary relation to another is under a duty to act for the benefit of the other *as to matters within the scope of the relation.* Fiduciary relations include among others the relation of trustee and beneficiary, guardian and ward, agent and principal, attorney and client . . . The directors and officers of a corporation are also fiduciaries, as are receivers, and executors and administrators. *The scope of the transactions affected by the relation and the extent of the duties im-*

posed are not identical in all fiduciary relations . . ." (Restatement of Restitution, Section 190, comment "a".) (emphasis added.)

As stated by Professor Scott in 49 Harvard Law Review at page 521:

"*In some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust . . .*" (emphasis added.)

Appellants place a great measure of reliance on the case of *Commercial National Bank in Shreveport vs. Parsons*, 144 F. 2d 231. That case is distinguishable from the case before us in that the fiduciary relationship arose out of a contract which imposed the *duties of a trustee* upon the "new [2221] bank". The court decided the case on the established rule that a *trustee* owes the duty of absolute fidelity to the *trust estate* and may not profit by dealing with it. We know of no better way to point up the distinction than to use the words of the court cited and emphasized by appellant's brief:

"The credit thus obtained by the new bank was a profit derived from the *trust property* as effectively as if it had been paid that much in cash." (emphasis added.)

Cases which deal with trustees, agents and partners are not controlling here as there is no contention that the subsidiary was a trustee, agent or partner. It is appellants' contention that the subsidiary dominated Corporation through the dual officers. If this be true, then a fiduciary relationship existed, but the duties imposed were not those of a trustee. While a trustee *may not deal* with the trust estate and thereby make a profit, affiliated corporations are usually

associated for the very purpose of dealing with each other for profit, e.g., manufacturing and sales companies; railroads and their subsidiary short line companies. Even the corporation which dominates its subsidiary, with the resultant fiduciary relationship, properly deals with its affiliate for profit *as long as there is no overreaching or unfairness.*

Whether or not a fiduciary relationship exists, and the extent of the duties imposed, depends upon the particular field of substantive law involved. We must look to the law of corporations to determine whether the subsidiary stood in a fiduciary relation [2222] to Corporation. The mere fact of officers and directors in common does not create such a fiduciary relationship. There is nothing insidious about duality of management and control as such. It is very common in the realm of business, particularly in the situation of parent and subsidiary, as here. At times business convenience requires such relationship. The *officers and directors* who occupy this dual position are fiduciaries to both companies and owe a duty of loyalty to each. Thus they cannot favor the interests of one corporation while sacrificing or betraying those of the other. If they do so, they must respond in damages for their tortious conduct or account for any benefits derived through their breach of duty.

But rules relating to the individual officers do not reach the point involved in this case. Here we must determine whether *the subsidiary corporation* stood in a fiduciary relation to *the parent corporation.* There are several orthodox ways in which one corporation may become a fiduciary in relation to another corporation, e. g., it may hold property

in trust for the other, or it may become an agent for the other. Fiduciary duties also arise where one corporation dominates the other. *Consolidated Rock Co. v. Du Bois*, 312 U. S. 510. Although the presence of common officers and directors does not in itself create a domination or a fiduciary relationship between the corporations, it does subject dealings between them to judicial scrutiny as to their fairness and reasonableness to ascertain if domination exists, and if so, whether it has resulted in [2223] overreaching which will raise a presumption of constructive fraud.

There obviously existed an interlocking management between Corporation and the subsidiaries. But this situation was not of the subsidiary's making. On the contrary, it was created by Corporation, whose stockholders elected its Board of Directors, who appointed its officers. Since plaintiff Corporation owned 100% of the stock of the subsidiary, it elected all of the directors of the subsidiary, which, in turn, appointed its officers. After the subsidiary was reorganized it was no longer controlled by Corporation but by the trustees appointed by the bankruptcy court.[6] Corporation continued in office the same directors who, in turn, continued to employ the same officers. This was not unnatural since Corporation continued to own all the capital stock of the subsidiary long after it had been divested of control of the subsidiary by reason of the reorganization.

If it be assumed that the advent of the trustees into the affiliation and the increased prosperity of the subsidiary resulted in control of the affairs of Corporation so as to

[6]The name of one of the trustees was submitted to the court by Corporation and the other was selected by the court and approved by all interested parties in the bankruptcy proceeding.

raise fiduciary obligations, the scope and extent of the subsidiary's obligations would be to deal fairly with Corporation. A corporation can only act through its officers and agents. It follows that if there was domination and [2224] unfairness it was exercised through the dual officers who forsook their obligations to Corporation, by which they were appointed, and served the purposes of the subsidiary. Although the arguments of appellants are exceedingly general, it is apparent that they assign three particulars wherein the dual officers failed in their obligations to Corporation, resulting in unfairness: (1) They filed consolidated returns; (2) they failed to exact an agreement from the subsidiary requiring payment of money to Corporation as a condition to their consent to file consolidated returns; (3) they should have resigned and allowed the appointment of successors who would have exacted such an agreement from the subsidiary. We shall discuss these three particulars seriatim.

The consolidated returns were filed by Corporation as the parent, for itself and its subsidiaries. Appellants contend that the subsidiaries caused[7] Corporation to file consolidated returns when it had "no duty or obligation whatsoever so to do". The filing of these returns was in exact conformity with the practice followed since 1916. Beginning in 1927 Michael J. Curry, first as treasurer and after February 1, 1942 as president of Corporation, supervised preparation of

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[7]Appellant Intervenors attribute the "causation" to "domination and control" of Corporation by the subsidiaries and trustees, whereas Corporation, which denies "domination and control" merely attributes it to its consent to the filing "at the special instance and request of the defendants and the trustees . . ." (pleadings)

consolidated returns, [2225] signed and filed them. In each year the consolidated tax liability was distributed pro rata to those members of the group who had taxable incomes without allocating any tax to a company showing a loss or paying such company tribute for the tax "saved" by the use of its loss in the returns. Mr. Curry supervised preparation of tentative tax returns for 1942, and on March 15, 1943 signed and filed them and arranged for an extension of time until May 15, 1943 to file the final returns. On March 23, 1943, F. C. Nicodemus, Jr., who was counsel for Corporation at the time and *appears on the pleadings and briefs in this case as present counsel for appellants,* suggested by letter[8] to Mr. Schumacher, one of the trustees of the operating company, that he be authorized to employ Messrs. Whitman, Ransom, Coulson & Goetz, tax experts, to advise him on tax matter. This was done. Mr. Polk of this firm continued to advise with the officers of the group through the periods here in question. Mr. Polk reviewed the tax situation with Mr. Curry and Mr. Nicodemus and on May 20, 1943 prepared a detailed written report[9] addressed to Mr. Curry and circulated to Mr. Schumacher and Mr. Nicodemus. The report reviewed the tax advantages of consolidated returns and suggested the possibility that, under the recently enacted amendment to Section 23(g) of the Internal Revenue Code, the loss of Corporation, upon a [2226] determination that its stock in the subsidiary was worthless, might constitute under a consolidated return, an offset to income of other group members. A consolidated return reporting the

[8]Pl. Ex. 39B (read into record, page 544)

[9]Pl. Ex. 50

loss of Corporation as an offset to group income was prepared in the joint New York office, signed by Mr. Curry, and filed by him on July 15, 1944. The returns reported no tax owing. Substantially the same procedure was followed for the "carry back" claim for refund March 9, 1945, as well as the consolidated tax returns for the first four months of 1944, which were filed July 15, 1945.

It hardly seems conceivable that Corporation could complain because consolidated returns were filed. Not only was it in accordance with past practice of the group and under the supervision of Corporation's president, as in former years, but it was done under the guidance of the independent tax experts employed upon the suggestion of the General Counsel for Corporation, who *represents appellants in* the present proceeding. As the trial court stated[10] ". . . when everybody was, as they were in this case, acting completely in the open in the matter, nobody was concealing anything from anyone else, the element of fraud or deception, of the kind that you refer to, is absent . . . Everybody knew that consolidated returns were being filed . . . Everybody knew that these attorneys were being employed to file this consolidated return. It was all done right out in the open." At the time [2227] of trial plaintiff intervenors appeared to agree with these observations of the trial court,[11] but on this

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[10]Page 970, Transcript.

[11]Page 971, Transcript: "The Court: Well, all I have to say to you there, Mr. Levy, is that I don't think it is necessary to carry that argument forward now. Everybody knew, didn't they, that the consolidated return was being filed? So that the defendant railroad company wouldn't have to pay any income tax? That was why it was filed, wasn't it?

"Mr. Levy: Yes, your honor."

appeal they infer that there was something sinister about the filing of the consolidated returns.

It is interesting to note the reactions of appellants to observations in the opinion of the trial court[12] to the effect that the Commissioner erred in allowing the tax deduction in question. They vehemently argue that the filing of the consolidated returns and the use of plaintiff's loss to offset defendant's income was proper under the tax law and regulations. It is also interesting to note that the compromise of the tax claim between the Bureau of Internal Revenue and Corporation acting through its attorney-in-fact, James K. Polk, [2228] occurred *after* this action was commenced on October 10, 1946, and *after* the filing of the complaint in

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[12]In the opinion filed by the trial court (85 F. Supp. 868), appears the expressed view that the Bureau of Internal Revenue should not have compromised the tax claim of the taxpayers and should have insisted that the claimed deductions be disallowed in their entirety. The court said, "If I had the power, I would not hesitate to set aside the tax settlement. Indeed, if I could, I would order these taxes paid to the United States. That would effectively dispose of the cause." While we agree with the principal holding of the trial court, we do not share this view. A taxpayer may avail himself of every means of tax deduction proper under the applicable statutes. Here the Commissioner questioned the taxpayer's right to the deduction and, after months of negotiation, compromised the disagreement with the taxpayer in lieu of litigating it in the Tax Court. The tax laws authorize the Commissioner to enter into compromises and they are binding on the court in the absence of fraud. This is particularly true in a collateral proceeding. The settlement of the tax claims is an undisputed fact in this case and whether or not it was advantageous to the government is not in issue. The trial court recognized the expression of this view as dictum when it stated: "Obviously the Court **cannot pass judgment upon the validity of the tax compromise and settlement.** It is now closed. It is final and cannot be reopened except for fraud." (emphasis added)

issued under the plan will be dated January 4, 1944.

November 27, 1944—

Order of Reorganization Court directing the revesting of properties of the Debtor in the Reorganized Company, authorizing and directing the carrying out of the plan, and fixing December 29, 1944 as "The date for the consummation of the plan of reorganization * * *."

December 29, 1944—

Reorganization plan consummated and title to all business, assets and property constituting the Debtor's estate, and all right, title and interest of the Reorganization Trustees, revested in the Reorganized Company pursuant to deed of the Reorganization Trustees.

December 31, 1944—

Possession, control and operation of all business and properties of Debtor transferred to and accepted by the Reorganized Company at 12 o'clock midnight, Pacific War Time.

April 30, 1945—

Ninth and Final Report and Accounting by the Trustees and petition for approval of their acts and accounts and for their discharge as Trustees filed in Reorganization Court.

May 21, 1945—

Order entered by Reorganization Court approving and confirming Ninth and Final Report and Accounting by Reorganization Trustees, approving and confirming their acts and accounts and discharging them as Trustees.

March 18, 1946—

Petition filed in Reorganization Court by Reorganization Committee for approval of their expenses and for a final order terminating the proceedings.

March 28, 1946—

Final order entered by Reorganization Court approving the report of Reorganization Committee, discharging the Committee and terminating proceedings.

(By this order the Court finds, *inter alia*, that the plan of reorganization has been fully and properly carried out and put into effect.)

March 9, 1945—
Claim filed with Commission $4,201,821.54 paid under con

NOTE: This claim was based larg of the stock of the Debtor owned by

March 9, 1945—
Claim filed with Commissioner of Internal Revenue for refund of the income and excess profits taxes in the sum of $4,201,821.54 paid under consolidated returns for 1942.

NOTE: This claim was based largely upon a "carry back" of an unused portion of the loss arising from the declaration of the worthlessness of the stock of the Debtor owned by the Holding Corp.

June 15, 1945—
Income and excess profits tax returns included the member

NOTE: No tax liability was show declaration of the worthlessness of

June 15, 1945—
Income and excess profits tax returns filed by the Holding Corp for the year 1944, showing no taxable income. These returns included the members of the affiliated group for the first four months of 1944.

NOTE: No tax liability was shown by these returns by reason of the "carry forward" of an unused portion of the loss arising from the declaration of the worthlessness of the stock of the Debtor owned by the Holding Corp.

June 27, 1946—
Institution of suit by Van Ki United States District Court Holding Corp, the James Fo realized through the filing o

NOTE: *The institution of this su of its stock loss in the consolidated*

June 27, 1946—
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intervention on April 7, 1947; that no effort was made to invoke the power of the court to enjoin the officers of Corporation from continuing in their efforts to have the Bureau accept the consolidated returns as filed; that nothing was done to revoke Polk's power-of-attorney to represent Corporation in the proceedings before the Bureau; that Polk, as attorney-in-fact for Corporation, made an offer of settlement of tax liability for 1942, 1943 and the first four months of 1944 by letter of May 19, 1947 to the Internal Revenue Bureau; that a stipulation (hereafter discussed) was entered into between counsel in this case approving the settlement of the returns with the Government; that Corporation's Board of Directors adopted a resolution approving [2229] and ratifying the offer of settlement August 13, 1947.

The conclusion is inescapable that Corporation's officers, when they filed consolidated returns, did not violate any obligation but, on the contrary, were conforming with the policy and directions of Corporation.

Appellants suggest that Corporation was under no obligation to file consolidated returns; that it could have demanded that the subsidiaries enter into an agreement to pay it a sum of money as a pre-requisite to its consent to filing such returns; that inasmuch as it officers did not exact such an agreement, they failed in their obligation to Corporation and are chargeable with an "unfair" omission to be imputed to the subsidiary by reason of the supposed domination.

Section 141(a) of the Internal Revenue Code grants the privilege of filing consolidated returns upon the condition that all members of the affiliated group consent to the regulations prescribed by the Commissioner under the authority

of subsection (b) of the same section. Regulation 104, Section 23.12 provides that the consolidated return shall be made by the parent corporation. Under the Regulations, the parent corporation is the agent for the entire group, and (except in unusual circumstances) all dealings with the Commissioner are handled by the parent.

Appellants argue that consolidated returns were designed solely for the benefit of the parent corporation. The argument is not sound. The Code [2230] and Regulations recognize that the benefit of consolidated returns is for all corporations in the group: Any subsidiary in the group, as well as the parent, may prevent the filing of consolidated returns if the filing is detrimental or contrary to the interests of such corporation. Appellants assert that in the usual case the tax saving which a subsidiary effects will enure to the parent by way of increasing the value of its stock or by way of dividends. This is quite true in the usual case. But it does not mean that this result must follow, nor does it follow that, because the value of a parent's equity in a subsidiary corporation is increased by reason of benefits flowing to the subsidiary's preferred stockholders and creditors, it may receive the benefits direct, regardless of the rights of the subsidiary's preferred stockholders, creditors and minority common stockholders.

The appellants and intervenors contend that the tax laws require "economic unity" for the filing of consolidated returns. This is incorrect. The Regulations suggests procedure in cases where a subsidiary has left the affiliated group. Regulation 104, Section 23.12(e). Thus, the regulations specifically envision situations where economic unity shall cease and yet permit the filing of consolidated returns. If,

by the time the returns are filed the affiliation has ceased to exist, any benefits to the subsidiary obviously cannot insure to the parent. That is precisely the situation in the case at bar. In the tax periods involved there was an affiliated group. When the returns and the claim for refund were [2231] filed, affiliation no longer existed. Therefore, the benefit of the consolidated return could not accrue to the parent corporation. If the assertion of appellants that consolidated returns "are not permitted for the benefit of the subsidiaries" were literally true, then there would be no lawsuit here because consolidated returns could not have been filed in the first instance.

Appellants cite three decisions of the Securities and Exchange Commission in support of their view that the rationale of the tax laws requires that any benefits resulting from the tax laws should go to the parent.[13] These decisions do not support this contention of appellants. These companies were seeking the approval of the Commission to alteration of inter-company agreements respecting income taxes. All three decisions show a decided viewpoint that the tax savings from consolidated returns *shall not* be paid over to the parent if this would in any way endanger the position of the creditors of the subsidiary. They also make clear that a company whose loss was utilized for the benefit of the group does not have a right to compensation from those who

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[13]In the Matter of Consolidated Electric & Gas Co., 15 S.E.C. 161; In the Matter of Consolidated Electric and Gas Co. and The Islands Gas and Electric Co., 13 S.E.C. 649; In the Matter of Cities Service Company and Cities Service Refining Corporation, Holding Co. Act of 1935, Release #5535, File 70-988.

benefited. In the Cities Service case, supra, the Commission said:

> "... we think it should be observed that in [2232] the ordinary case the fact that one subsidiary contributes a particular income deduction to a consolidated return *does not in itself entitle that subsidiary to the benefits of the reduced taxes* resulting from the deduction. Where the reductions are possible from filing a consolidated return, they ordinarily are due to a number of factors contributed by the various members of the consolidated group, including, among others, earnings, and excess profits tax credits, as well as income deductions." (emphasis added)

There is nothing in the Code or Regulations that compels the conclusion that a tax saving must or should enure to the benefit of the parent company or of the company which has sustained the loss that makes possible the tax saving.

Assuming, as we have, that the subsidiary dominated Corporation through control of the dual officers, it did not abuse its supposed dominant position because the officers and directors common to both corporations did not sacrifice Corporation's interests to those of the subsidiary. When the Supreme Court decided that Corporation could not participate in the increased earnings of the operating company while in reorganization, Corporation suffered a severe loss. Since it had no income, there was no possible way for it to achieve any tax advantage to offset the loss. But its affiliate did have use for the loss and the group was entitled, under the tax law, to make use of that means of tax savings. The dual officers owed fiduciary duties to both corporations to promote the interests of both and [2233] to obtain for each what it was entitled to under the tax laws. Under this state

of facts these officers had a positive duty to make use of the loss as they did, that is, to offset the income of members of the affiliated group with deductible losses of other members. If the positions of the corporations were reversed and the subsidiary had a loss and the parent had income, the officers would have been obliged to file consolidated returns to enable Corporation to make use of the loss. Indeed, this very thing had occurred in previous years of the affiliation and Corporation had effected substantial tax savings (Def. Ex. 46) by reason of filing consolidated returns. The record is clear that on none of these occasions was tribute paid to a subsidiary which had suffered a loss. The officers would have been derelict in their duty to the subsidiary had they failed to file consolidated returns. Their duty to Corporation required only that they not sacrifice its interests and did not require them to exact tribute for following the practice of the past twenty-five years. After the transaction Corporation was in exactly the same position that it was in before the subsidiary had effected the tax saving allowed by the tax laws.

However, it is contended that the subsidiary should have notified the Corporation's stockholders and directors of the filing of consolidated returns so that independent directors and officers could have been put in charge of Corporation's interests to make a bargain with the subsidiaries and obtain compensation as a prerequisite to filing consolidated [2234] returns. There are several things wrong with this argument. The most obvious is that the entire transaction was open and above board. Many persons having an interest in Corporation, including stockholders and counsel, were fully aware of the situation. They chose not to act. They appar-

ently preferred to permit the transaction to stand, intending thereafter to bargain for a share in the tax savings. They made no effort to inject themselves into the tax settlement with the government. But all this assumes that it would have been proper for Corporation to have made such a bargain. The Corporation was the sole owner of the subsidiary's capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities. *Consolidated Rock Co. v. DuBois,* 312 U. S. 510, 522. It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. A parent company is not acting in the best interests of its subsidiary when it seeks to appropriate to itself an advantage which the tax laws give the subsidiary.

Plaintiff argues that it was a "complete stranger" to defendant when the consolidated return was filed July 15, 1944 because the affiliation terminated on April 30, 1944 when its stockholdings were transferred to the reorganization committee. A tax return is an historical document relating to the past. This return related to a period when the affiliation existed. All fiduciary duties with respect to matters arising during the relationship continue during the [2235] winding up period, and are "as sacred and inviolable after as before the expiration of its term".[14] It would be ridiculous to say that a fiduciary who performs an act

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[14]Trice v. Comstock, 121 Fed. 620, 625 (C.C.A. 8, 1903);
Uniform Partnership Act, 7 U.L.A. Sec. 30;
Cal. Corp. Code Sec. 15030;
3 Scott on Trusts (1939) Sec. 344;
16 Fletcher, Corporation (Perm. Ed.) Sec. 8174.

winding up matters which relate to the affiliation period may exact payment merely because the relationship has technically terminated. If Corporation had required tributed as a condition of its cooperation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors. Equity will not permit a recovery as a substitute for a bargain which would have been unfair.

The record is barren of evidence to support the contention that Corporation was dominated by the subsidiary, or that there was a breach of any duty owed to Corporation. As the trial court stated, "The so-called 'duality of control' much discussed and emphasized, is not important."

Appellants contend that they have a special claim to the 1942 tax saving. They rely upon a pretrial stipulation and order. The proposed settlement of tax liability with the government provided that the returns for 1942, 1943 and first four months of 1944 were to be approved as filed, and that the claim for refund of 1942 taxes was to be rejected. Intervenors applied to the court below for an order restraining the consummation of the settlement on [2236] the theory that the rejection of the 1942 refund claim might be prejudicial to the position of Corporation in this litigation. The parties entered into a stipulation providing that *for purposes of litigation* the 1942 refund claim, diminished in proportion to the diminuation of the entire tax saving, should be deemed to have been allowed and "paid to the plaintiff *as the agent for the affiliated group* . . ." (emphasis added). The pretrial order confirmed the stipulation.

The trial court did not make formal findings of fact and conclusions of law, but relied upon section 52(a) F.R.C.P., which provides in part: ". . . If an opinion or memorandum

of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein . . .'' Findings of fact and conclusions of law are intended to aid appellate courts by affording them a clear understanding of the basis of the decision below. Findings are not a jurisdictional requirement of appeal which this court may not waive. Even in cases where there are no findings, if the record is so clear that the court does not need them, it may waive the defect on the ground that the error is not substantial in the particular case.[15]

In the instant case the trial court's opinion discloses adequately the issues of fact which were before the court and the court's findings thereon.

The trial court, in a note appended to its opinion, [2237] stated that ''inasmuch as there is little factual dispute'' the opinion would serve as findings of fact and conclusions of law, but ''counsel if they wish, may submit findings . . .''. All parties elected not to submit additional or more detailed findings except that the appellants proposed findings with respect to the above stipulation and pretrial order, and also a conclusion of law to the effect that the defendant should pay to the plaintiff the sum of $3,385,290. These proposed findings and conclusions, which were inconsistent with those embodied in the opinion, were rejected by the trial court.

Appellants argue that the court below concluded that it should leave the parties where it found them and that Corporation is therefore entitled to the assumed avails of the reduced refund claim.

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[15] Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310;
Hurwitz v. Hurwitz, 136 F. 2d 796;
Goodacre v. Panagopoulos, 110 F. 2d 716.

The stipulation and pretrial order were entered into and made for the purpose of protecting the position of Corporation in relation to the refund claims *only* if it should be found entitled to the refund. *The court found it was not entitled to it.* Appellants' position is no stronger with respect to the refund for 1942 taxes paid by the subsidiaries than it is with respect to the 1943 and 1944 savings of the subsidiaries. It is true that the government requires consolidated returns be filed in the name of the parent and that refunds are paid to the parent, but where such refunds are paid, the parent holds the refund as agent or trustee for the benefit of the affiliate which has overpaid.[16]

[2238] In their brief appellant-intervenors allude to the losses they sustained as stockholders and imply that they have an equitable right to compensation apart from that of Corporation. To believe this would be to misapprehend their position. A corporation is a legal entity separate and distinct from its stockholders and benefits to the latter flow from the rights of the corporation. If this were not true these intervenors could not hope to gain by this proceeding as *they* sustained no loss by reason of Corporation being barred from participation in the reorganization plan. Their pleadings, as well as a stipulation filed in this suit, show that they acquired their stock after Corporation's stock in the subsidiary had been declared worthless. Defendants offered to prove at the trial that intervenors purchased their stock for less than one cent on the dollar. The offered evidence was properly excluded as irrelevant by the trial court. The fact, if it be a fact, that any or all of the present stockholders of Corporation acquired their stock as a speculation

[16]Bankers Trust Co. vs. Florida East Coast, etc., 92 F. 2d 450.

while the corporation was in the process of liquidation and its "stock was of trifling value" (page 11, intervenors' opening brief), is irrelevant to the issues here. Corporation is an entity and the issue is whether or not it is entitled to recover $17,000,000 from the successor of its former subsidiary. If it prevails its stockholders are entitled to reap the benefit, regardless of when they became such, or how "trifling" a sum they paid for their stock. The intervenors recognized this when they [2239] filed their complaint in intervention to *assert Corporation's claims.*

We have examined the other authorities cited by appellants and find nothing contrary to our holding here. Appellants cite *Southern Pacific Company v. Bogert,* 250 U.S. 483, 492. That case was not concerned with the question of fiduciary relationship between parent and subsidiary. Rather, it was concerned with the fiduciary duty owed by the holders of the majority of the stock of a corporation to the minority stockholders. The case holds that a parent company has a fiduciary duty to any minority stockholders of the subsidiary.

Also cited is *North American Co. v. S. E. C.,* 327 U. S. 686, 693. That case is not in point either. The court was not concerned with any question of fiduciary relationships. Rather it was concerned with the validity of the so-called "utility holding company death sentence" provision of the Public Utilities Holding Company Act.

The judgment is affirmed.

JAMES ALGER FEE, District Judge, dissenting:

There are no findings of fact which support the judgment of the Trial Court or the affirmance thereof by a majority of this Court.[1] The cause should be remanded for this reason

alone.[2] The Trial Court gives two reasons for decision against plaintiff: first, that the "tax escape" was a fraud on the government, and, second, that a recovery [2240] would violate the reorganization decree. Neither has any validity.

The major portion of the opinion of the Trial Court is devoted to the proposition that the "tax escape" was a fraud upon the government,[3] and therefore the proceeds were given to the defendant, an active wrongdoer.[4] This position that there was a fraud is given no support by the tax agents of the government who made the settlement.[5] It was expressly repudiated in open court by every party in this case. The majority of this Court, as the opinion shows, does not rely upon it.

A second subsidiary theory was also advanced below with little emphasis. The Trial Court said it would be inequitable to allow recovery to plaintiff because the stock of the then subsidiary owned by plaintiff was denied participation in either the assets or earnings in the reorganization proceeding. This reason is as unstable as the first.[6] The claim of plaintiff was not one against the original company, which was placed in reorganization. Everyone admits the genesis of the loss of plaintiff occurred later. Therefore, the claim would not in any event be barred by the decree of reorganization.[7] The liability to the government for taxes was not barred by that decree either. Liability for the use of plaintiff's loss long after the closure of the reorganization proceeding to obtain a benefit for defendant by compromise of the still existing tax claim could not be discharged nor affected by the decree in reorganization. The right furnished consideration for contractual liability between

[2241] plaintiff and defendant as independent corporations. Plaintiff had a property right as owner of these shares of stock.[8] The reorganization court had power to deny plaintiff participation in the assets of its subsidiary, and, as a result, all but nominal values in the shares in the subsidiary were lost. But plaintiff was not in reorganization itself.[9] The company in reorganization did not own the stock and could not legally exercise the appurtenant property right to file a consolidated return. The reorganization court had no jurisdiction of plaintiff or of these property rights.

Decree of that court attempting to destroy rights of property in the stock owned by plaintiff would be void. The reorganization decree does not deal with the property rights in the stock and is therefore res judicata neither as to plaintiff nor as to its rights of property in the shares of stock or appurtenances.

Thus the two grounds advanced to sustain the judgment fail. The cause should be reversed for failure to state adequate findings to support the judgment. Findings must be made in the Trial Court. Appellate courts have no such right or function. The majority opinion attempts to accomplish justification of the result below by drawing inferences, deductions and conclusions from evidence which they claim to find in the record. It would be possible for other judges to set up a diametrically opposite set of facts from which a judgment in favor of plaintiff might be based. The very reason that Rule 52 requires findings of fact [2242] is illustrated by the majority opinion. For the technical difficulties of finding a basis of fact for this judgment are many. Indeed, such difficulties are insurmountable.

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February 11, 1947—
Offer of settlement of tax liabilities for 1942, 1943 and first four months of 1944 presented to Commissioner of Internal Revenue.

(By letter of James K. Polk, Attorney-in-Fact, to Joseph D. Nunan, Jr., Commissioner of Internal Revenue, Washington, D. C.)

April 7, 1947—
Complaint in intervention by Van Kirk, et al., filed in suit of the Holding Corp against the Reorganized Company, et al. in the United States District Court for Northern District of California.

May 19, 1947—
Offer of settlement of tax liabilities for 1942, 1943 and first four months of 1944 presented to Internal Revenue Agent in Charge, New York, N. Y.

(By letter of James K. Polk, Attorney-in-Fact, to C. R. Krigbaum, Internal Revenue Agent in Charge, New York, N. Y. This offer conforms with offer in letter of February 11, 1947, supra.)

August 13, 1947—
Resolution adopted by Board of Directors of Holding Corp approving and ratifying the offer of settlement made to Commissioner of Internal Revenue on February 11, 1947, upon the condition that the Reorganized Company enter into a certain stipulation, which stipulation was subsequently executed and filed with the United States District Court.

August 13, 1947—
Offer of settlement of tax liabilities, as proposed by letter from James K. Polk to Joseph D. Nunan, Jr., Commissioner of Internal Revenue, dated February 11, 1947, accepted by Commissioner of Internal Revenue.

(By letter of E. J. McLarney, Deputy Commissioner, to The Western Pacific Railroad Corporation and Affiliated Companies.)

August 26, 1947—
Notice of disallowance by Commissioner of Internal Revenue of claims for refund of taxes for the year 1942.

(By letter of E. J. McLarney, Deputy Commissioner, to The Western Pacific Railroad Corporation.)

If recovery is to be denied, the findings of fact, upon which determination adverse to plaintiff is based, must deal with the admitted facts and the allegations of the complaints of intervenors and plaintiff. Thereby, these material claims must be negatived.

In order to indicate what findings must be made to negative plaintiff's claim, a review of various phases thereof will be made. First, plaintiff had a property right to file or refuse to file consolidated returns, which could neither be given away without consideration nor cut off judicially without due process. Second, a trust fund was apparently created to pay these taxes by the reorganization court, and no order thereof has been shown vesting this fund in defendant. Third, by stipulation with defendant, plaintiff, as trustee, deposited a trust fund in court, which has not been distributed. Fourth, as an independent corporation, plaintiff, at request of defendant, filed consolidated returns and made a settlement with the United States, from which defendant derived benefit. Therefore, plaintiff is entitled to recovery for at least as much as it was worth. Fifth, a recovery much in excess of bare compensation for doing the acts is foreshadowed. Plaintiff has not been found to be in a fiduciary capacity toward defendant, and therefore the actual cash benefit obtained by defendant by use of losses [2243] of plaintiff might well be compensated by award of an equitable portion of the tax remission which the United States allowed on account thereof. The findings made do not negative these contentions.

First then, plaintiff was found by the Trial Court to have been the owner of all the stock in the operating company when the petition for reorganization was filed. The Inter-

state Commerce Commission held that the assets of the operating company, at the initiation of the proceeding, were so shrunken that this stock was valueless for the purpose of participation in either the assets or earnings of the reorganization. The Supreme Court affirmed the denial of the petition of plaintiff for this relief. Plaintiff thereby is found to have sustained a loss of $75,000,000.00. There is no finding that the property right in the shares of stock was taken away from plaintiff either by this order or by the decree of reorganization.[10] Because of this ownership of these shares, plaintiff claims, under the recent enactment of Congress, a property right appurtenant thereto to use this loss in consolidated return and to offset it against earnings made by the properties in reorganization. Since, under the law, all corporations concerned must consent to the filing of consolidated returns, it is clear, contrary to the statement in the majority opinion, that plaintiff had no duty requiring it to file these returns. Plaintiff had a legal right to refuse to file. There is neither finding of fact that this property right did not accrue to plaintiff nor a finding that the [2244] right vested in the subsidiary, the trustees in reorganization or in defendant.

It is found that plaintiff, by contract, transferred the stock in the former subsidiary to the reorganization trustees, after the right to file consolidated returns and have the benefit of offsetting losses against operating gains by the trustees, for income tax purposes, had accrued. These shares are thus recognized as property rights. There is no finding that the right to file or refrain from filing consolidated returns was sold and transferred with the shares of stock to the reorganization trustees.

And here it might be well to deal with one specious argument. It seems to be assumed that the officers of plaintiff could give away the property right to file or refuse to file consolidated returns either voluntarily or acting under the control of defendant or the reorganization trustees. This is strange doctrine. At the time of the transfer of stock, rights of creditors of plaintiff as well as those of stockholders were involved. By the enactment of Elizabeth, an insolvent corporation cannot hinder, delay or defraud its creditors by a transfer of property in their despite.[11] The equitable considerations are stressed by the Trial Court. The Chancellors have universally held that a transfer of all the assets of corporation, at the time not insolvent, cannot be made even by a majority of the stock.[12] Neither officers nor directors, without a vote of the majority, have such power.[13] In this case, it is of stellar importance that this right of plaintiff was its sole asset and that, upon appropriation thereof, [2245] it became insolvent.[14] Specifically in any event, the transfer must be for adequate consideration and not in fraud of creditors or it will be invalid as against stockholders.[15] There are thus equitable considerations which the findings did not exclude.[16]

In a suit where stockholders of plaintiff intervene, there must be findings that there was adequate consideration for the shares of stock and the appurtenant right of filing a return. Otherwise, the District Court would be obliged to set aside the reorganization decree in order to grant relief by recapturing the assets of plaintiff improvidently given away.[17]

But a jury argument is made based upon a bare offer, which the Trial Court properly held incompetent, that the

present stockholders of plaintiff did not pay adequate value for the stock. Suffice it to say that the James interests, which are present stockholders of defendant and which will share in this windfall, apparently acquired that stock to some extent by compromise of the interests of plaintiff in the stock which it formerly held.

Second, plaintiff claims there was a trust fund created by the reorganization court in the amount of $7,100,000.00 for the payment of taxes, and that defendant added $3,000,000.00 to the fund for the same purpose. Plaintiff claims, since these funds were saved by its action in filing the consolidated returns and making a contract of settlement with the government, that it is entitled to receive some compensation for conserving the trust funds. This claim is not valid as to the fund initiated by defendant [2246] itself. A corporation has a right to set up reserves from its funds to meet contingencies. But the money impounded by the Bankruptcy Court to pay taxes was made up of funds in the hands of the reorganization trustees. There must be a finding that the Court decreed that this money should become the property of the defendant if not used to pay taxes. Otherwise, it constitutes a trust fund of undistributed assets of the reorganization.[18]

Third, plaintiff claims defendant stipulated that the $3,385,290.00 should be treated as if it had been paid to plaintiff "as agent" and the latter had placed this trust fund in court for distribution.[19] By the stipulation, plaintiff "as agent" was trustee of an express trust and, as such, had a right to deposit the fund and ask for a determination of the rights of all parties thereto, as in the nature of interpleader. Plaintiff affirmatively demanded findings upon this feature,

and the Trial Judge refused to make them. A stipulation of parties to litigation that a fund is deposited in court is sufficient. The Court must give affirmative directions that the fund be paid to the proper party.[20] Before such a judgment be entered, findings of fact are required. It is assigned as error that the Trial Judge refused to make findings on this point. The Rule requires findings of fact. This is error requiring reversal. The judgment here against plaintiff did not end the case. According to the very record before us, there is still a fund in the Trial Court which has not been distributed.

Fourth, we need not go so far afield. If we disregard [2247] control of the officers[21] of plaintiff by defendant, the ownership of the stock and the appurtenant right to file returns and the presence of a trust fund, still a cause of action was proven prima facie[22] by facts which the Trial Court did find. We need only to be sophomorical enough to remind ourselves that, where one, at the special instance and request of another, does an act and benefit accrues to the one who made the request, the legal result is so standardized that for centuries it has been stated in one of the common counts.[23] Here there were two independent corporations at the time of the settlement of tax liability. They were capable of contracting with each other. Neither was longer connected with the other. Plaintiff, at the request of defendant long after the reorganization had been closed, entered into a settlement with the United States, whereby its losses were used to obtain a benefit of $17,000,000.00 for defendant. Plaintiff was not bound to refuse consent to the filing of consolidated returns. It would seem, therefore, that sufficient facts are shown so that, in an action on the claim,

plaintiff should recover (quantum meruit)[24] as much as the service was worth. Findings as to any affirmative defense should be specific.

If defendant had emerged sufficiently from reorganization to pay its own attorneys $300,000.00 for the same service, it is difficult to see how the reorganization decree prevents defendants from compensating plaintiff at least for what the services were worth, which were rendered at its request and which resulted in benefit to it.

Fifth, it seems clear that definitive findings must [2248] be made on other phases in order to deny plaintiff a much broader recovery. An argument is made that plaintiff is a fiduciary as respects defendant. The tax statute provides that plaintiff could use its loss of $75,000,000.00 to offset the earnings of the reorganization trustees and thereby obtain a remission of taxes for the reorganized company. Without the loss to plaintiff, the statute would not have applied. Without consent of plaintiff, neither could consolidated returns have been filed nor settlement made. The tax statute does not go farther and lay down any rule for allocation of the benefits obtained from a remission of taxes. The principles of equity should control division.[25] It is said, although there are no findings that the history of prior consolidated returns is controlling.[26] Of course, it cannot probably be shown how plaintiff heretofore dealt with a consolidated return after there has been a divorce from a subsidiary. If we look at it realistically, but little question arises. If plaintiff were still the owner of the stock of defendant, then the allocation of the $17,000,000.00 to defendant would be reflected in the increased value of its stock. The transfer of the stock left the right untouched. Since increase in value

of stock in defendant no longer is of avail to plaintiff, there should be another method of applying the remission to the loss.

Finally, it may be, as the Trial Court said, that there is an overwhelming public policy which dictates that the reorganized company should be left alone as owner of the "amazing and undeserved tax" remission. But, before we, as Judges, take this [2249] sole remaining asset without compensation from stockholders of the plaintiff, who bore the losses, and give it as a surplus to distribute to the stockholders of the reorganized company, we should set out in clear and specific findings of fact the exact steps by which we accomplish such a result.

The cause should be reversed in order to permit adequate findings to be made.

(Endorsed:) Opinion and Dissenting Opinion. Filed Oct. 29, 1951. Paul P. O'Brien, Clerk.

FOOTNOTES

[1]The patent insufficiency of the findings of the lower court to support the weight of the superstructure now imposed is apparent. The order adopted the opinion as findings: "Findings of Fact. Plaintiff having proposed findings of fact in addition to the findings contained in the Court's opinion filed herein on September 6, 1949, and the defendant having objected thereto, and the Court being now satisfied that all facts necessary for decision are found in the opinion of September 6, 1949, now adopts by reference all such findings as its formal findings of fact in this cause, for all purposes as if the same were fully set forth herein. Conclusions of law. The Court concludes that the plaintiff shall take nothing herein and that the defendants shall have judgment in their favor for their costs of suit." Rule 52, Federal Rules of Civil Procedure; 28 U.S.C.A. § 2106; Interstate Circuit vs. United States, 304 U.S. 55, 56; Kelley vs. Everglades District, 319 U.S. 415, 420, 421.

[2]The opinion of September 6, 1949, thus referred to, appears in 85 F. Supp. 868. Insufficiency of findings appears in important particulars indicated below.

[2250] There are no findings as to the mechanics of use of the right of plaintiff. It is not shown whether any resolutions were passed by the Board of Directors or stockholders of plaintiff authorizing the use for benefit of defendant. There is no finding whether a gift of the right was intended or whether there was an attempted payment of consideration.

There is no finding that plaintiff was ever party to the reorganization proceeding. There is no finding that plaintiff had any connection with the proceeding except to prosecute a claim for value of stock, which was disallowed.

There is no finding that the compromise settlement with the government, in which plaintiff participated and from which benefit to defendant arose, was connected with or contemporaneous with the reorganization proceeding.

The court should have found that defendant honestly believed that it was rightfully entitled to use the loss of plaintiff without consulting those beneficially interested in plaintiff or it used the loss fraudulently in deliberate disregard of the rights of those beneficially interested in plaintiff. The court should have found whether defendant was guilty either of mistake or of fraud. The belief of defendant's officers as to its rights at the time of filing the consolidated returns is one of the key facts in the case and should have been the subject of findings.

[3]The rationale of the opinion is set forth in colorful language. 85 F. Supp. 868, 875: "An array of able counsel on both sides have put forth prodigious and ingenious efforts, one side to retain the benefits of the tax 'escape', and the other to obtain them. And all the time the taxes escaped in reality belong to the United States! The Court cannot cause these taxes to be paid, where they should be paid, to the United States."

[4]Even if the transaction were illegal, the result reached by the Trial Court could not stand. Cf. Barney vs. Saunders, 57 U.S. 534, 543: "They cannot be allowed to aver that the profits made on the [2251] trust funds should be put in their own pockets, because they were unlawful gains, for fear that the conscience of the cestui que trust should be defiled by participation in them. To indulge trustees in such an obliquity of conscience, would be hold-

ing out immunity for misconduct and an inducement to speculate with the trust funds, and put them in peril."

[5]The fact that the agents of the government, who effected the settlement, did not agree that there was a fraud on the United States is shown by United States ex rel. S. Roberts vs. The Western Pacific Railroad, 9 Cir., No. 12,723, June 15, 1951.

[6]The error of the lower court was in assuming that plaintiff is seeking an interest in the defendant corporation instead of compensation for property taken by defendant which belonged to plaintiff. The Trial Court made no finding as to the nature of the right to file consolidated returns, which only plaintiff could exercise (Reg. 104, § 23.16(a)), but which it could refuse to exercise (Reg. 104, § 23.11(a)). Until such findings are made, there is no basis for a judgment denying participation in benefit.

[7]The effect of the decree is provided by 11 U.S.C.A. § 205(f), Tilt vs. Kelsey, 207 U.S. 43, 52. Since the tax settlement between the government and the corporation occurred after the decree in reorganization, there could be no res judicata. Commissioner vs. Sunnen, 333 U.S. 591, 597, et seq.; Diaz vs. United States, 223 U.S. 442, 449.

[8]An incontrovertible proof of the proposition that plaintiff had no duty to apply the loss for the benefit of defendant may be cited. If plaintiff had sold a gold mine for a profit of over $75,000,000.00, its loss on the stock of the subsidiary could have been applied to offset any taxes against plaintiff. In that event, the trustees in reorganization would have been required to pay taxes against the operating company. Once used, the power of applying the loss would be functus officii, and plaintiff would have received the entire benefit.

[2252] [9]Callaway vs. Benton, 336 U.S. 132. The error in this proceeding, therefore, was the failure to reorganize plaintiff also. An illustrative case, where the parent was in reorganization, is reported in a series of opinions as In re Portland Electric Power Co., 97 F.Supp. 857-921. There a consolidated return was filed during the proceedings and the benefits appropriately distributed.

[10]It is inconceivable that a decree of reorganization prevents the company, when released from tutelage, from entering engagements and incurring liabilities. Otherwise, the reorganization would be perpetual. See In re Portland Electric Power Co., 97 F.Supp. 857, 873.

[11]Act of 1571, 13 Eliz. c. 5; Glenn, Fraudulent Conveyances and Preferences (Rev. Ed. 1940), §§ 61 d, e, Vol. I, pp. 95-99.

[12]Des Moines Life & Annuity Co. vs. Midland Insurance Co., 6 F.2d 228. The statutes carry out the principle with various limitations. As plaintiff is a Delaware corporation, see Del. Rev. Code (1935) § 65.

[13]Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed.) § 1107.

[14]The trust fund theory probably applies. See Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed.) § 7371.

[15]Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed.) § 2946, notes 99 and 1.

[16]An interesting case in this Court, where the subsidiary was held liable for the unauthorized transfer of property of the parent by an officer of the subsidiary, is Clark & Wilson Lumber Company vs. McAllister, 101 F.2d 709.

[17]Since plaintiff is a Delaware corporation, the decisions of that state are cited as illustrative of the general principle. Robinson vs. Pittsburg Oil Refining Corporation, 14 Del. Ch. 193, 199; Hutton vs. [2253] West Cork Railway Company, 23 L.R. Chancery Div. (1883) 654, 671, 677; Revised Code of Delaware (1935), Ch. 65, § 65, Ch. 174. Cf. Laws of Delaware (1941), Ch. 132, § 1.

[18]The Court below, the United States District Court for the Northern District of California, Southern Division, was the reorganization court. 34 F.Supp. 493. It therefore had the power to set aside the decree in reorganization, 11 U.S.C.A. §§ 11(8), 205(1), and administer this unadministered asset. Incidentally, the defendant cannot escape under any theory since it is under bond to pay all claims against the trustees.

[19]The stipulation of the parties was that a fund was paid into Court by plaintiff and therefore it must be returned to plaintiff's possession, unless some affirmative proof showed defendant was entitled thereto. The Trial Court held: "But, as between the parties, no persuasion of conscience or equity impels me to do otherwise than to leave the parties where they are, the defendant with its amazing and undeserved tax success; the plaintiff as the reorganization left it, without interest in the debtor." Instead of restor-

ing the parties to status quo ante, the Trial Court affirmatively awarded this to defendant. But no findings to sustain affirmative award are present.

[20]Rule 67, Federal Rules of Civil Procedure; 28 U.S.C.A. §§ 2041, 2042; Georgia vs. Madrazo, 26 U.S. 110, 121; United States vs. Morgan, 307 U.S. 183, 193; Osborn vs. United States, 91 U.S. 474, 479.

[21]As to the nature of the confidential relationship involved, where corporations have officers in common, see cases collected in annotation in 114 A.L.R. 299.

"It [a constructive trust] arises where one person acquires title to property from another by an abuse of a fiduciary or confidential relation between them * * *." Restatement of Restitution, § 166, Comment [2254] d. 3 Scott on Trusts, § 648, p. 2336. Johnson vs. Umsted, 8 Cir. (1933) 64 F.2d 316; Johnson vs. Clark, 7 California 2d 529, 61 P.2d 767 (1936); Duncan vs. Dozey, 318 Illinois 500, 149 N.E. 495 (1925); Theis vs. Vonderheyden, 94 N.J.Eq. 317, 807, 119 Atl. 502, 121 Atl. 927 (1922).

[22]Other grounds for constructive trust, which it is possible for the trier of the fact to find upon the basis of evidence in the record, are fraud (Restatement of Restitution, § 166, Comment b; Templeton vs. Hollinshed, 119 Oregon 620, 250 P. 747), mistake (Restatement of Restitution, §§ 49, 170; 3 Scott on Trusts, § 468), and conversion or misappropriation (Burke Grain Co. vs. St. Paul Mercury Indemnity Co., 8 Cir., 94 F.2d 458; Pioneer Mining Co. vs. Tyberg, 9 Cir., 215 F. 501). As noted in the text following, a trust need not be worked out in all probability since simpler theories may serve for recovery.

[23]Matarese vs. Moore McCormack Lines, 2 Cir., 158 F.2d 631, 170 A.L.R. 440 and note; Corbin on Contracts, § 1112; 1 Williston on Contracts, § 41, p. 115; Costigan, Implied in Fact Contracts and Mutual Assent, 33 Harv. L.R. 376; Burton vs. Burton Stock Car Co. (1898), 171 Massachusetts 437, 50 N.E. 1029; Ft. Wayne C. & L.R. Co. vs. Haberkorn (1896), 15 Indiana App. 479, 44 N.E. 322.

[24]Assumpsit would lie even though the Trial Court made findings of misappropriation, embezzlement and conversion. Reynolds vs. New York Trust Co., 188 F. 611; Terry vs. Munger (1890), 121 New York 161, 24 N.E. 272, 8 L.R.A. 216, 18 Am. St. Rep. 803; Conaway vs. Pepper (1919), 7 Boyce 511, 108 Atl. 676; Roberts

vs. Evans (1872), 43 California 380; consult annotation 97 A.L.R. 250 and text treatment 1 C.J.S. Actions § 50(b).

[25]Restatement, Restitution, §§ 1, 81; Phillips-Jones Corporation vs. Parmley, 302 U.S. 233.

[26]See Note 8, supra.

III. Per Curiam Opinion of January 30, 1952, on Appellants' Petitions for Rehearing in the United States Court of Appeals for the Ninth Circuit.

[2260] *United States Court of Appeals*
for the Ninth Circuit

[Title of Cause.]

Jan. 30, 1952

ON APPELLANTS' PETITIONS FOR REHEARING

Before: HEALY, Circuit Judge,
FEE and BYRNE, District Judges.

PER CURIAM

The petitions of the appellants and intervenors for a rehearing are denied. Insofar as the petitions seek a rehearing en banc, they are stricken as being without authority in law or in the rules or practice of the court. See Kronberg v. Hale, 9 Cir., 181 F. 2d 767.

[Endorsed] Order. Filed January 30, 1952.

Paul P. O'Brien, Clerk.

IV. Dissenting Opinion of February 18, 1952, of Judge James Alger Fee on Appellants' Petitions for Rehearing in the United States Court of Appeals for the Ninth Circuit.

[2261] *United States Court of Appeals*
for the Ninth Circuit

[Title of Cause.]

Feb. 18, 1952

ON APPELLANTS' PETITIONS FOR REHEARING

Before: HEALY, Circuit Judge, and
FEE and BYRNE, District Judges.

JAMES ALGER FEE, District Judge, (dissenting and suggesting a rehearing en banc of all Circuit Judges):

This cause involves the disposition of over $21,000,000.00. The solution requires application of novel statutory language affecting the fields of bankruptcy and taxes. I have expressed myself heretofore and still feel that the findings of the lower court do not support the determination made by two judges on the panel here.

I am unable to agree with either the denial of rehearing or the striking of the petitions which ask for a rehearing by the full complement of Circuit Judges of this Court en banc. Two District Judges and one Circuit Judge constituted the panel which heard the case. As has been pointed out in this serious and important litigation, three District Judges have, respectively, expressed three widely divergent views, while no member of the Court of Appeals has written a line on the merits.

[2262] I therefore suggest to the Court of Appeals a rehearing en banc of all the Circuit Judges. For this there is precedent in this Circuit.[1] The practice as I understand it, substantially accords with that of the Third Circuit,[2] which is admirable. Inasmuch as this might be the court of last resort in this case, it seems fairer to have the issues disposed of by Circuit Judges.

The Supreme Court of the United States at least once has given permission to an appellant to apply to this court for a hearing en banc. 316 U. S. 649.[3] In taking that action, reference was made to Textile Mills Securities Corporation vs. Commissioner of Internal Revenue, 314 U.S. 326.

[Endorsed]: Filed February 18, 1952. Paul P. O'Brien, Clerk.

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[1]Judges Denman, Matthews and Stephens sat in Hopper vs. United States, 9 Cir., 142 F. 2d 167, and Judges Wilbur, Denman and Healy sat in Crutchfield vs. United States, 9 Cir., 142 F. 2d 170. At page 177 of 142 F. 2d appears Circuit Judge William Denman's motion for a rehearing en banc of the Hopper case, supra, wherein it is stated that the cause is "now pending for rehearing in this Court." Accordingly, the rehearing of that case was held en banc before Judges Wilbur, Garrecht, Denman, Matthews, Stephens and Healy, being all of the Circuit Judges of this Court. Hopper vs. United States, 9 Cir., 142 F. 2d 181.

[2]United States vs. Gallagher, 3 Cir., 183 F. 2d 342, was heard by a panel of two Circuit Judges and one District Judge, and, upon suggestion of one of the Judges, was heard en banc by all Circuit Judges.

[3]See Robinson vs. Johnston, 9 Cir., 130 F. 2d 202.

V. Opinion and Dissenting Opinion of July 9, 1952, in Re Petition to File Motion to Vacate Order, etc. in the United States Court of Appeals for the Ninth Circuit.

[2288] *United States Court of Appeals for the Ninth Circuit*

[Title of Cause.]

IN RE PETITION OF WESTERN PACIFIC RAILROAD CORPORATION FOR LEAVE TO FILE A MOTION DENOMINATED "MOTION TO VACATE ORDER STRIKING APPELLANT'S PETITION FOR REHEARING EN BANC AND REINSTATING SUCH PETITION."

Before: DENMAN, MATHEWS, STEPHENS, HEALY, BONE, ORR, and POPE, Circuit Judges

HEALY, Circuit Judge.

OPINION

Case No. 12,506, supra, upon its coming at issue in this court, was regularly assigned for hearing and [2289] determination to a court or division of three judges comprising Circuit Judge Healy and District Judges Fee and Byrne. Subsequent to argument and submission of the case the court handed down an opinion and order affirming the judgment of the district court, Judge Fee dissenting. —— F. 2d ——. Thereafter the appellants petitioned for "rehearing and rehearing en banc," and the court on January 30, 1952, denied the petition, Judge Fee again dissenting. —— F. 2d ——. Insofar as the petition sought a rehearing in banc it was ordered stricken as unauthorized by law or practice.

On March 10, 1952, the Western Pacific Corporation presented the petition for leave described in the caption. In its supporting brief it asserts that it is its right under the law to have its petition for rehearing considered and acted upon by all the circuit judges. On order of a majority of the circuit judges, the court has been assembled in banc for the purpose of announcing the principles of law and practice it deems applicable in respect of in banc hearings. This course is thought appropriate in order that litigants and the bar may be advised not only of the position taken by the court but of the reasons for it.[1]

[2290] The governing statutory provision, 28 USCA § 46(c), reads:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court

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[1]In recent years it has become the custom of counsel almost as a matter of course to petition the full membership of the court for a rehearing in banc, upon suffering an adverse decision at the hands of a court of three judges. This hopeful concept of the right of litigants appears to stem from declarations in the dissenting opinion in Independence Lead Mines v. Kingsbury (1949), 9 Cir., 175 F. 2d 983, at p. 992, cert. den. 338 U. S. 900, to the effect that two judges in a court or division of three are without authority to pass upon or deny a petition for rehearing addressed to all the circuit judges.

The numerous petitions of this nature have been disposed of by the court or division concerned either (1) by ignoring the application for in banc action and treating the petitions simply as ordinary petitions for rehearing, or (2) by striking them insofar as they sought in banc action. The treatment has not in the least served to discourage losing counsel or to stem the growing tide of such petitions.

in banc shall consist of all active circuit judges of the circuit."[2]

The obvious intendment of this statute is to perpetuate the United States Courts of Appeals as courts of three judges in all cases save those in which an in banc hearing is ordered by all or a majority of the circuit judges. No doubt Congress was [2291] fully alive to the fact that these courts, despite the increase in their membership, would be unable to keep abreast of the constantly growing volume of judicial business unless they continued in all normal circumstances to function as courts of three.

Important light will be shed on the problem under inquiry if we examine the method pursued in the assignment of cases, as prescribed by our Rule 4.[3] In practice the cal-

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[2]The section was enacted as part of the 1948 Judicial Code revision. In its entirety it reads as follows:

"46. Assignment of judges; divisions; hearings; quorum

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

[3]Rule 4, subdivisions 1 and 2, reads:

"ASSIGNING OF CAUSES FOR HEARING

"1. The calendars of the court shall be made up by the Clerk

endars for the court are tentatively made up by the chief judge in collaboration [2292] with the clerk. On these calendars each case is assigned for hearing and determination to a court or division of three named judges, unless it has been otherwise ordered. The proposed calendar is circulated among all the judges, and any designation or assignment may be modified or set aside by a majority. When the calendar is approved by the judges their action is uniformly manifested by their initialing the same, as is done in the case of court orders generally. Thus the calendar as finally adopted evidences or necessarily implies at least the tentative determination of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc. In the instances in which at the time of assignment it is agreed by all or a majority of the judges that a particular case should be heard and determined in banc, it is calendared as such.[1] It [2293]

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under the direction of the Chief Judge subject to the approval of the majority of the judges.

2. The Chief Judge after conference with the Circuit Judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be modified or set aside by a majority of the judges."

[1]Since the decision in Textile Mills v. Commissioner, 314 U. S. 326 (1941) approximately thirty cases in all have been heard in banc in this circuit. Nineteen of these, or about two-thirds of the whole, were assigned to the court in banc at the time they were originally calendared. Perhaps more than half of the nineteen were cases of great public consequence, such, for example, as those growing out of the suspension during the war of the writ of habeas corpus and the institution of martial law in Hawaii, or cases involving the forcible removal of the Japanese from the Pacific Coast states. Others were contempt matters involving claimed

sometimes occurs, too, that examination of a case preliminary to hearing, or consideration of it after argument, leads the judges to whom it was assigned to conclude that it is an appropriate cause for in banc consideration, and they so indicate to the remaining judges. If the latter or a majority of all agree, the case is then reassigned for hearing by all the judges.[5]

If we examine the status of Case No. 12,506 in the light of this practice, it becomes apparent that it was calendared and heard by court order as one in which in banc consideration was not deemed requisite. There remains to inquire whether the losing party in the cause is at this juncture entitled as of right to have its petition for rehearing considered and ruled upon by a court composed of all the circuit judges.

The statute, it will be recalled, commits to a "court or division of three judges" the power to *hear* and *determine* the cases and controversies assigned to it. Obviously its determination of any such case or controversy is a decision of the Court of Appeals, and as such is a final decision, subject to review only as prescribed by 28 USCA § 1254. Circuit judges other than those designated to sit on such

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violations of the constitutional prohibition against self-incrimination.

There are no definite criteria that we know of by which to determine what cases are suitable for in banc consideration. However, causes of extraordinary public importance or those involving constitutional questions probably belong in the category.

[5]McCoy v. United States, 9 Cir., 169 F. 2d 776; Samuel v. United States, 9 Cir., 169 F. 2d 787; Tee Hit Ton Tribe v. Olson, 9 Cir., 160 F. 2d 525; Los Angeles Building & Construction Trades Council v. LeBaron, 9 Cir., 185 F. 2d 405; Price v. Johnston, 9 Cir., 159 F. 2d 234, 161 F. 2d 705.

court or division are not members of it, and officially they play, and are entitled to play, no part in its deliberations at [2294] any stage. That this is so is made clear by subdivision (a) of § 46 (see Note 2 above) providing that "Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs." If regard be had for this mandate circuit judges may not intrude themselves, or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit.

A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals. If it grants a rehearing it may follow either of two courses: (a) it may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate suggest to the nonparticipating judges that the case is one which ought to be reheard in banc; and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration.[6]

[2295]. Adoption of the view currently being urged would render merely tentative or provisional the decisions of the

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[6]This was the course followed in Hopper v. United States, 9 Cir., 142 F. 2d 181; Southern Pacific Co. v. Guthrie, 9 Cir., 180 F. 2d 295, 186 F. 2d 926; Evaporated Milk Ass'n v. Roche, 130 F. 2d 843; and Pacific Gas & Electric Co. v. SEC, 139 F. 2d 298. In the **Hopper** case, supra, and to a lesser degree in Southern Pacific v. Guthrie, intracircuit conflicts were resolved. The other two cases cited in this note were nondescript matters.

court in 98 per cent or more of the cases that come before it. On petition of a dissatisfied party its decisions would automatically be subject to a species of horizontal appeal which would completely nullify the prime statutory objective of effecting a division of the court's work. The judges other than those to whom the cases had been assigned would perforce be required to acquaint themselves with the issues and problems involved in the same painstaking manner as did their associates who had heard and determined the causes initially, and this without the latter's advantage of having heard oral argument. Obviously, unless he is prepared to stultify himself, no judge would undertake to rule upon petitions for rehearing without adequate and full study and investigation of the merits.

On these considerations and in harmony with its understanding of the statutory scheme, the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc. Accordingly, in the exercise of its uncontrolled discretion the court has declined altogether to entertain petitions of litigants for such hearings. The position it takes is that, apart from the possible disqualification of a judge, the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties.

It has been remarked by some commentators that [2296] the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts. The hazard, we think, may easily be overestimated. It is minimized by the alertness of counsel and by informal and unofficial interchanges among the judges. Where conflicts

occur they are capable of remedy by in banc action without wholesale duplication of effort, as our own practice and experience have demonstrated.

The petition for rehearing in this cause has already been authoritatively denied by the division to which the cause was assigned. The petition for leave to file, addressed to the court in banc, is denied.

From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing.

DENMAN, Chief Judge, dissenting from the court's holding that the circuit judges not participating in a division, here six of the seven such judges, (a) are without power to consider a litigant's petition for a rehearing en banc, and (b) where a rehearing or rehearing en banc has been denied by a division, are without power to vote to grant a rehearing en banc, if two of the division's judges, here with but one circuit judge, do not desire such a rehearing. This appears from the following language of the opinion:

> "A petition for rehearing in any such case, whatever its form or wording, *must necessarily*[1] be [2297] treated as addressed to and is *solely* for disposition by the court or division to which the case was assigned for determination. If the court *so constituted,* or a majority of its members, denies the petition, *that ends the matter so far as concerns the Court of Appeals.* If it grants a rehearing it may follow either of two courses: (a) it may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought ade-

[1]Emphasis hereafter appearing in quoted matter is supplied.

quate *suggest to the nonparticipating judges that the case is one which ought to be reheard in banc;* and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration."

* * * *

"The statute, it will be recalled, commits to a 'court or division of three judges' the power to *hear* and *determine* the cases and controversies assigned to it. Obviously *its* determination of any such case or controversy is a decision of the Court of Appeals, and as such is a *final decision, subject to review ONLY as prescribed by 28 U.S.C. § 1254.*" Thus squarely is denied the power of the court en banc to review a division's decision in a "rehearing en banc . . . ordered by a majority of the circuit judges." See 28 U.S.C. 46(c).

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"From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing."

In this case the Western Pacific Railroad Corporation, hereafter the Corporation, petitions the [2298] Court en banc for leave to file a petition for a rehearing en banc. The latter seeks to establish, inter alia, that the judgment of the division which heard the case decided the main issue therein contrary to the decision of a prior division of this court.

The division in the instant case, consisting of one circuit judge and two district judges, has ordered "stricken" a petition addressed to the seven judges constituting the court en banc. This order follows a precedent of similar strikings of petitions for rehearings en banc in the cases of Kronberg v. Hale, 181 F.2d 767 (Cir. 9), Fruehauf Trailer v. Myers,

181 F.2d 1008 (Cir. 9), Northwestern Mut. Ins. Co. v. Gilbert, 182 F.2d 256 (Cir. 9).

Since Kronberg v. Hale, the Clerk has distributed no petitions for rehearings en banc to the non-participating circuit judges. From a casual remark of counsel in a social contact, I learned of the Corporation's instant petition and instructed the Clerk to distribute it to the six circuit judges not sitting in the division. But for this casual discovery and my suggestion that the stature and determination of the Corporation's counsel made it likely they would seek mandamus in the Supreme Court, the petition would have had the "striking" treatment of the above cases.

The court's opinion came after a conference originally called for the consideration of the adoption of the rule considered last in this dissent, which would have made the burden of such petitions one we easily could bear.

[2299] A. *The court's decision violates (as well as ignores) the Supreme Court's decision in United States ex rel. Robinson v. Johnston, 316 U.S. 649, 650, a decision aimed to settle differences in the circuit's divisions.*

The case of Textile Mills Corp. v. Commissioner, 314 U.S. 326, held that notwithstanding the three-judge provision of section 212 of title 28, U.S.C., 1940 ed., a court of appeals might lawfully consist of a greater number of judges, and that the five active circuit judges of the third circuit might sit in banc for the determination of an appeal.

The Third Circuit in C.I.R. v. Textile Mills Corp., 117 F.2d 62 at page 70, in holding that its five circuit judges could sit en banc, states that otherwise they would not have

the power to correct differing views of the judges in the divisions of the court such as the Supreme Court describes as occurring in the Fifth Circuit in John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181.[2]

The Supreme Court in its Textile Mills case at page 334 in affirming the Third Circuit and overruling our decision in Lang's Estate v. C.I.R., 97 F.2d 867, 869, where we held we could not sit en banc [2300] where two divisions of the court differed as to the law controlling, states of rehearings en banc[3] that:

> . . . "Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that

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[2]Following this the Textile Mills case states at page 71:

. . . "Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court, it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question . . ."

[3]What is said of the need of rehearings en banc for the then Third Circuit applies a fortiori today to the Ninth Circuit. The Third Circuit in the 1941 fiscal year had but five judges and 285 docketings. The Ninth Circuit has had an increase in population of six million in twelve years. In the fiscal year 1952 it had 446 docketings. On the national average of docketings for circuit judges the Ninth Circuit should have ten judges. It has seven judges but the Senate has passed a bill increasing the judgeships to nine and the House Judiciary Committee has agreed they are needed. 'No doubt within a year we will have nine judges with three divisions sitting simultaneously. That is to say, we have 56% more docketings and will have almost half again the number of divisions in which exist the hazard of conflicting decision referred to in the Textile Mills decisions.

in our federal judicial system these courts are the courts of last resort in the run of ordinary cases . . ."

In enacting 28 U.S.C. § 46(c) Congress codified the Textile Mills decision, the Reviser's Notes stating that that section "preserves the interpretation established by the Textile Mills case."

Prior to this codification of the Textile Mills decision, there was decided by one division of this circuit the case of Robinson v. Johnston, 118 F.2d 998, [2301] and later in a division of three other judges; the case of Crockett v. United States, 125 F.2d 547. The two divisions differed on the controlling law. Certiorari was sought in the Robinson case before the Crockett case was decided and it was denied. A petition for rehearing in the Supreme Court was denied. The Crockett case was then called to the attention of the court in a second petition for rehearing which was granted. The order denying the petition for certiorari was set aside and the writ of certiorari granted. Certainly this action of the Supreme Court was purposeful and deliberate.

In granting certiorari the Supreme Court in United States ex rel. Robinson v. Johnston, 316 U.S. 649, held it was the duty of this court en banc to entertain a petition for leave to file a petition for rehearing en banc, for it vacated our judgment and remanded the case to us, stating:

"... In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston, 118 F.2d 998, 1001, and Crockett v. United States, 125 F.2d 547, 548, 549), and in view of this Court's decision in Waley v. Johnston, ante, p. 101, reversing 124 F.2d 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceed-

ings, including *leave* to petitioner to apply for a hearing before the court *en banc*. See Textile Mills Corp. v. Commissioner, 314 U.S. 326 . . ."

The Corporation strongly urges the above contentions in its denied petition, all of which is ignored [2302] in this court's opinion. Instead it is said of the seeking of the leave to file the petition, that consideration of such action by any of the circuit judges not in the division (here six) would be "to *intrude* upon a . . . division on which they have not by order of the court been directed to sit."

How absurd it was, one must conclude, for the Supreme Court to order such an intrusion in Robinson v. Johnston!

B. *The Cavalier Refusal of the Court to Consider the Contentions of the Corporation's Petition.*

The shabby treatment of the litigant and his counsel in refusing to consider their contentions and authorities comes after the court's claim that its opinion gives consideration to "*the principles of law * * * which it deems applicable to en banc hearings.*"

No self respecting federal judge sleeps comfortably if he is conscious of having rendered an opinion deciding a case in which he has *purposely* failed to consider a substantial contention supported by authorities submitted to him and by such evasion has based his decision on a ground directly opposed to the evaded contention.

A possible explanation for the silent treatment of the litigant's contention and authorities in this case is that Robinson v. Johnston was deemed irrelevant because decided before the codification of the Textile Mills case in 28 U.S.C. § 46(c). That seems absurd, however, for the Su-

preme Court's construction of a law before its exact codification, as here, [2303] is applicable after codification. Otherwise, why in 28 United States Code Annotated are there the thousands of citations in sections of the Judicial Code, enacted in 1948, which codifies the then law and statutes?

C. *The Opinion's Absurd Misstatements Respecting the Assignment of Cases to the Court's Divisions.*

The opinion states:

> "... Thus the calendar as finally adopted *evidences* or necessarily implies at least the *tentative predetermination* of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc..."

The Supreme Court in the Textile Mills case has established a definite criterion for the rehearings en banc provided for in 28 U.S.C. § 46(c). It is the only one there stated, though there are others. It is that conflicts of law between the decisions of two of the court's divisions are cause for rehearing en banc. By clearing the law en banc, the circuit does so for the 96.3% of litigation in which this court's decisions are final.

Such en banc action prevents the burden on the Supreme Court, such as in the certification of the question of such differing divisions in Lang's Estate v. C.I.R., 97 F.2d 867, 869, a burden the Supreme Court later refused to assume in its return of Robinson v. Johnston for our en banc consideration of our divisions' divergencies.

[2304] It is almost a rude question to ask, "How, in heaven's name, are the seven judges en banc to know tenta-

tively or otherwise that the division to which they assign the case will thereafter decide it without conflict with a prior decision of a different division"? The phrase, "How, in heaven's name," is used advisedly, for our tentative decision would require divine omniscience.

The opinion states that another criterion is whether the case to be assigned to a division is "one involving constitutional questions."

The slightest reflection shows that the court en banc could make its tentative assignment of a case to a division because *not* involving a constitutional question only by examination of all the briefs in all the cases to be assigned to determine whether such a constitutional contention is at issue.

Were this truly what we have done, it would have involved a volume of judicial effort comparable to that the court's opinion seeks to avoid with petitions for rehearings en banc.

In the eleven years since the Textile Mills case, the Clerk advises, we have assigned to division over two thousand two hundred cases. In but nineteen cases, less than one per cent, have they been assigned to the court en banc. These were cases whose extraordinary importance had wide newspaper notoriety. In *none* of the remaining two thousand two hundred cases has the court en banc assigned them to division after an examination of the briefs for that purpose.

[2305] D. *Further to avoid considering the corporation's contention and authorities, the opinion misstates the source of the contention that rehearings en banc are needed to cure the divergence of divisions.*

On the source of this contention the court's opinion states, "It has been remarked by *some commentators* that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts."

"Some commentators"! To what extent will the court go in order to avoid mentioning that this hazard was stated first by the Third Circuit in the Textile Mills case and on its appeal by the Supreme Court, and later implicitly by the Supreme Court in returning Robinson v. Johnston to this court because of the difference in viewpoint of our divisions. That is to say, in such holdings on the criterion of divergence, the Third Circuit and the Supreme Court are no more than mere commentators.

The opinion seeks to minimize the likelihood of a division overruling sub silentio a prior division's holding and this with the certainty of nine judges and three divisions in the near future.[4] The idea is that the judges in the division so acting, "by *in*formal and unofficial interchanges" with the nonparticipating judges, will advise the latter that the decision is at variance with that of a prior division. In my seventeen years on the bench I have had no associate so confess his mistaken act.

An examination of the three cases cited, supra, the Kronberg, Fruehauf Trailer and Northwestern [2306] Mutual cases, in which the petitions for rehearing en banc were

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[4]See footnote 3, supra.

stricken, shows that two of them were founded on such conflict of divisions and the third on conflicts in district court decisions on important matters. Also in the seven cases of Bradley Mining Co. v. Boice, 12684; Acheson v. United States, 12772; Independence Lead Mines Co. v. Kingsbury, 11959; Tanimura v. United States, 13014; California v. United States, 12184; Sunbeam Lighting Co. v. Sunbeam Corp., 12357, and Zamlock v. United States, 12753, the division judges refused consideration of the petition addressed to the seven and thus prevented the court en banc from considering the contention in each that the division's decision conflicted with the decision of a prior division.

E. *The court's confessed fear of the burden of an overwhelming volume of such petitions may be avoided by an amendment of its rules.*

Against a flood of such petitions we can protect ourselves, as has the Supreme Court, by amending our Rule 25 as follows:

"Rule 25.

REHEARING

"A petition for rehearing of a decision by a division of the court may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

[2307] "Where there has been a denial of a rehearing of a decision by a division, a petition for a rehearing in bank may be filed within fifteen days. The petition shall be in the form above described and with the

same certificate of counsel. No petition will be entertained, unless one of the judges participating in that decision shall join in seeking such rehearing."

The Supreme Court has similarly protected itself on its petitions for rehearing by a provision in its Rule 33, of which the pertinent portion is:

"Such a petition . . . will not be granted unless a justice who concurred in the judgment desires it and a majority of the Court so determines."

In the last seven years there have been but 75 dissents, an average of less than 11 per year. Probably less than 11 judges per year would join in petitioning for a rehearing en banc.

In view of our prospective three divisions and the likely need for such rehearings en banc, an average of eleven such petitions would not be an intolerable burden, less than 4% of our submitted cases. It would substantially reduce the likelihood of conflict between the divisions.

By requiring first a rehearing by the division, the district judges would not be barred from the reconsideration of a decision.

The motion to file should have been considered on its merits and granted.

(Endorsed:) Opinion and Dissenting Opinion. Filed. Jul. 9, 1952. Paul P. O'Brien, Clerk.

VI. Supplement of September 11, 1952, to Dissenting Opinion of Chief Judge Denman in the United States Court of Appeals for the Ninth Circuit.

[2313] *United States Court of Appeals*
for the Ninth Circuit

[Title of Cause.]

Sept. 11, 1952

SUPPLEMENT TO DISSENTING OPINION OF CHIEF JUDGE DENMAN, FILED HEREIN ON JULY 9, 1952

Since the writing of my dissenting opinion herein I have been advised by Chief Judge Harold M. Stephens of the United States Court of Appeals for the District of Columbia that that court has rendered a series of decisions in conflict with the decision of this court on the question of the right to consider a petition or motion for rehearing in banc [2314] where made by a litigant alone or by a single judge in the division which has decided the case.

It thus appears that this case is of the character described in Rule 38(5)(b) of the Supreme Court. The decisions of the Court of Appeals for the District of Columbia determining its practice there are those contained in the following communication to me from Chief Judge Stephens:

"Washington, D. C.
September 11, 1952

Honorable William Denman
Chief Judge
U. S. Court of Appeals
United States Post Office and Courthouse
San Francisco

My dear Judge Denman:

In response to your inquiry regarding the practice in this court with respect to hearings in banc and rehear-

ings in banc under the provisions of Section 46 of Title 28 of the United States Code, I wish to advise as follows:

In determining in which cases to sit in banc, two methods have been followed in the United States Court of Appeals for the District of Columbia Circuit, namely:

(1) Any judge or judges or any division of the court may request that a case be heard originally or reheard in banc. Such judge or judges or division of the court usually addresses a memorandum to all of the active circuit judges indicating why he or they thinks the case should either be heard or reheard [2315] in banc, and requests the judges to notify the chief judge of their votes on the request. If a majority favor the in banc hearing, an order to that effect is entered and the case is scheduled for the in banc hearing or rehearing.

(2) Any party to a case may by written motion or petition request that the original hearing or a rehearing to be held in banc. Such a motion or petition is submitted to and ruled upon by all of the active circuit judges of the circuit.

In the following cases rehearings in banc were ordered on the request of one member of the division of the court which originally heard the case:

No. 10446, Kephart vs. Kephart, 193 F. 2d 677.

No. 11081, Quinn vs. U. S. Not yet decided.

No. 10943, Emspak vs. U. S. Not yet decided.

In the following case rehearing in banc was ordered on the request of a judge not a member of the division which originally heard the case:

No. 10063, Stewart vs. Overholser, 186 F. 2d 339.

In the following cases the original hearings in banc were ordered on the request of the original division:

No. 11039, Thompson Co. vs. D. C. Not yet decided.

No. 11044, D. C. vs. Thompson Co. Not yet decided.

[2316] In the following case the original hearing in banc was ordered on the request of one member of the court:

No. 10473, Overholser vs. Boddie, 184 F. 2d 240.

In the following cases rehearings in banc were ordered on the petition of one of the parties:

No. 10504, in the Matter of John W. Carter, 192 F. 2d 15.

No. 10854, Columbia National Bank vs. D. C., 195 F. 2d 942.

No. 10846, Citizens Bank vs. D. C., 195 F. 2d 946.

No. 10835, D. C. vs. Catholic Education Press. Not yet decided.

Very truly yours,

/s/ HAROLD M. STEPHENS,
Chief Judge of the United States Court of Appeals for the District of Columbia Circuit."

It is ordered that the above opinion be printed as a part of the record in this case and that a properly certified copy be sent to the Supreme Court of the United States as a part of the certiorari proceedings sought by Western Pacific Railroad Corporation.

WILLIAM DENMAN,
Chief Judge

[Endorsed] Supplement to Dissenting Opinion of Chief Judge Denman. Filed Sep. 11, 1952. Paul P. O'Brien, Clerk.

Due service and receipt of a copy of the within is hereby admitted this ..... day of December, 1952.

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Attorneys for petitioners The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver

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Attorneys for petitioners Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc.

Office - Supreme Court, U. S.
FILED
JUN 26 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1952

LIBRARY
SUPREME COURT, U.S.

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
1. Plaintiff's $75,000,000 stock loss	2
2. The use of plaintiff's loss as a tax credit to wipe out respondent's tax liability	3
3. The anomaly of respondent's retaining all, and plaintiff's none, of the $17,000,000 tax benefit	5
4. The divided allegiance of the plaintiff's management; respondent's domination and control of plaintiff	6
5. The proceedings below	9
QUESTIONS PRESENTED	11
REASONS FOR GRANTING THE WRIT	12
POINT I—The construction of the Federal Tax Laws by the majority below is contrary to uniform and overwhelming authority	13
A	13
B	19
C	19
POINT II—The Court below improperly found—without support in the District Court's decision—that respondent's retention of the savings conformed with the "past practice" of the parties and "the policies and directions" of the plaintiff. These improper findings were essential for the decision below	20

PAGE

A—The findings of "past practice" by the Court below 21

B—The findings of the Court below that the tax transactions were handled in conformance with "the policy and directions" of plaintiff 23

POINT III—The Court below's conclusions of law concerning the fiduciary relations and duties between the parties are not based on the application of any local law and are clearly contrary thereto 27

A—The majority's conclusion of law that plaintiff was respondent's fiduciary is erroneous 27

B—The majority's holding that respondent was not plaintiff's fiduciary is erroneous 28

C—The Court below erred in holding that the fiduciary duty of fairness permits the fiduciary to use the *cestui* for its own profit so long as the *cestui* is not damaged thereby 31

CONCLUSION 33

APPENDIX: Text of Statutes and Regulations Relied On 1

Internal Revenue Code 1
§ 23(g) 1
§ 141 2
§ 52 4

Treasury Regulation 104 4
§ 23.12 4
§ 23.15 5
§ 23.16 6

Title 28, U. S. C., § 46(c) 7

R. C. P., Rule 52(a) 7

TABLE OF CASES

	PAGE
Alameda Investment Co. v. McLaughlin, 28 F. 2d 81 (D. C., N. D. Cal., 1928), aff'd 33 F. 2d 120 (C. C. A. 9, 1929)	14
Allied Chemical & Dye Corporation v. Steel and Tube Co., 14 Del. Chan. 1, 120 Atl. 486	27
Atlantic City Electric Co. v. Commissioner, 288 U. S. 152 (1933)	14
Banco Kentucky Co.'s Receiver v. National Bank of Kentucky's Receiver, 281 Ky. 784, 137 S. W. 2d 357 (1939)	31
Blaustein v. Pan American P. & T. Co., 263 App. Div. 97, 31 N. Y. S. 2d 934 (1st Dept., 1941), aff'd 293 N. Y. 281, 56 N. E. 2d 705 (1944)	27
Blum v. Fleishhacker, 21 F. Supp. 527, (D. C., N. D. Cal., 1937), mod. and aff'd 109 F. 2d 543, cert. den. 311 U. S. 665	30
Burnet v. Aluminum Goods Mfg. Co., 287 U. S. 544 (1932)	18
Chelrob v. Barrett, 293 N. Y. 442, 57 N. E. 2d 825 (1944)	29
Cities Service Co., Matter of, S. E. C. Holding Co. Act., Release No. 5535, January 3, 1945, file No. 70-988	19
Consolidated Electric & Gas Co., Matter of, 15 S. E. C. 161 (1943)	18, 19
Consolidated Rock Products Co. v. DuBois, 312 U. S. 510 (1941)	28
Duke Power Co. v. Commissioner, 44 F. 2d 543 (C. C. A. 4, 1930), cert. den. 283 U. S. 903	14, 15, 16
Ecker v. Western Pac. R. Corp., 318 U. S. 448 (1943)	3
Geddes v. Anaconda Copper Mining Co., 245 Fed. 225 (C. C. A. 9, 1917), rev'd on other grounds, 254 U. S. 590 (1921)	29, 30

PAGE

George A. Fuller Co. v. Commissioner, 92 F. 2d 72 (C. C. A. 2, 1937) 17, 18
Globe Woolen Co. v. Utica G. & E. Co., 224 N. Y. 483, 121 N. E. 378 (1918) 29
Goodell v. Verdugo Canon Water Co., 138 Cal. 308, 71 Pac. 354 (1903) 29, 30
Handy & Harman v. Burnet, 284 U. S. 136 (1931) 14
Islands Gas & Electric Co., 13 S. E. S. 649 (1943) 19
James Estate, In re. 86 N. Y. Supp. 2d 78 (Surr. Ct., 1948) 31
Keenan v. Eshleman, 23 Del. Ch. 234, 2 Atl. 2d 904 (S. Ct., 1938) 29
Kennedy v. Emerald Coal & Coke Co., 42 Atl. 2d 398 (S. Ct., Del., 1944) 29
Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp., 173 F. 2d 416 (App. D. C., 1949) 29
Oil Shares Inc. v. Commercial Trust Co. of N. J., 304 U. S. 551 (1937) 13
Phillips-Jones Corporation v. Parmley, 302 U. S. 233, on writ of certiorari, reversing 88 F. 2d 958 (C. C. A. 3, 1937) 12
Potter v. Sanitary Co. of America, 22 Del. Ch. 110, 194 Atl. 87 (1937) 30, 31
San Diego v. San Diego & L. A. R. Co., 44 Cal. 106 (1872) 29
Southern Pacific Co. v. Bogert, 250 U. S. 483 (1919) 27, 28
Spreckles v. Commissioner, 41 B. T. A. 370 (1940) 14
Title Ins. & Tr. Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542 (1915) 29
Trinity Buildings Corp. v. Commissioner, 40 B. T. A. 1315 (1939) 18

TABLE OF STATUTES AND REGULATIONS

	PAGE
Internal Revenue Code:	
§ 23(g)2	2
	App. 1
§ 23(g)4	2, 3
	App. 1
§ 52	2
	App. 4
§ 122(b)	4
§ 141	2, 3
	App. 2
R. C. P. 52(a)	2
	App. 7
Securities and Exchange Commission, Rule U-45(b)(6)	19
Supreme Court Rule 38(5)(b)	11, 12
Treasury Regulation 104	2
§ 23.12	4
	App. 4
§.23.15(a) and (d)	18
	App. 5
§ 23.16	4
	App. 6
28 U. S. C. § 46(c)	2, 12
28 U. S. C. § 1254(1)	2
28 U. S. C. §§ 1291 and 1294(1)	2
28 U. S. C. §§ 1331 and 1332	2

TABLE OF AUTHORITIES

Fletcher, Corporations, Vol. 13, § 5811, pages 127-8	28
48 Harv. L. Rev. 1, 8, per Mr. Justice Harlan F. Stone	6
65 Harv. L. Rev. 1256, May 1952	12
Report of the Senate Finance Committee, 70th Cong., 1st Sess., S. R. 960, p. 14 (1928)	14

IN THE.

Supreme Court of the United States

October Term, 1952

No.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC., plaintiffs-intervenors below, pray that a writ of certiorari issue to review (a) the judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 29, 1951, and (b) that Court's order of January 30, 1952 denying their petition for rehearing and striking their petition for rehearing *en banc*. Said petitioners are preferred stockholders of the plaintiff and submit this petition simultaneously with plaintiff's petition.

Opinions Below

The opinion of the District Court (R. 258) is reported in 85 F. Supp. 868. The opinion of the Court of Appeals

(R. 2214) affirming the judgment of the District Court and the dissenting opinion of Fee, J. (R. 2239) have not yet been reported. A further opinion of the Court of Appeals striking petitions for rehearing *en banc* (R. 2260) and the opinion of Fee, J. dissenting therefrom and suggesting a rehearing by all the Court of Appeals Judges (R. 2261) have not yet been reported.

Jurisdiction

The Court of Appeals judgment was entered October 29, 1951 (R. 2255). Thereafter on January 30, 1952 a petition for rehearing *en banc,* or alternatively for rehearing duly filed was denied, the prayer for rehearing *en banc* being ordered stricken as "without authority in law or in the rules or practice" of the Court (R. 2260). By order dated April 24, 1952, this Court extended petitioners' time for seeking certiorari until June 27, 1952.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The Court of Appeals had jurisdiction under 28 U. S. C. §§ 1291 and 1294(1), and the District Court had jurisdiction under 28 U. S. C. §§ 1331 and 1332.

Statutes Involved

The statutes relied upon are Internal Revenue Code §§ 23(g)(2) and (4), 52 and § 141; Treasury Regulation 104, Title 28 U. S. C. § 46(c), R. C. P. 52(a); the pertinent provisions thereof are reprinted in the appendix hereto.

Statement

1. *Plaintiff's $75,000,000 stock loss.* In 1916, plaintiff, a holding company, acquired for $75,000,000 all the stock of respondent, an operating railroad company (R. 493). In 1935, respondent went into reorganization (Bank-

ruptcy Act, § 77) and remained in reorganization under two court appointed Trustees until December 29, 1944 (R. 494, 1908, 1916).

On March 15, 1943 this Court reinstated the Interstate Commerce Commission's plan, which declared that plaintiff's stock interest in respondent was without equity and not entitled to share in the assets of the reorganized respondent. *Ecker* v. *Western Pac. R. Corp.*, 318 U. S. 448 (1943).

This plan was consummated on December 29, 1944, when the reorganization Trustees returned the assets to respondent and respondent issued its new securities in accordance with the plan (R. 499, 2000).

Respondent's reorganization irretrievably wiped out plaintiff's $75,000,000 investment in respondent's stock. After March 15, 1943—the date of the Supreme Court's affirmance of the reorganization plan—plaintiff and respondent became and remained economic strangers to each other. However prosperous respondent might become in the future, plaintiff had no share therein.

2. *The use of plaintiff's loss as a tax credit to wipe out respondent's tax liability.* Staggering as plaintiff's loss was, it presented one mitigating feature: The tax laws gave plaintiff the right to deduct this loss for income and excess profits tax purposes. (Internal Revenue Code, § 23(g)(4)). This section, enacted in 1942, provided that losses resulting from the worthlessness of a stock investment in an affiliate were to be treated as operating losses (rather than as capital losses as theretofore).

Plaintiff's loss was so utilized, but it derived no benefit therefrom whatsoever. Instead, the entire benefit was reaped by respondent—plaintiff's loss was used to discharge respondent's tax liabilities. This was accomplished through the mechanics of consolidated tax returns.

Under the Internal Revenue Code, § 141 consolidated tax returns may be filed for a group of corporations headed by

a common parent and interconnected by at least 95% stock ownership. In such a return, the respective losses and profits of each of the affiliated corporations are offset against each other and taxes are paid on any net profit for the group as a whole. However, only the parent can file such a return (Treasury Reg. 104, §§ 23.12 and 23.16).

Although this Court's decision rendered plaintiff's stock interest in respondent worthless, plaintiff, nonetheless, continued to be the legal owner of all of respondent's stock. This was so because respondent's reorganization was not consummated until much later. Plaintiff's ownership of this old stock continued until April 30, 1944, on which date plaintiff surrendered all of this stock to respondent's reorganization committee (R. 260). Hence the plaintiff, for tax purposes, continued as respondent's parent and had the right to file consolidated returns for the year 1943 and the first four months of 1944.*

Since respondent, during this period, had earned substantial profits from its wartime railroad operations, it would have had to pay a huge tax thereon, more than $17,000,000 (R. 262). But there was an alternative to the payment of this tax: To cause plaintiff to file consolidated tax returns and for plaintiff therein to offset its huge stock loss against respondent's profits, resulting in no tax payable by respondent. This could be accomplished not only for the year 1943, in which plaintiff's stock loss had occurred, but also by carrying this loss back and forward to 1942 and 1944, respectively (Internal Revenue Code, § 122(b)).

Exactly this was done. As a result, plaintiff's stock loss wiped out respondent's tax liability for the year 1943 and 1944 and provided the basis for a refund of the taxes paid for the year 1942.

Thereafter, in August, 1947, by settlement with the Commissioner of Internal Revenue, the returns for 1943 and 1944 were approved as filed and the claim for refund was denied (R. 171-5, 262-3).

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* Hereafter referred to as the year 1944.

Thus respondent, instead of paying more than $21,000,000 in taxes for the period 1942-44; paid only about $4,000,000. Respondent therefore saved $17,000,000 by using plaintiff's tax credit (R. 266-7).

3. *The anomaly of respondent's retaining all, and plaintiff's none, of the $17,000,000 tax benefit.* Normally one suffering a loss, deductible for tax purposes, will likewise be the beneficiary of the tax savings flowing from this deduction. To state that the tax laws intend this result merely emphasizes the obvious.

Nor would this purpose be any less effectuated in consolidated returns. There a parent corporation would deduct its loss from the earnings of a subsidiary. The resulting tax savings of the subsidiary normally would automatically—through the payment of dividends or through the increased value of the parent's equity in the subsidiary—redound to the benefit of the parent which, in an economic sense, owns the subsidiary's assets.

This result would likewise accord with the purpose of consolidated returns. As will be shown hereinafter (pp. 13-19), such returns were permitted in order to give the owners of a parent corporation utilizing subsidiaries, the same tax benefits as the owners of a corporation doing business through various departments.

But this automatic effectuation of the purposes of the tax laws was impossible in the instant case. Plaintiff's stockholdings of respondent though, legally valid, were actually worthless pieces of paper during the period for which, and at the very time plaintiff was filing consolidated tax returns. The Supreme Court's decision of March 15, 1943 had severed the economic relationship between plaintiff and respondent and in fact respondent had ceased to be plaintiff's subsidiary. Hence, plaintiff could derive no automatic benefit—either through dividends or increased value of stock—from any tax savings conferred on respondent.

If nonetheless the tax savings were permitted to remain where they fell, namely, with respondent, the purpose of the tax laws would be perverted: Plaintiff's stock loss would be unalleviated by any tax advantage; the owners of plaintiff, as the parent, would be denied the benefits of consolidated returns. The prosperous respondent in turn would obtain a wholly gratuitous deduction for a loss which it never suffered. In short, respondent would obtain an undeserved and unmotivated tax windfall.

However, the parties had at hand the means to make sure that the tax benefits would go where in justice and by the spirit of the tax law they belonged, namely, the plaintiff. Suitable arrangement could have been made at the time of the filing of the consolidated returns concerning the ultimate disposition of the resulting tax savings (see *infra*, pp. 18, 19). Such an arrangement would have assured plaintiff all or a substantial portion of the tax savings in effectuation of the purposes of the tax laws.

No such arrangements were made. Instead the tax savings were permitted to remain where they fell—in respondent's hands. Plaintiff received none, although its tax credit and its filing of consolidated returns produced the savings and the tax laws intended these savings to mitigate plaintiff's loss.

This gratuitous conferring of a $17,000,000 benefit on respondent has a simple explanation: "The failure to observe the fiduciary principle, the precept as old as Holy Writ, that 'a man cannot serve two masters'." 48 Harv. L. Rev. 1, 8, per Mr. Justice Harlan F. Stone.

4. *The divided allegiance of the plaintiff's management; respondent's domination and control of plaintiff.* During the critical period in which the consolidated returns were filed, all of plaintiff's officers were respondent's employees; they received their entire compensation from respondent, none from plaintiff (Pl. Ex. 30, R. 527, 1738). Thus plaintiff's president, Mr. Curry, was respondent's employee as well as vice-president, director and a member of its exec-

utive committee (R. 719, 1724). Despite these titles, Curry's actual position was, and had been since 1927, simply that of chief clerk or office manager, under his "boss", Mr. Schumacher, one of respondent's trustees (R. 639). He considered himself merely a "signing officer" (R. 641,) and he signed whatever documents Schumacher, the trustee, or Elsey, respondent's president, told him to sign (R. 642). From June 1, 1943 until the latter part of 1948, Curry's entire compensation was paid by respondent (R. 1738, 1288, 653, 656).

During this critical period, a majority of plaintiff's board of directors were likewise employees of respondent. They, too, received their compensation solely from respondent, not at all from plaintiff (Pl. Ex. 22, R. 1720; R. 1135-1139).

Plaintiff's general counsel (Messrs. Nicodemus and Campbell, constituting the firm of Pierce & Greer) simultaneously were attorneys for respondent and its trustees (R. 793, 1119-21, 2150). For these services, they received their compensation from respondent's trustees plus additional fees from respondent (R. 534-8, 1730-1, 1738). They received no compensation from plaintiff (R. 1723).

Respondent's tax counsel were Whitman Ransom Coulson & Goetz, Messrs. Polk and Coulson being the partners in charge of these tax activities; they likewise became plaintiff's tax counsel and continued as such throughout the critical period (Pl. Ex. 39-A, 39-E, R. 543-547, 556, 1399, 1438-41). That firm's compensation for its tax work was paid exclusively by respondent (R. 548-557).

Thus, in the handling of the tax transactions, plaintiff was without independent management and independent attorneys; the financial stake of all lay with respondent, not plaintiff.

This divided allegiance manifested itself in the handling of the tax returns. At every stage, it was respondent and its tax counsel who took the initiative in the handling of these tax transactions. Plaintiff's role was confined to the mechanical, unquestioning and uninformed execution of

respondent's decisions. Respondent's tax counsel conceived the plan of utilizing plaintiff's stock loss as a tax deduction in consolidated returns (Pl. Ex. 50, R. 1757, 1760-1). They made their recommendation to do so early in 1944, but only to respondent (R. 1267-8, 1410-11, 1448). They sent an opinion from New York to respondent in California (Pl. Ex. 54, R. 605)—with not even a copy to plaintiff in New York (R. 665). Respondent and tax counsel simply determined to use plaintiff's tax credit to eliminate its own taxes without bothering to ask for plaintiff's permission (R. 1448). Respondent's "full time employees", under the supervision of tax counsel, prepared the tax returns (R. 663). They were then submitted to Curry, respondent's employee and plaintiff's president and "signing officer" for his signature. Thereupon Curry did just that. He signed (R. 664). He did so without benefit of advice of independent counsel, without consultation with his board, indeed without any thought whatsoever (R. 664, 808).

Roughly the same procedure was followed in connection with the 1944 returns and the 1942 refund claim. Again respondent and its tax counsel made the decision and the same "signing officer" signed the returns as plaintiff's president (R. 623, 1018, 1449-50). However, by this time, plaintiff's president had moved to the office of respondent's tax counsel, and was receiving a $3000 annual retainer from respondent via tax counsel with instructions "to put himself at Polk's (tax counsel's) disposal" (R. 1498, 1744).

Finally, in 1947, these tax matters culminated in a settlement with the government. The same pattern was pursued in the handling of this settlement. Respondent's tax counsel procured the signature of plaintiff's president on a power of attorney—again without consulting plaintiff's board and without the board's knowledge or approval (R. 667-8, 1025-6). Thereafter, on February 11, 1947, tax counsel submitted a written offer of settlement to the government in plaintiff's name (R. 1430), but he did so after procuring authorization only from respondent, not from

plaintiff (R. 1282-4, 1429-31). Two months later, on the heels of a conference with respondent, tax counsel finally notified plaintiff of the settlement offer which he had made in its name (R. 668-9, Pl. Ex. 68, R. 1788, 1460-1). The reason for this one-sided representation is baldly admitted by tax counsel: "my responsibility was to them (respondent) and not to the corporation (plaintiff)" (R. 1431).

5. *The proceedings below.* In October 1946, prior to the settlement with the government, plaintiff brought the instant action against respondent for an accounting for the tax benefits flowing from the use of plaintiff's tax credits in the consolidated returns.

Petitioners' motion for intervention herein was granted on April 7, 1947 (R. 122).

Both petitioners and plaintiff sought accounting from respondent for the tax savings. However, petitioners as plaintiff's stockholders, at no time connected with its or respondent's management, urged below that, on the facts herein, respondent was plaintiff's fiduciary, charged with a minimum fiduciary duty of "entire fairness" in conducting these tax transactions. To determine the fairness of respondent's taking all, and plaintiff none, of these tax savings, petitioners, inter alia, looked to the animating purposes of the tax laws which permitted these savings, to determine the extent to which this result effectuated or defeated their purpose. We urged on the basis of controlling authority in this and other Courts, and congressional expressions of purpose and intent, that the purpose and intent of the tax laws was to confer on the plaintiff, which suffered the loss and was the parent, the tax savings flowing therefrom. Hence fairness entitled plaintiff, not respondent, to obtain the tax benefits.

The District Court gave judgment to respondent for reasons having nothing to do with the above contentions—indeed, on a ground not urged by any of the parties and

without benefit of any briefs thereon. As stated by Fee, J. (dissenting opinion below):

> "The major portion of the opinion of the Trial Court is devoted to the proposition that the 'tax escape' was a fraud upon the government, and therefore the proceeds were given to the defendant, an active wrongdoer. This position that there was a fraud is given no support by the tax agents of the government who made the settlement. It was expressly repudiated in open court by every party in this case" (R. 2240).

As a "subsidiary theory", the District Court stated that plaintiff's claim to the tax savings was in some fashion at variance with respondent's plan of reorganization (R. 273).

The Court of Appeals affirmed in an opinion by Byrne, District Judge, Healy, Circuit Judge concurring, with dissenting opinion by Fee, District Judge.

However, both majority and dissent rejected the District Court's grounds for its decision.

Broadly summarized, the basis for the majority opinion, leaving respondent with $17,000,000 of tax benefits, is the holding that plaintiff was under a duty to respondent to file consolidated returns, and use its own loss therein in order to obtain and confer tax savings on respondent. The majority reached this conclusion as a matter of law—federal tax law and fiduciary law—and as a matter of fact, based on findings made by it, not the District Court.

The dissenting opinion recommended reversal and remand to permit adequate findings to be made because: "There are no findings of fact which support the judgment of the Trial Court or the affirmance thereof by a majority of this Court" (R. 2239). In the course of sustaining this position, the dissent takes up the contentions of the majority and clearly indicates complete disagreement with them.

Thereafter, petitioners asked the Court below for rehearing *en banc* before all the Court of Appeals Judges of the Ninth Circuit, or alternatively for reargument. The same panel (Byrne and Fee, District Judges, and Healy, Court

of Appeals Judge) entertained the petition and denied the request for reargument; rehearing *en banc* was stricken as "without authority in law or the rules of practice of this court" (R. 2260). Again, Fee, J. dissented, "suggesting rehearing *en banc*":

> "This cause involves the disposition of over $21,000,000.00. The solution requires application of novel statutory language affecting the fields of bankruptcy and taxes. * * *
>
> "* * * Two District Judges and one Circuit Judge constituted the panel which heard the case. As has been pointed out in this serious and important litigation, three District Judges have, respectively, expressed three widely divergent views, while no member of the Court of Appeals has written a line on the merits.
>
> "I therefore suggest to the Court of Appeals a rehearing en banc of all the Circuit Judges. For this there is precedent in this Circuit" (R. 2261-62).

Questions Presented

1. Must a former parent corporation join in consolidated Federal income and excess profits tax returns with its former subsidiary and use therein the former parent's loss to extinguish the tax liability of its former subsidiary, without any accounting by the former subsidiary to the former parent for the benefit thus obtained? The loss so utilized was the parent's loss of its entire investment in the subsidiary. It was so utilized by the former parent's management and counsel at the direction of the former subsidiary for whom they likewise were officers and counsel.

2. Does not the Court of Appeals exceed its appellate office and so far depart from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its power of supervision (Sup. Ct. Rule 38(5)(b)), where the appeals court finds facts *ab initio* to affirm a judgment which it holds to be non-sustainable on the legal theories applied by the trial court, particularly where the appeals

court's findings are contrary to those which the trial court made and to the evidence?

3. May a litigant petition a Court of Appeals for a rehearing *en banc* under 28 U. S. C. § 46(c) after decision by a three-judge panel; or may two judges of the panel strike out such petition as "being without authority in law or in the rules or practice of this court", thus preventing the petition from being considered by the court of seven judges?

Reasons for Granting the Writ

The errors of the majority below present substantial questions of Federal law and procedure which this Court should review. The importance of these errors is emphasized in the dissenting opinion below; in addition, the majority's decision has recently been criticized as erroneous (65 Harv. Law Rev. 1256, May 1952).

The Court below held that the purpose and intent of the Federal tax laws were to give the former subsidiary, respondent, the benefit of the tax savings, and not the former parent, plaintiff. Based on this construction of the tax laws, it gave judgment for respondent. The Court below thereby misconstrued the purposes of the tax laws. Its error on this critical issue of Federal tax law justifies the granting of certiorari herein. See *Phillips-Jones Corporation* v. *Parmley*, 302 U. S. 233, on writ of certiorari, reversing 88 F. 2d 958 (C. C. A. 3, 1937).

The majority below further premised its judgment on findings of fact made, *de novo*, to sustain a theory of recovery not even remotely encompassed by the District Court's opinion. These findings were contrary to those which the trial court made and to the uncontradicted evidence in the record. This highly prejudicial procedure likewise requires review because it is a departure "from the accepted and usual course of judicial proceedings" by Federal courts of appeal (Sup. Ct. Rule 38(5)(b); see also

Oil Shares Inc. v. *Commercial Trust Co. of N. J.*, 304 U. S. 551 (1937), per curiam, granting certiorari and simultaneously reversing and remanding to the District Court for appropriate findings).

The Court below decided questions of fiduciary law without first determining the applicable local law, without citation or discussion of any local law whatsoever and in fact contrary thereto.

In urging the above reasons for certiorari herein, we are mindful of the need for brevity. To that end, we shall avoid unnecessary repetition of material presented in plaintiff's petition for certiorari, simultaneously filed herein. The Court is respectfully referred to the arguments therein (including all discussion of the third question, supra), as supplementary to and in support of this petition.

We proceed to take up the reasons for granting the writ herein.

POINT I

The construction of the Federal Tax Laws by the majority below is contrary to uniform and overwhelming authority.

The majority below held:

> "There is nothing in the Code or Regulations that compels the conclusion that a tax savings must or should inure to the benefit of the parent company or of the company which has sustained the loss that makes possible the tax savings" (R. 2232).

Instead, it found that the tax laws intended to and did give the benefit of such tax savings to the subsidiary, the respondent.

A

In so holding, the majority flies in the face of overwhelming and uniform authority establishing that consolidated returns were designed and intended for the benefit of the

parent, plaintiff, not the subsidiary, respondent: *Handy & Harman* v. *Burnet*, 284 U. S. 136, 140 (1931); *Report of the Senate Finance Committee*, 70th Cong., 1st Sess., S. R. 960, p. 14 (1928), quoted in *Spreckles Co.* v. *Commissioner*, 41 B. T. A. 370, 375 (1940); *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S. 152, 154 (1933); *Duke Power Co.* v. *Commissioner*, 44 F. 2d 543, 545 (C. C. A. 4, 1930), cert. den. 283 U. S. 903. The same rule was enunciated in the 9th Circuit in *Alameda Investment Co.* v. *McLaughlin*, 28 F. 2d 82 (D. C., N. D. Cal., 1928), aff'd 33 F. 2d 120 (C. C. A. 9, 1929); and by the District Court in this case (R. 269).

This was clearly stated in the *Report of the Senate Finance Committee* (supra), quoted in *Spreckels Co.* v. *Commissioner* (supra):

> "The permission to file consolidated returns by affiliated corporations merely recognizes the business entity as distinguished from the legal corporate entity of the business enterprise. * * * The mere fact that by legal fiction several corporations owned by the same stockholders are separate entities should not obscure the fact that they are in reality one and the same business owned by the same individuals and operated as a unit. To refuse to recognize this situation and to require for tax purposes the breaking up of a single business into its constituent parts is just as unreasonable as to require a single corporation to report separately for tax purposes the gains from its sales department, from its manufacturing activities, from its investments, and from each and every one of its agencies."

To assure that the consolidated group would "in reality (be) one and the same business", Congress adopted the requirement that the parent own 95% of the stock of its subsidiary. It did so with the clear contemplation and design that such a requirement would assure this economic unity. Thus, the same Committee (*supra*, at p. 14) stated

> "Much of the apprehension about consolidated returns will be removed when it is realized that it is only

when the corporations are really but one corporation that the permission to file consolidated returns is given, and that no ultimate advantage under the tax laws really results. The present law permits the filing of consolidated returns only where one corporation owns at least 95 percent of the stock of the other corporation or if at least 95 per cent of the stock of both corporations is owned by the same interest. The provision embodies the business man's conception of a practical state of facts."

Thus the purpose of consolidated returns was simply to give the common owner of a corporation operating through subsidiaries the same tax benefits as the owner of a corporation operating through various departments. In both cases the intended beneficiary was neither the department nor the subsidiary, but rather the owners of the business, i.e., the parent and its stockholders. Hence, neither the department nor the subsidiary, if it operates profitably, would have any ground in its own person to seek a reduction of its taxes, even though another department or another subsidiary has sustained a loss. But the parent (the common owner) can do so because the profits and losses of each department or subsidiary are the profits and losses of the parent.

Hence the right to offset such losses and profits against each other in consolidated returns is the parent's right created in its interest and for its benefit; any advantage flowing to the subsidiary therefrom is merely incidental and the happenstance by which the parent obtains its intended advantage. *Duke Power Co.* v. *Commissioner* (*supra*).

None of the above authorities were discussed or even mentioned by the majority below. Nonetheless, their conclusion was rejected.

The Court below proceeded to reach a diametrically opposite and contrary result, i.e., the tax laws intended to give the subsidiary (the respondent) all the benefit of consolidated returns and the parent (plaintiff) none. The

majority cites no authority whatsoever for this conclusion. Nor can any be cited. It rests its conclusion on a fragmentary analysis of two provisions of the tax law: the provision giving the subsidiary the right to refuse to join in consolidated returns; and the provision permitting consolidated returns for a period of affiliation less than the taxable year, even though such affiliation had ceased at the time for filing such returns.

Neither of these provisions justifies the Court below's conclusions therefrom. The right of the parent, which alone can file consolidated returns, to refuse to do so is not comparable to the right of the subsidiary to refuse to do so. Giving this right to the parent was in furtherance of the purpose and intent that the parent should be the beneficiary of the benefits. Congress viewed the parent and its stockholders as the owners of one business consisting of a group of affiliates (*supra*, pp. 14, 15). It therefore gave the parent the *sole* right to file consolidated returns for the group on the assumption that as the common owner it would and should determine, in its own self-interest whether or not to file such returns. As stated in *Duke Power Co.* v. *Commissioner* (*supra*):

> "It (Congress) assumed that if there was that degree of affiliation which the law required, there was a dominant control, and it gave to that dominant control the right to make the choice" (p. 545).

Hence, concluded that Court, if the parent were to "decide that its best interests require filing by it of a separate tax return, no provision of the law denies it this privilege" (p. 545).

The subsidiary's right was not given for any such reason. Congress obviously did not view the subsidiary as the owner of the group. Therefore, the subsidiary's right to refuse to join is not, like the parent's, given in recognition of its position as the common owner. In fact, it is no more than a protective veto to cover this possible eventuality: Despite the presence of 95% stock ownership, the sub-

sidiary might still be independent of and not properly an economic unit with the parent; it could then exercise its veto and refuse to join in consolidated returns. This has occurred when the subsidiary's trustee in bankruptcy exercised this veto. *George A. Fuller Co.* v. *Commissioner*, 92 F. 2d 72 (C. C. A. 2, 1937).*

Equally unfounded is the Court's reliance on tax law provisions permitting consolidated returns for a period of affiliation less than the taxable year, though the affiliation had ceased at the time of actual filing of returns. Permitting the filing of such returns has an obvious justification: Consolidated returns, if appropriate for a full tax year, are just as appropriate for any part thereof in which the affiliation existed. But such consolidated returns are no different from others. The fact that such returns could be filed does not prove, as the Court below held, that "any benefits to the subsidiary obviously cannot inure to the parent" (R. 2230). Since only the parent can file consolidated returns, its self-interest will determine whether it should or should not file such returns for a shortened period. If the subsidiary in its self-interest should deem it appropriate, it may prevent the filing by exercising its protective veto of non-consent. In short, the filing or non-filing of such returns and the sharing of the benefits therefrom could well be the subject of negotiation and result in both sharing. On the other hand, the parent, in the very act of terminating the affiliation, can insure itself the benefit of subsequent filing of consolidated returns. Thus, if the parent were selling its 95% stock interest in a subsidiary to a stranger and at the time of sale knew that its loss in a consolidated return would confer a $17,000,000 tax saving on the subsidiary, could it be doubted that this would be reflected in the price of the stock being sold?

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* As is urged in plaintiff's petition for certiorari, the decision below in effect nullifies this protective veto. The Court below expressly stated that the trustee in reorganization herein, if it had the loss, would have been under a mandatory duty to join in consolidated returns with plaintiff and contribute its loss thereto (R. 2233).

From this right to file consolidated returns after termination of affiliation, the Court further deduces that the tax laws do not "require 'economic unity'". Nor did the appellants argue, as stated by the Court, that the tax laws did "*require*" economic unity. Instead, appellants argued that the tax laws *contemplated* that there would be economic unity during the period of affiliation; the authorities established this contention; (supra, pp. 14, 15). And the statute *required* 95% stock ownership on the theory that compliance with this requirement would effectuate the contemplated objective of economic unity. Instances have arisen where despite literal compliance with the statutory requirement of 95%, the contemplated economic unity did not in fact exist. Nonetheless, the Courts have held that compliance with the literal statutory requirement is the test for the filing of consolidated returns. *Burnet* v. *Aluminum Goods Mfg. Co.*, 287 U. S. 544 (1932); *George A. Fuller Co.* v. *Commissioner*, 92 F. 2d 72 (C. C. A. 2, 1937); *Trinity Buildings Corp.* v. *Commissioner*, 40 B. T. A. 1315 (1939). It is precisely that compliance with the literal statutory requirement which permitted consolidated returns herein, dispite the absence of economic unity.

But this result hardly establishes, as the Court below found, that therefore consolidated returns are permitted for the benefit of the subsidiaries. The purpose of the tax laws remains unaltered. But in this and similar cases the purpose of the tax laws is not automatically effectuated. The parent's normal and automatic benefiting from its subsidiary's savings, could not occur; it held mere pieces of paper representing neither equity nor right to dividends. Hence, the statutory purpose required effectuation in another fashion, namely, by an agreement among the parties allocating the resulting tax savings.

Agreements of this type are expressly permitted by the tax regulations (Treas. Reg. 104, § 23.15(a) and (d), Appendix herein). Such agreements are a familiar device and have received administration sanction and approval. *Matter of Consolidated Electric & Gas Co.*, 15 S. E. C. 161

(1943); the *Islands Gas & Electric Co.*, 13 S. E. C. 649 (1943); *Matter of Cities Service Co.*, S. E. C. Holding Co. Act, Release No. 5535, January 3, 1945, file No. 70-988.*

B

Finally, not only has the majority below misconstrued the purpose of consolidated returns, but it has also overlooked the purpose of another aspect of the tax laws. Congress in 1942 made a loss in the stock of an affiliate deductible against ordinary income. It did so for an obvious purpose. It wished to mitigate the economic impact of such stock loss by any tax savings resulting from its deductibility. This purpose, too, has been subverted herein. For plaintiff suffered the loss, but only respondent obtained the tax savings resulting therefrom. Patently, plaintiff's loss has not been mitigated when tax savings resulting therefrom go to another, the respondent.

C

For the above reasons we submit that it is indefensible for the majority below to conclude:

> "There is nothing in the Code or Regulations that compels the conclusion that a tax saving must or

* In each case, the S.E.C., pursuant to its Rule U 45(b)(6), approved as fair and reasonable agreements allocating tax savings. In each instance, the parent received the benefit of those savings. But the question posed was how it should receive that benefit. In *Matter of Consolidated Electric & Gas Co.* (*supra*), the parent was permitted to obtain these savings by direct payment from the subsidiaries in whose pockets the savings originally fell; there, as here, the parent's loss produced the saving—the loss being, as here, in the stock of a subsidiary. In the other two cases, the tax savings were paid to the subsidiary contributing a particular deduction with the parent still benefiting therefrom. Indeed, the need for such an agreement is much stronger in the instant case than in those before the Commission. For in each of those cases the consolidated group was an economic unit and the benefits did automatically inure to the parent; thus permission for tax saving payments there was a matter of expediency, whereas in the instant case, with the economic unity destroyed, such payments were a matter of necessity.

should inure to the benefit of the parent company or of the company which has sustained the loss that makes possible the tax saving" (R. 2232).

Equally indefensible was the Court's unsupported holding that these tax laws did compel the conclusion that the tax savings must and should inure to the subsidiary which didn't suffer any loss.

This erroneous interpretation of the tax laws was then used as an essential link in concluding that respondent, not plaintiff, was entitled to judgment herein. For, said the Court, whether plaintiff be respondent's fiduciary (as it held) or both were under a fiduciary duty to deal with each other without "unfairness" (as it assumed)—performance of these duties entitled respondent to the tax savings because they were "an advantage which the tax laws give the subsidiary" (R. 2234), which "it was entitled to under the tax laws" (R. 2232), and which plaintiff "owed a duty not to require its subsidiary to forego" (R. 2234).

Again, the Court below found performance of these duties in certain conclusions of fact which it drew. We proceed to show that these facts were found, without support in the District Court's decision and contrary to the evidence in the record.

POINT II

The Court below improperly found—without support in the District Court's decision—that respondent's retention of the savings conformed with the "past practice" of the parties and "the policies and directions" of the plaintiff. These improper findings were essential for the decision below.

The majority below found as a fact that the group, since 1946, had filed consolidated tax returns and no member made any payment over to any other member of the group contributing a loss and producing tax savings therefrom.

It found that the parties, in joining in consolidated returns for the critical period herein, without plaintiff's obtaining any of the tax savings flowing from the inclusion of its loss, acted in conformance with their "past practice". Furthermore, found the Court below, filing and joining in consolidated returns in this fashion, conformed with "the policy and directions" of plaintiff.

Hence, based on these findings, the Court held that plaintiff was not entitled to recover any of the tax savings herein since defendant's retention was in conformance with the alleged "past practice" of the parties and its own "policies and directions".

Implicitly recognizing the need for findings of the trial court to justify these essential findings of fact, the majority stated:

> "In the instant case the trial court's opinion discloses adequately the issues of fact which were before the court and the court's findings thereon" (R. 2236).

As we shall see, the trial court's opinion, performs no such function with respect to "past practice"; with respect to the corporation's "policy and directions", its findings are contrary to those of the majority below.

A

The findings of "past practice" by the Court below.

The trial court made no findings whatsoever on this alleged practice; its opinion is silent on this issue. Past practice was totally immaterial for its decision. Therefore, both petitioners and the appellate court were deprived of the judgment of the trier of the facts on this issue. The majority below was therefore compelled to make its own findings *de novo*.

The vice of permitting such *de novo* findings is not merely technical. Frequently trial courts, during the trial, give strong indications that certain issues are immaterial; counsel therefore abjures rebuttal evidence; and the trial

court adheres to this view in its decision. If the appellate court overrules this view and, instead of remanding, then proceeds to make its own findings of fact on such a record, the litigant and his counsel have been neatly trapped. In the instant case, the trial court did express the view that past practice and evidence thereon was immaterial.* No rebuttal evidence was adduced. The trial court in its opinion adhered to his view. Nonetheless, the majority, adopting a contrary view, has, instead of remanding, proceeded on this record to find the facts.

Fortunately, despite the absence of rebuttal evidence, there is sufficient in the record, principally from respondent's evidence, to indicate that the majority produced *de novo* findings contrary to the evidence.

In fact, a member of the consolidated group did make substantial tax savings payments to plaintiff. During the years from 1918 to 1924, one of the then affiliates, Utah Fuel Company, joined with plaintiff and respondent in the filing of consolidated returns. Plaintiff's losses offset against that affiliate's income in consolidated returns, gave rise to tax savings for that affiliate. Nonetheless, it did not keep those tax savings. Instead, it made tax savings payments to plaintiff, the parent.† Thus, the majority's finding (made without any discussion of these facts) that "the record is clear" that no tax payments were made (R. 2233), is refuted.

Nor was there in fact any practice worthy of the dignity and effect given to it by the Court below. Prior to bank-

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* The trial court itself had said (R. 1377):

> "I just don't see the point of what any affiliated company has done in the past as a matter of practice in these returns, because they have all been decisions that have been made by the parent company, and when the parent company decided that it was proper to file affiliated returns, it filed them, * * *. What we have in this case is not concerned with that."

† The facts with respect to these payments appear from a Price Waterhouse report (Deft. Ex. 40, not printed pursuant to order; R. 2176).

ruptcy, tax savings fell into the pockets of both plaintiff and respondent (Deft. Ex. 46, 47; R. 2040-1); but to plaintiff, as the parent of an economic unit, it was immaterial, during this period, where they fell since in either event, as the tax laws intended, plaintiff automatically benefited therefrom. Thereafter, during bankruptcy, neither plaintiff nor respondent's trustees had taxable income until 1942 (Deft. Ex. 46, 47; R. 2040-1). And in 1942, unfettered by any so-called past practice, tax counsel was retained to advise, *inter alia*, on the "very critical question" of whether consolidated or separate returns should be filed (Pl. Ex. 39-B, 39-D; R. 544), and consolidated returns were then used merely because they were advantageous (R. 1759).

B

The findings of the Court below that the tax transactions were handled in conformance with "the policy and directions" of plaintiff.

The majority below states:

> "The conclusion is inescapable that Corporation's (plaintiff's) officers, when they filed consolidated returns, * * * were conforming with the policy and directions of Corporation" (R. 2229).

Necessarily, this must mean that plaintiff's "policy and directions" were formed and acted upon by its officers and counsel who were independent of respondent. The Court below found this independence: "The record is barren of evidence to support the contention that Corporation (plaintiff) was dominated by the subsidiary (respondent), * * *" (R. 2235).

These conclusions are belied by the District Court's own findings and the uncontradicted evidence in the record.

The findings of the District Court are unambiguous:

> "It was there (in the supplementary complaint) further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation, and that by reason of such con-

trol plaintiff was caused to file the consolidated returns for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control'" (R. 264).

"* * * there is a preponderance of the evidence in favor of the plaintiff's contention of 'duality of control'" (R. 272).

The trial court's opinion setting forth the chronology of events, constantly gives effect to these conclusions of fact. It reiterates that what was done in the handling of these tax transactions, was done not by plaintiff, but by respondent, *its* employees and *its* tax counsel (R. 261-263, 265). In short, it found that the men of divided allegiance did in fact serve the quick, not the dead.

The majority below nevertheless reached a contrary conclusion. But it did so simply by ignoring the facts. It portrayed the actors in these tax transactions as if they were independent representatives of plaintiff. Thus, the majority narrates the tax activities herein in terms of what was done by Mr. Curry, F. C. Nicodemus, Jr., and Mr. Polk and his law firm. Curry is described merely as plaintiff's president, and one time treasurer (R. 2224); F. C. Nicodemus, Jr., is described merely as "the General Counsel for Corporation" (plaintiff) (R. 2226); and Polk and his law firm are described as "independent tax experts" (R. 2226).

Briefly summarized, the uncontroverted facts, nowhere mentioned in the majority opinion, with respect to these persons are:

Mr. Curry, as we have shown, supra (pp. 6-8), was, during the critical period, respondent's vice-president, an employee of respondent's trustees, receiving his compensation from them, not plaintiff and, finally, on retainer to the respondent for services in connection with the very tax transactions involved herein.

F. C. Nicodemus, Jr., plaintiff's general counsel was, throughout the critical period, employed to rep-

resent respondent's trustees and respondent, and received his compensation from them while receiving no compensation from plaintiff (R. 533-6, 793, 1119-21, 1723, 1730-1, 1738, 2150, Def. Ex. 14, R. 1901).

Whitman, Ransom, Coulson & Goetz (Mr. Polk), for the tax services involved herein, were paid by respondent and not by plaintiff (R. 548, 557, 1721). Far from being "independent", this firm had the strongest ties to respondent. Throughout the reorganization it represented respondent's largest single creditor entitled under the plan to about 28% of respondent's stock, i.e., the James interests (R. 963); it was this representation and the "vital" stake of this client in respondent which caused that firm, shortly before their retention, to look into the manner in which respondent's tax matters were being handled and thereupon to be retained as tax counsel (R. 965, 536-548). As the representative of this large creditor interest, Mr. Coulson was made a member of respondent's reorganization committee and his firm became its counsel (Int. Ex. 15, R. 1625, Pl. Ex. 10; R. 1674, 1677). After reorganization, while his firm was still handling these tax transactions, he became a director of respondent, still representing the James 28% stock interest therein (R. 548).

The opinion is replete with other examples of the effect of this same sin of omission. For example: The majority says tax counsel was employed "upon the suggestion of General Counsel for Corporation" (plaintiff), citing plaintiff's exhibit 39B, R. 544 (R. 2226). In fact, this was Mr. Nicodemus' letter to his client, respondent's trustee, Mr. Schumacher. And in broaching this subject, Mr. Schumacher, writing to Nicodemus on trustee's stationery, clearly shows this:

"As one of the Trustees of the Western Pacific Railroad Company, I am looking to you to cooperate with

> Mr. Matthew, General Counsel for the Trustees in protecting the trust estate in the preparation of the final return" (Pl. Ex. 39A; R. 544).

Again, the majority refers to another letter, Polk's letter of May 20, 1943 (Pl. Ex. 50) as a report addressed to Mr. Curry and circulated to Mr. Schumacher and Mr. Nicodemus (R. 2225). The trial court more accurately described this letter for what it was: a letter "addressed to Curry, vice-president of *defendant company*" (R. 265, ftn. 5); and it was circulated by Polk to his paying client, the trust[illegible] and the latter's New York attorney.

Thus, the majority's conclusion that what was done was in conformance with "the policies and directions" of plaintiff cannot stand comparison with the record and the findings of the trial court. The record establishes and the trial court's finding reflect that, in fact, respondent dominated and controlled plaintiff in the handling of the tax transactions.

The majority's error herein underlines the necessity for strictly adhering to the principle that trial courts, not appellate courts, ought to find the facts. The dissenting opinion below aptly summarized the vice of any other practice:

> "The cause should be reversed for failure to state adequate findings to support the judgment. Findings must be made in the Trial Court. Appellate courts have no such right or function. The majority opinion attempts to accomplish justification of the result below by drawing inferences, deductions and conclusions from evidence which they claim to find in the record. It would be possible for other judges to set up a diametrically opposite set of facts from which a judgment in favor of plaintiff might be based. The very reason that Rule 52 requires findings of fact is illustrated by the majority opinion. For the technical difficulties of finding a basis of fact for this judgment are many. Indeed, such difficulties are insurmountable" (R. 2241-2).

POINT III

The Court below's conclusions of law concerning the fiduciary relations and duties between the parties are not based on the application of any local law and are clearly contrary thereto.

The majority below held plaintiff to be respondent's fiduciary in the critical period, merely because of its ownership of respondent's worthless stock. It rejected plaintiff's contention that *respondent* was plaintiff's fiduciary in these tax transactions; interlocking management, says that Court, absent respondent's domination and control of plaintiff, does not give rise to a fiduciary relationship. It then assumed, arguendo, that respondent was under a fiduciary duty to deal "fairly" with plaintiff; it held that there was fairness so long as the *cestui*, plaintiff, suffered no damage.

The majority asserted all of the above conclusions without ascertaining what local law is applicable and without citing any local law whatsoever so holding.

In each instance, the rule of law enunciated by the Court below is contrary to the local law applicable hereto.

A

The majority's conclusion of law that plaintiff was respondent's fiduciary is erroneous.

The majority holds plaintiff was respondent's fiduciary solely because it was "the sole owner of the subsidiary's capital stock". Clear beyond cavil is the contrary rule of law: Mere stock ownership does not make the parent a fiduciary of its subsidiary. *Allied Chemical and Dye Corporation v. Steel and Tube Co.*, 14 Del. Ch. 1, 120 Atl. 486; *Blaustein* v. *Pan American P. & T. Co.*, 263 App. Div. 97, 119, 31 N. Y. S. 2d 934, 956 (1st Dept., 1941), aff'd 293 N. Y. 281, 56 N. E. 2d 705 (1944); *Southern Pacific Co.*

v. *Bogert*, 250 U. S. 483 (1919); *Fletcher, Corporations*, Vol. 13 § 5811, pp. 127-8. All of the above authorities require, in addition to mere stock ownership, that the stockholder in fact dominate and control his corporation. This the Court below could not find. In fact, it conceded that during the critical period respondent "was no longer controlled by Corporation (plaintiff) but by the Trustees appointed by the bankruptcy court", and respondent's "railroad properties were controlled and operated by (said) trustees" (R. 2223, 2216).

The only authority cited by the majority below for its conclusion is *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 522 (1941). But there, too, at the very page cited, this Court plainly stated that it was imposing fiduciary duties on a holding company because "it has dominated and controlled its subsidiaries".* Strangely enough, the Court below, in another point in its opinion, states the same holding for that case: "Fiduciary duties also arise where one corporation dominates the other. *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 522."

B

The majority's holding that respondent was not plaintiff's fiduciary is erroneous.

Although the majority below conceded "there obviously existed an interlocking management," (R. 2223) it nonetheless held that, as a matter of law, "the mere fact of officers and directors in common does not create such a

---

* The Supreme Court's complete language reads (312 U. S., at 522):

> "But equity will not permit a holding company, *which has dominated and controlled its subsidiaries*, to escape or reduce its liability to those subsidiaries by reliance upon self-serving contracts which it has imposed on them. A holding company, as well as others *in dominating and controlling positions* (*Pepper* v. *Litton*, 308 U. S. 295), has fiduciary duties to security holders of its system which will be strictly enforced." (Italics ours.)

fiduciary relationship" (R. 2222). The Court cites no authority whatsoever for this rule of law. The contrary, we submit, is a rule of universal application.

The law is the same in Delaware, where plaintiff is incorporated; in California, where defendant is incorporated; in New York, where the interlocking officers functioned and the returns were filed; and in other jurisdictions throughout the land. *Keenan* v. *Eshleman*, 23 Del. Ch. 234, 243-4, 2 Atl. 2d 904 (S. Ct., 1938); *Kennedy* v. *Emerald Coal & Coke Co.*, 42 Atl. 2d 398, 402 (S. Ct., Del., 1944); *Goodell* v. *Verdugo Canon Water Co.*, 138 Cal. 308, 71 Pac. 354 (1903); *Title Ins. & Tr. Co.* v. *California Development Co.*, 171 Cal. 173, 205-6, 152 Pac. 542 (1915); *Chelrob* v. *Barrett*, 293 N. Y. 442, 460-2, 57 N. E. 2d 825 (1944); *Globe Woolen Co.* v. *Utica G. & E. Co.*, 224 N. Y. 483, 489-90. 121 N. E. 378 (1918, Cardozo, J.); *Mayflower Hotel Stockholders Protective Committee* v. *Mayflower Hotel Corp.*, 173 F. 2d 416, 418-23 (App. D. C., 1949, with numerous references). *Geddes* v. *Anaconda Copper Mining Co.*, 245 Fed. 225 (C. C. A. 9, 1917), rev'd on other grounds, 254 U. S. 590 (1921).

The rule rests on wisdom, as old as Holy Writ, that "no man can faithfully serve two masters, whose interests are or may be in conflict"; *San Diego* v. *San Diego & L. A. R. Co.*, 44 Cal. 106, 113 (1872). Just as there is danger that a director, in dealing with his corporation, will favor his personal interests, so in transactions between interlocking corporations "the danger to be avoided is that a director or group of directors, common to two corporations, may, for reasons of self-interest, favor one of the entities in its dealings with the other"; *Mayflower Hotel* case, *supra*, 173 F. 2d, at 420. Hence, courts impose "the most careful scrutiny of transactions between the corporations represented by common directors, to the end that in the absence of arm's length bargaining, the scales may not, even through mistake or inadvertence, be unfairly tipped to one side or the other"; *Chelrob* v. *Barrett*, *supra*, 293 N. Y., at 461.

This Court has given the classical and most frequently cited formulation of this doctrine in *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 599 (1921):

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation; and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness; * * * This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality and, we now add, in the soundest business policy."

The Court below rejected this universal rule without discussion of the above authorities. It merely held that, in addition to interlocking management there must be domination and control. It cited no authority whatsoever for this proposition. We know of none. (The Court further compounded this error by making its own finding of fact, contrary to the District Court's finding, that there was no domination and control (discussed *supra*, pp. 23-26).)

Certain other grounds are suggested in the majority's opinion as possible bases for its rejection of the rule of interlocking management: Absence of assertion or proof of "actual fraud" and the openness of dealing and the good faith of the parties are adverted to (R. 2219, 2226); however, the rule is applied nonetheless. Cases cited *supra*, p. 29; *Blum* v. *Fleishhacker*, 21 F. Supp. 527, 533 (D. C., N. D. Cal., 1937), mod. and aff'd 109 F. 2d 543, cert. den. 311 U. S. 665; *Goodell* v. *Verdugo Canon Water Co.*, 138 Cal. 308, 314, 71 Pac. 354 (1903). The issue, says the Court, is whether a *subsidiary* stood in a fiduciary relationship to a *parent* (R. 2222) and the interlocking management "was not of the subsidiary's making" but of the parent's (R. 2223). The rule of interlocking management is imposed with the same rigor whether the subsidiary or parent invokes its protec-

tion. *Potter* v. *Sanitary Co. of America*, 22 Del. Ch. 110, 194 Atl. 87 (1937); *Banco, Kentucky Co.'s Receiver* v. *National Bank of Kentucky's Receiver*, 281 Ky. 784, 137 S. W. 2d 357 (1939). Once duality is created—no matter by whom or how innocently—it subjects the entities to fiduciary standards in their dealings with each other. *In re James Estate*, 86 N. Y. Supp. 2d 78 (Surr. Ct., 1948).*

C

The Court below erred in holding that the fiduciary duty of fairness permits the fiduciary to use the *cestui* for its own profit so long as the *cestui* is not damaged thereby.

Having assumed, arguendo, respondent's fiduciary obligations to plaintiff, the Court below held that respondent could deal with plaintiff "for profit as long as there is no overreaching or unfairness" (R. 2221).

The Court then applied this standard. It concluded that respondent, by keeping all the profit, had nonetheless dealt fairly with its *cestui*, the plaintiff.

This was "fairness", said the Court, because it "did not sacrifice Corporation's (plaintiff's) interests to those of the subsidiary" (R. 2232). And there was no such "sacrifice" because plaintiff, poor and without income, could not use its own loss by itself to create tax savings for itself.

Shorthanded, the Court simply held that this fiduciary could profit at will from its dealings with its *cestui* so long as the *cestui* was not damaged thereby. This holding is not tendered as the applicable local law; it is supported by no authority. The law to the contrary is well established generally, as well as in cases specifically involving tax savings and the conduct of fiduciaries with respect thereto. (See

* Moreover, as we have seen, this argument has a totally fallacious factual premise. Respondent and its trustees, not plaintiff, created the duality during the critical period. They made plaintiff's management and counsel their "full time employees" and made their tax counsel plaintiff's tax counsel. They alone compensated them for their services.

cases cited and discussed at length in plaintiff's accompanying petition.)

The majority's conclusion is particularly shocking as a rule of fiduciary conduct, which, formulated to require conduct far above the "morals of the market place", is here applied to require far less.

In its most basic terms, the filings of consolidated returns were indeed transactions designed to make a profit. Plaintiff and respondent each had an essential ingredient for achieving the profit. Plaintiff had a $75,000,000 loss; respondent had large taxable income. The tax savings could be made only if both got together on a joint course of action, namely, the plaintiff would file consolidated tax returns for both in which its loss would offset respondent's income with resulting tax savings of $17,000,000. This was done and the joint effort of both produced those savings or profits. But only one, of all people, the fiduciary, respondent, retained all the profit while plaintiff, its *cestui*, received none.

Can this result possibly be fairness by a fiduciary to its *cestui*?

Let us compare our case with a more usual commercial analogy: Suppose that a fiduciary manages two businesses, one belonging to himself, the other to his cestui. By combining the purchasing power of the two, he buys merchandise at prices cheaper than each business would have had to pay separately. However, the entire amount of the reduced price is kept by the fiduciary; the *cestui* gets none of the savings. Could it be doubted that the fiduciary would be held guilty of "overreaching or unfairness"? Would even the "morals of the market place" produce such a result were there strangers dealing at arm's length? Would it be any answer for the fiduciary to say that his *cestui* was undamaged because it was still getting the same old merchandise at the same old price?

We submit that in our case as in the above hypothetical case, any reasonable test of fairness would deny that a fiduciary can take all and give its *cestui* none of the results of their joint efforts.

Conclusion

This "serious and important litigation" has traveled a most unusual litigative road. The District Court, after a thirteen day trial and upon a voluminous record (R. 264), reached its conclusion on grounds not urged or briefed by any of the parties. Thereafter, the Court below, by a majority, affirmed. But it rejected the District Court's grounds. Instead, it substituted its own and, to do so, it in effect sought to constitute itself as the trial court. The majority opinion below is the result—shot through with improper and erroneous findings of fact, misconstruction of the federal tax laws, improper and erroneous application of the rules of fiduciary law, lack of regard for local law—all intertwined and inseparable grounds for the decision below. A dissenting opinion was written, and thereafter a further dissent, making the unusual suggestion that "this serious and important litigation" should be heard by all the Court of Appeals' Judges of the Ninth Circuit.

Thus, the cleavage among the four Judges (three District Court Judges and one Court of Appeals Judge), who have thus far heard this case, has been deep, vehement and fundamental. The four have voiced three significantly different and conflicting major points of view, with further conflicts on important legal and factual premises.

Undoubtedly, these conflicts and errors reflect the difficulty of the issues involved and the large amount at stake. Landmark cases, such as the instant one, beget such deep-seated differences. They likewise require and justify hearing by this Court to set those conflicts at rest authoritatively and finally.

For all of the reasons herein, we respectfully urge that substantial justice for the petitioners and for the thousands of stockholders of plaintiff, justifies the granting of this petition for certiorari.

Dated, June 25, 1952.

Respectfully submitted,

JULIUS LEVY,
Attorney for Petitioners.

APPENDIX

Text of Statutes and Regulations Relied On.

Internal Revenue Code

§ 23. *Deductions from gross income.* In computing net income there shall be allowed as deductions: * * *

(g) Capital losses.

(1) Limitation. Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

(2) Securities becoming worthless. If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.

(3) Definition of securities. As used in paragraph (2) of subsection the term "securities" means (A) shares of stock in a corporation, and (B) rights to subscribe for or to receive such shares.

(4) Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purposes of this paragraph a corportion shall be deemed to be affiliated with the taxpayer only if:

(A) at least 95 per centum of each class of its stock is owned directly by the taxpayer; and

(B) more than 90 per centum of the aggregate of its gross incomes for all taxable years has been from sources other than royalties, rents (except rents derived from rental of properties to employees of the company in the ordinary course of its operating business), dividends, interest (except interest received on deferred purchase price

of operating assets sold), annuities, or gains from sales or exchanges of stocks and securities; and

(C) the taxpayer is a domestic corporation.

* * * * * * *

§ 141. Consolidated returns.

(a) Privilege to file consolidated income and excess-profits-tax returns. An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making consolidated income and excess-profits-tax returns for the taxable year in lieu of separate returns. The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. The making of a consolidated income-tax return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated returns shall include the income of such corporation for such part of the year as it is a member of the affiliated group. In the case of a corporation which is not a member of the affiliated group after March 31, 1942, of the last taxable year of such group which begins before April 1, 1942, such corporation shall not be considered a member of the affiliated group for consolidated income-tax-return purposes for such year but shall be considered a member of such group for consolidated excess-profits-tax-return purposes for such year, and the consent required in the case of such corporation shall relate only to the consolidated excess-profits-tax regulations.

(b) Regulations. The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making consolidated income- and excess-profits-tax returns and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income- and excess-profits-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. Such regulations shall prescribe the amount of the net operating loss deduction of each member of the group which is attributable to a deduction allowed for a taxable year beginning in 1941 on account of property considered as destroyed or seized under section 127 (relating to war losses), and the allowance of the amount so prescribed as a deduction in computing the net income of the group shall not be limited by the amount of the net income of such member.

* * * * * * *

(d) Definition of "affiliated group". As used in this section, an "affiliated group" means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

(1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

(2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of at least one of the other includible corporations.

As used in this subsection, the term "stock" does not include nonvoting stock which is limited and preferred as to dividends.

* * * * * * *

§ 52. * * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Treasury Regulation 104

§ 23.12:

(a) A consolidated return shall be made on Form 1120 by the common parent corporation for the affiliated group. Such return shall be filed at the time and in the office of the collector of the district prescribed for the filing of a separate return by such corporation.

(b) Each subsidiary must prepare duplicate originals of Form 1122, consenting to these regulations and authorizing the common parent corporation to make a consolidated return on its behalf for the taxable year and authorizing the common parent (or, in the event of its failure, the Commissioner or the collector) to make a consolidated return on its behalf (as long as it remains a member of the affiliated group), for each year thereafter for which, under section 23.11 (*a*), the making of a consolidated return is required. One of such forms as prepared by each subsidiary shall be attached to the consolidated return, as a part thereof; and the other shall be filed, at or before the time the consolidated return is filed, in the office of the collector for the district prescribed for the filing of a separate return by such subsidiary. No such consent can be with-

drawn or revoked at any time after the consolidated return is filed.

* * * * * *

§ 23.15:

(a) Except as provided in paragraph (*b*), the common parent corporation and each subsidiary, a member of the affiliated group during any part of a consolidated return period, shall be severally liable for the tax (including any deficiency in respect thereof) computed upon the consolidated net income of the group.

(b) If, at the time of filing a consolidated return, one or more, but not all, of the members of the affiliated group are in bankruptcy under the laws of the United States or in receivership in any court of the United States or of any State, Territory, or the District of Columbia, then the liability under paragraph (*a*) of each such member of the group with respect to the period covered by such return shall not exceed such portion of the consolidated tax liability for such period as the several corporations included in the consolidated return may, subject to the approval of the Commissioner, agree upon, or, in the absence of such an agreement, an amount equal to its liability for such year computed as if a separate return had been filed.

(c) If a subsidiary has ceased to be a member of the affiliated group, its liability under paragraph (*a*) shall remain unchanged, except that if such cessation occurred prior to the date upon which any deficiency is assessed and resulted from a bona fide sale of stock for fair value, the Commissioner may, if he believes that the assessment or collection of the balance of the deficiency will not be jeopardized, make assessment and collection of such deficiency from such former subsidiary in an amount not exceeding the portion thereof allocable to it upon the basis of income used in the computations respectively of the normal tax and any surtaxes included in such deficiency.

(d) Any agreement entered into by one or more members of the affiliated group with any other members of such

group or with any other person shall in no case have the effect of reducing the liability prescribed under this section.

§ 23.16

(a) The common parent corporation shall be for all purposes, in respect of the tax for the taxable year for which a consolidated return is made or is required, the sole agent, duly authorized to act in its own name in all matters relating to such tax, for each corporation which during any part of such year was a member of the affiliated group. The corporations, other than the common parent, shall not have authority to act for or to represent themselves in any such matter. For example, all correspondence will be carried on directly with the common parent; notices of deficiencies will be mailed only to the common parent, and the mailing to the common parent shall be considered as a mailing to each such corporation; notice and demand for payment of taxes will be given only to the common parent, and such notice and demand shall be considered as a notice and demand to each such corporation; the common parent will file petitions and conduct proceedings before the Board of Tax Appeals, and any such petition shall be considered as having also been filed by each such corporation; the common parent will file claims for refund or credit; refunds will be made directly to and in the name of the common parent and will discharge any liability of the Government in respect thereof to any such corporation; and the common parent in its name will give waivers, give bonds, and execute closing agreements, offers in compromise, and all other documents, and any waiver or bond so given, or agreement, offer in compromise, or any other document so executed, shall be considered as having also been given or executed by each such corporation. Notwithstanding the provisions of this paragraph, however, any notice of deficiency, in respect of the tax for a consolidated return period, will name each corporation which was a member of the affiliated group during any part of such period, and any assessment (whether of the original tax or of a deficiency) will be

made in the name of each such corporation (but a failure to include the name of any such corporation will not affect the validity of the notice of deficiency or the assessment as to the other corporations); any notice and demand for payment will name each corporation which was a member of the affiliated group during any part of such period (but a failure to include the name of any such corporation will not affect the validity of the notice and demand as to the other corporations); and any distraint (or warrant in respect thereof), any levy (or notice in respect thereof), any notice of a lien, or any other proceeding to collect the amount of any assessment, after the assessment has been made, will name the corporation from which such collection is to be made. The provisions of this paragraph shall apply whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time. Notwithstanding the provisions of this paragraph, the Commissioner may, if he deems it advisable, deal directly with any member of the group in respect of its liability, in which event such member shall have full authority to act for itself.

Title 28 U. S. C., § 46(c)

Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

R. C. P., Rule 52(a)

In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *.

PAGE

Handy & Harman v. Burnet, 284 U. S. 136 (1931) 53
Higgins v. Smith, 308 U. S. 473 (1940) 73
Hurwitz v. Hurwitz, 136 F. 2d 796 (App. D. C., 1943) 85, 86

Jacuzzi Bros. v. Berkeley Pump Co., 191 F. 2d 632 (C. A. 9, 1951) 84
James Estate, In re, 86 N. Y. S. 2d 78 (Surr. Ct., 1948) 41

Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148 (1919) 41
Keenan v. Eshleman, 23 Del. Ch. 234, 2 Atl. 2d 904 (S. Ct., 1938) 36
Kelley v. Everglades Drainage District, 319 U. S. 415 (1943) 84
Kennedy v. Emerald Coal & Coke Co., 42 Atl. 2d 398 (S. Ct., Del., 1944) 36
King, Matter of, 183 N. Y. 440 (1906) 86
Kistler v. Giggles, 171 F. 2d 912 (C. A. 8, 1949) 84
Klaxon Co. v. Stentor El. Mfg. Corp., 313 U. S. 487 (1941) 37
Kupperman v. M. & J. Becker, Inc., 198 F. 2d 765 (C. A. 2, 1952) 84

Leslie v. Commercial National Bank in Shreveport, 28 F. Supp. 927 (D. C., W. D. La., 1939) 45, 46, 64

Mahler v. Oishei (N. Y. Co. Index No. 28485, N. Y. Sup. Ct., Nov. 12, 1947), reviewed 61 Harvard L. Rev. 1058 (1948) 46
Marian v. Mariani, 276 App. Div. 205, 93 N. Y. S. 2d 370 (1st Dept., 1949) 36, 38, 43, 44
Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp., 173 F. 2d 416 (App. D. C., 1949) 36, 37
Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310 (1940) 85
McClure v. O. Henry T. & A. Co., 184 F. 2d 636 (C. A. 7, 1950) 84
Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545 (1928) 45
Mississippi Pub. Co. v. Murphree, 326 U. S. 438, 444 (1946) 86

PAGE

Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300 (1937) 35

Oil Shares Inc. v. Commercial Trust Co., 304 U. S. 551 (1938) 84

Overfield v. Pennroad Corp., 42 F. Supp. 586 (D. C., E. D. Pa., 1941), rev'd on other grounds, 146 F. 2d 889 44

Park & Tilford v. Schulte, 160 F. 2d 984 (C. C. A. 2, 1947), cert. den. 332 U. S. 761 4

Pepper v. Litton, 308 U. S. 295 (1939) 36, 48

Potter v. Sanitary Co. of America, 22 Del. Ch. 110, 194 Atl. 87 (1937) 42

Reconstruction Finance Corp. v. Denver and R. G. W. R. Co., 328 U. S. 495 (1946) 11

Sausalito Bay Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 Pac. 57 (1913) 36

San Diego v. San Diego & L. A. R. Co., 44 Cal. 106 (1872) 36

Southern Pacific Co. v. Bogert, 250 U. S. 483 (1919) 41, 66

Title Ins. & Tr. Co. v. California Development Co., 171 Cal. 173, 152 Pac. 542 (1915) 36, 41, 66

Trinity Buildings Corp. v. Commissioner, 40 B. T. A. 1315 (1939) 88

Truncale v. Universal Pictures Co., 76 F. Supp. 465 (D. C., S. D. N. Y., 1948) 46, 47

United States v. Chemical Foundation, 272 U. S. 1 (1926) 89

United States v. Cleveland, P. & E. R. Co., 42 F. 2d 413 (C. C. A. 6, 1930) 57

Western Pac. R. Co., In re, 124 F. 2d 136 (C. C. A. 9, 1941) 5

Young v. Higbee Co., 324 U. S. 204 (1945) 64

TABLE OF STATUTES AND REGULATIONS

	PAGE
Bankruptcy Act, § 77	5
Federal Rules of Civil Procedure, Rule 52	33, 39, 83, 85
Internal Revenue Act of 1918, § 240(a), 40 Stat. 1082	72
Internal Revenue Act of 1938, § 23(g), 52 Stat. 461	50
Internal Revenue Act of 1942, § 123, 56 Stat. 820	50
Internal Revenue Code, 26 U. S. C.:	
§ 23(g)(4)	6, 50, 51, 91, App. 93
§ 122(b)	7, App. 94
§ 141	6, 9, 51, 68, 73, App. 95
Judicial Code, 28 U. S. C.:	
§ 46(c)	28, 31
§ 1254(1)	2
§ 1291	2
§ 1332	2
Securities and Exchange Commission, Rule U-45(b)(6), 17 C. F. R. (1949), § 250.45(b)(6)	45, 74, App. 103
Treasury Regulation 104, 26 C. F. R. (1949), § 23:	
§ 23.12	6, 55, App. 99
§ 23.15	47, 56, 62, 73, App. 100
§ 23.16(a)	6, 25, App. 101

TABLE OF AUTHORITIES

PAGE

Federal Rules of Civil Procedure, Committee Note of 1946 to Rule 52(a) 86

3 Fletcher, Corp. (Perm. Ed., 1947), § 961, p. 433 41

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Restatement, Restitution (1937):

§ 1, Comment e, pp. 14-15 64
§ 197, Comment c, pp. 809-810 64

Senate Finance Committee, Report, 70th Cong., 1st Sess., S. R. 960 (1938) 52, 57

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
The Parties	2
Statement of Case	4
1. Plaintiff's $75,000,000 stock loss	4
2. Plaintiff's tax credit and its use to save taxes	5
3. The anomalous nature of respondent's retention of the tax saving and the denial of any tax benefit to plaintiff	8
4. Duality of Management	10
(a) Plaintiff's financial collapse and its dependence on respondent	10
(b) Plaintiff's stockholders (the James Interests)	11
(c) Plaintiff's officers	13
Michael J. Curry	13
John F. Wienken	14
Mary C. Valouch	14
(d) Plaintiff's directors	15
Thomas M. Schumacher	15
Catherine Sheehan	15
William W. Hatton	16
A. Perry Osborn	16
Willis D. Wood	16
H. Brau Campbell	16
(e) Plaintiff's lawyers	17
Pierce & Greer	17
Whitman, Ransom Coulson and Goetz	17

PAGE

5. Duality in action in the handling of the consolidated returns 19

(a) The returns for 1943 19

(b) The returns for 1944 21

(c) The refund claim for 1942 22

(d) Curry's preoccupation with respondent's interests 22

(e) The tax settlement with the Government 23

(f) Respondent's $10,100,000 reserve for this litigation 26

The Decision of the District Court 26

The Decision of the Court of Appeals 27

Assignment of Errors 29

Summary of Argument 31

POINT I—Respondent was under the fiduciary duty to deal fairly with plaintiff because of the duality of their managements 34

1. The interlock between the managements of plaintiff and respondent imposed upon respondent a fiduciary duty of dealing fairly with plaintiff in their tax transaction (the "duality rule"); the duty existed regardless of actual domination of plaintiff by respondent 34

2. The District Court found, contrary to the Court of Appeals, and the evidence demonstrates, that the conduct of plaintiff's tax affairs was dominated by respondent 38

3. Plaintiff did not create the managerial interlock with respondent; even if it had, respondent's fiduciary duties would have been the same 41

4. The absence of secrecy did not relieve respondent from the duty to deal fairly with plaintiff 42

PAGE

5. The alleged good faith of the dual officers did not relieve respondent from the duty to deal fairly with plaintiff 44

6. The fiduciary rule is applicable to tax transactions between fiduciary and *cestui* 45

POINT II—Respondent breached its fiduciary duty to deal fairly with plaintiff by taking all, and allowing plaintiff none of the tax benefits produced by the use of plaintiff's tax credit 48

A. The purpose of the tax laws was to benefit plaintiff, not respondent 49

1. The purpose of § 23(g)(4) of the Internal Revenue Code, in recognizing a stock loss as a tax credit, is to confer a tax benefit on the corporation which has suffered the loss 50

2. The purpose of the consolidated return statute, in permitting the losses of one affiliate to be offset against the profits of another affiliate, is to benefit the common owner of the group, i.e., the parent corporation 51

3. The Court below erred in holding that the tax laws were not designed for plaintiff's benefit 54

(a) In requiring the subsidiary's consent to the filing of consolidated returns, the tax laws do not indicate a purpose of conferring a tax benefit on the subsidiary 55

(b) The fact that consolidated returns may be filed in certain anomalous situations where the economic unity between parent and subsidiary is severed, does not indicate a statutory purpose to benefit the subsidiary rather than the parent 56

PAGE

(c) The Court of Appeals overlooked that tax savings payments are particularly justified in those situations where, because of the economic severance of the affiliates, the purpose of the tax laws is not automatically effectuated 59

B. Plaintiff's tax credit was a valuable assets which, in fairness, plainfiff could not be expected to surrender to respondent without receiving an adequate share of the resulting tax benefits 61

C. Plaintiff owed respondent no legal duty to file consolidated returns and thus to make its tax credit available to respondent 65

1. Plaintiff's ownership of respondent's stock did not impose fiduciary duties on plaintiff 65

2. The holding of the Court of Appeals that every affiliated corporation having a deductible loss owes its profitable affiliates a duty to join in consolidated returns has dangerous implications, is contrary to the tax laws and finds no support in fiduciary law 67

D. The alleged tax practice of the Western Pacific group in earlier years furnishes no precedent for a period in which the affiliation between plaintiff and respondent had ended 69

E. Agreement for the fair allocation of tax savings among affiliated corporations are permitted and well supported by precedent 72

1. Agreements for the allocation of tax savings are expressly permitted by statute and regulation 72

2. Agreements for the allocation of tax savings are well supported by precedent 74

PAGE

POINT III—The Court of Appeals erred in making findings of fact where the District Court had made none or had made contrary findings 81

POINT IV—The grounds upon which the District Court based its decision were erroneous 87

A. Plaintiff's alleged inability to recover because of the injustice of respondent's tax savings 87

1. The Government was not unjustly deprived of taxes 87

2. The Government's tax claim, if any, has been validly and properly settled 89

3. Even if the tax settlement had been a wrong against the Government, it would not defeat plaintiff's rights 89

B. Plaintiff's claim is not inconsistent with respondent's reorganization plan 90

CONCLUSION 92

APPENDIX: Text of Statutes and Regulations Cited

Internal Revenue Code:

§ 23 93

§ 122 94

§ 141 95

Treasury Regulation 104, 26 C. F. R. (1949), § 23:

§ 23.12 99

§ 23.15 100

§ 23.16 101

Securities and Exchange Commission, Rule U-45, 17 C. F. R. (1949), § 250.45 103

TABLE OF CASES

PAGE

Almeda Investment Co. v. McLaughlin, 28 F. 2d 81 (D. C., N. D. Cal., 1928), aff'd 33 F. 2d 120 (C. C. A. 9, 1929) 53, 54
Alexander v. Theleman, 69 F. 2d 610 (C. C. A. 10, 1934) 36
Allied Chemical & Dye Corp. v. Steel & Tube Co., 14 Del. Ch. 1, 120 Atl. 486 (1923) 66
Alprosa Watch Corp. v. Commissioner, 11 T. C. 240 (1948) 61
Atlantic City Electric Co. v. Commissioner, 288 U. S. 152 (1933) 53

Banco Kentucky Co.'s Receiver v. National Bank of Kentucky's Receiver, 281 Ky. 784, 137 S. W. 2d 357 (1939) 42
Barney v. Saunders, 16 How. (57 U. S.) 535 (1853) 90
Blaustein v. Pan American P. & T. Co., 263 App. Div. 97, 31 N. Y. S. 2d 934 (1st Dept., 1941), aff'd 293 N. Y. 281, 56 N. E. 2d 705 (1944) 66
Blum v. Fleishhacker, 21 F. Supp. 527 (D. C., N. D. Cal., 1937), mod. and aff'd 100 F. 2d 543, cert. den. 311 U. S. 665 ..... 43, 44

Campbell v. Campbell, 170 F. 2d 809 (App. D. C., 1948) 84
Case v. Los Angeles Lumber Co., 308 U. S. 106 (1939) 90
Certain-Teed Products Corp. v. Topping, 171 F. 2d 241 (C. A. 2, 1948) 64
Chelrob v. Barrett, 293 N. Y. 442, 57 N. E. 2d 825 (1944) 36, 37, 38, 42, 43, 44
Cities Service Co., Matter of (S.E.C. Holding Company Act Release No. 5535, January 3, 1945, File No. 70-933) 74, 76, 79
Clarke v. Greenberg, 296 N. Y. 146, 71 N. E. 2d 443 (1947) 64
Commercial National Bank in Shreveport v. Connolly, 176 F. 2d 1004 (C. A. 5, 1949) 45, 46

PAGE

Commercial National Bank in Shreveport v. Parsons, 144 F. 2d 231 (C. C. A. 5, 1944), reh. den. 145 F. 2d 191, cert. den. 323 U. S. 796 ..... 45, 46, 64
Connolly v. Commercial Nat. Bank in Shreveport, 189 F. 2d 608 (C. A. 5, 1951) 45
Consolidated Electric & Gas Co., Matter of, 15 S.E.C. 161 (1943) 51, 75, 76
Consolidated Rock Products Co. v. DuBois, 312 U. S. 510 (1941) 66, 67

Doyle v. Hamilton Fish Co., 234 Fed. 47 (C. C. A. 2, 1916) cert. den. 243 U. S. 649 86
Duke Power Co. v. Commissioner, 44 F. 2d 543 (C. C. A. 4, 1930), cert. den. 282 U. S. 903 ..... 52, 55, 68

Eeker v. Western Pac. R. Corp., 318 U. S. 448 (1943) 5, 92
Ewen v. Peoria & E. R. Co., 78 F. Supp. 312 (D. C., S. D. N. Y., 1948), cert. den. 336 U. S. 919 48

Fleishhacker v Blum, 109 F. 2d 543 (C. C. A. 9, 1940), cert. den. 311 U. S. 665 64

Geddes v. Anaconda Copper Mining Co., 254 U. S. 590 (1921) 35, 38

Geddes v. Anaconda Copper Mining Co., 245 Fed. 225 (C. C. A. 9, 1917), rev'd on other grounds, 254 U. S. 590 35
George A. Fuller Co. v. Commissioner, 92 F. 2d 72 (C. C. A. 2, 1937) 88
Globe Woolen Co. v. Utica G. & E. Co., 224 N. Y. 483, 121 N. E. 378 (1918) 36
Goodacre v. Panagopoulos, 110 F. 2d 716 (App. D. C., 1940) 85
Goodell v. Verdugo Cañon Water Co., 138 Cal. 308, 71 Pac. 354 (1903) 36, 43
Gregory v. Helvering, 293 U. S. 465 (1935) 73

ing companies,* acquired 61% of plaintiff's common and 8.8% of its preferred stock (R. 501), constituting control. By 1943 plaintiff's common stock, ranging behind more than $38,000,000 of preferred (R. 1717), had become completely worthless.

But the James Interests also held large amounts of the secured obligations of respondent (R. 1718) which, under the reorganization plan, entitled them to 28% of the to-be-issued stock of respondent (Pl. Ex. 1).** It was therefore to the advantage of the James Interests to favor respondent, not plaintiff. Thus if the tax savings here involved enured to respondent, the James interest therein was 28%; while it was only 8.8% if the tax savings went to plaintiff.

The James Interests acted in accordance with their advantage: They abandoned plaintiff and cast their lot with respondent. They decided to support respondent's reorganization plan (R. 618) which theretofore they had opposed (R. 536-7). They decided to withhold further advances to plaintiff (R. 575-6); the James representatives on plaintiff's board retired (R. 1480); and at plaintiff's annual meetings the James stock was neither represented nor voted (Pl. Ex. 19, R. 503; Def. Ex. 54, R. 1632, 2053-2069). Plaintiff was thus deprived of that measure of protection and supervision which a vigilant controlling stockholder ordinarily would exercise over a corporation's management.

Plaintiff's 4700 public stockholders (R. 659), scattered throughout the country (R. 659), were forced into equal inactivity since plaintiff was too impoverished even to

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* Arthur Curtiss James died in 1941 (R. 745). He, his estate, his personal holding companies (R. 503) and the James Foundation of New York, Inc. (R. 1011) are herein referred to as the "James Interests".

** Under the plan, the James Interests were entitled directly to 21½% of the respondent's new voting stock (R. 975) and, in addition, to convertible bonds of respondent which the James Interests subsequently converted into voting stock of respondent (R. 1718; see R. 1725-8), giving them an aggregate of 28%.

send out proxies or proxy statements for its annual meetings (Def. Ex. 54, R. 1632, 2053-2069). None of those meetings was therefore attended by a quorum (Pl. Ex. 19; R. 503).

The protection of plaintiff's interests was thus left entirely to the integrity and vigilance of its officers and directors.

(c) *Plaintiff's officers.* During the period in which the consolidated tax returns and the refund claim were filed—1944 and 1945—plaintiff had only two officers: Its president *Curry* and its secretary *Wienken*, later replaced by *Valouch* (R. 1719).

Michael J. Curry was not only the president, treasurer and a director of plaintiff throughout the critical period (R. 1719, 1720) but, at the same time, also a vice-president, a director and a member of the executive committee of *respondent* (R. 719, 1724).*

With all his titles, Curry considered himself merely a "figurehead" (R. 646-7). His actual position was, and had been since 1927, simply that of chief clerk or office manager (R. 639); he was "merely a signing officer" (R. 641, 1450) and signed whatever documents Schumacher (*respondent's* chairman) or Elsey (*respondent's* president) told him to sign (R. 642).

From June 1, 1943 Curry's entire compensation was paid by *respondent* (R. 1738); nothing whatever by plaintiff (R. 645).

After the closing of the New York office on April 30, 1945, *respondent* arranged for Curry to move to the offices of Whitman Ransom Coulson and Goetz, respondent's tax counsel (R. 1287-8), and for them to pay him a $3,000 annual "retainer", because Curry's services "as president of the old holding company" (i.e., plaintiff) were "essential"

* Curry resigned as respondent's vice-president on April 30, 1945 (R. 1724) and as respondent's director on November 20, 1944 (R. 719).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

Opinions Below

The decision of Goodman, D.J., in the United States District Court for Northern California, Southern Division (R. 258), dismissing the action after a trial without jury, is reported 85 F. Supp. 868.

The District Court's decision was affirmed on appeal. The prevailing and dissenting opinions in the United States Court of Appeals for the Ninth Circuit, both on the appeal

itself and on petitions for rehearing (R. 2214, 2239, 2260, 2261, 2289, 2296), are reported 197 F. 2d 994.

A supplemental dissenting opinion (R. 2313) has not yet been reported.

Jurisdiction

The District Court's jurisdiction was predicated on diversity of citizenship and presence of the jurisdictional amount; 28 U. S. C., § 1332. The jurisdictional facts are alleged in the Complaint (R. 6) and admitted in the Answers (R. 12, 117-8).

The jurisdiction of the Court of Appeals rested on 28 U. S. C., § 1291.

The jurisdiction of this Court rests on 28 U. S. C., § 1254(1). The judgment of the Court of Appeals was entered October 29, 1951 (R. 2255). A timely petition for rehearing, filed December 17, 1951, was denied on January 30, 1952 (R. 2256-7, 2259-60). On April 24, 1952, by order of Mr. Justice Douglas, petitioners' time to file a petition for certiorari was extended to June 27, 1952. The petition for a writ of certiorari was filed June 26, 1952, and granted October 13, 1952.

The Parties

This action was brought by the plaintiff Western Pacific Railroad *Corporation* (hereinafter called the "plaintiff" or the "Corporation"). The defendants, respondents here, are the Western Pacific Railroad *Company* (hereinafter called "respondent" or the "Company")* and certain of its subsidiaries. The latter have comparatively minor stakes in this litigation.

* With respect to the period from November 1935 to December 1944, the reference to "respondent" or the "Company" will include its reorganization trustees in whose hands, during that time, were respondents' assets and affairs. Respondent, upon emerging from its reorganization, assumed the obligations of the trustees (Pl. Ex. 15, R. 499, 1712, 1713).

The petitioners here are preferred stockholders of plaintiff, owning 25,465 shares of plaintiff's preferred stock (R. 1650-2); about 6.7% of all of the preferred outstanding (R. 1717). Petitioners became stockholders of plaintiff between July 1942 and February 1944, long before the transactions complained of (R. 1650-2).

Petitioners were permitted to intervene in this action as parties plaintiff (R. 122). Plaintiff as well as petitioners appealed from the adverse decision of the District Court (R. 326-7); and, after the affirmance by the Court of Appeals, both were granted certiorari by this Court.

In the light of the able and learned brief submitted by counsel for plaintiff, we would hesitate to burden this Court with an additional memorandum were it not for certain differences in presentation and analysis which we consider as important. The differences arise from the history of the litigation and the peculiar position of these petitioners.

In June, 1946—prior to this action—the petitioners instituted a stockholders' action in the federal District Court for Southern New York, in which the claim involved herein (in addition to other claims) was asserted for the first time (R. 337, 706-7, 1024). The New York complaint alleged, in short, that plaintiff and respondent had interlocking managements; that plaintiff was controlled by respondent's agents; that these facts created a fiduciary relation between plaintiff and respondent, requiring respondent to deal fairly with plaintiff; and that respondent, in certain tax transactions with plaintiff, had breached its fiduciary duty to plaintiff by appropriating all benefits of the transactions to itself and allowing none to plaintiff.

After the legal sufficiency of the New York complaint had been sustained (R. 337), plaintiff's management and attorneys (named as defendants in New York) caused the Corporation to bring the present action on October 10, 1946, complaining of the same tax transactions with respondent (R. 5).

Plaintiff, however, failed to allege the managerial interlock between the parties or the control of plaintiff by respondent's agents. Accordingly, we moved for leave to intervene herein on the ground that plaintiff's management inadequately represented the rights of plaintiff and its stockholders; and this motion was granted on April 7, 1947 (R. 122).

Our intervenors' complaint (R. 123) alleged the facts, omitted by plaintiff, establishing what we conceive to be the all-important fiduciary relation between plaintiff and respondent. Plaintiff at first denied these allegations and put us to our proof * (R. 156); later on plaintiff adopted certain of our allegations, but not those referring to its own personnel (R. 208); until finally plaintiff's present counsel, retained on the eve of trial, likewise proclaimed the existence of the fiduciary relation.

Nonetheless, substantial differences still exist between plaintiff and petitioners in the presentation and analysis of the factual basis and the legal effect of this fiduciary relation. As intervenors, we are not bound by any admissions of plaintiff, *Park & Tilford v. Schulte*, 160 F. 2d 984, 988-9 (C. C. A. 2, 1947), cert. den. 332 U. S. 761. We are therefore impelled to submit this separate brief in which, appearing on behalf of stockholders (not management), we can let the chips fall where they will.

Statement of Case

1. Plaintiff's $75,000,000 stock loss.

In 1916 plaintiff, a holding company, acquired all the stock of respondent, an operating railroad company (R. 493). Plaintiff's investment in respondent's stock was more than $75,000,000 (R. 262).

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* The petitioners accepted this invitation, as demonstrated by the extensive depositions (R. 275) which produced the evidence at the trial.

In 1935 respondent went into bankruptcy reorganization (Bankruptcy Act, § 77) in the District Court for Northern California, Southern Division. Its property was placed in the hands of two court-appointed trustees (R. 494). In 1939 the Interstate Commerce Commission promulgated a plan of reorganization (233 I. C. C. 409) which declared that respondent's stock held by plaintiff was worthless and not entitled to share in the assets of the reorganized Company (R. 259, 495). Under the plan the secured creditors of respondent were to become its new owners and were to receive all of its stock, when issued.

This reorganization plan was approved by the District Court in 1940 (R. 259). Although reversed on appeal, *In re Western Pac. R. Co.*, 124 F. 2d 136 (C. C. A. 9, 1941), the plan was, on March 15, 1943, reinstated and affirmed by this Court and thus became final; *Ecker* v. *Western Pac. R. Corp.*, 318 U. S. 448 (1943). In due course, the plan was confirmed on October 11, 1943 (R. 260); and it was consummated on December 29, 1944 when the reorganization trustees returned the assets to respondent and respondent issued its new securities in accordance with the plan (R. 499, 2000).

The results of respondent's reorganization were shattering to plaintiff. Its principal asset, the $75,000,000 investment in respondent's stock, was totally lost. The loss was irretrievable; for however prosperous respondent might become in the future, plaintiff had no part therein. From March 15, 1943—the date of this Court's affirmance of the reorganization plan—the economic unity between plaintiff and respondent was severed: plaintiff and respondent became and remained complete strangers to each other.

2. Plaintiff's tax credit and its use to save respondent's taxes.

Staggering as plaintiff's loss was, it presented one mitigating feature: The amount of the loss could be used as an income and excess profits tax deduction. The right to this tax credit was created by Internal Revenue Code,

§ 23(g)(4),* enacted in 1942 (56 Stat. 820), which provided that losses resulting from the worthlessness of the stock of an affiliate are to be treated as operating losses (rather than as capital losses as theretofore).

But plaintiff was not allowed to derive any benefit from this tax credit. Instead, the entire benefit was reaped by respondent. This was accomplished through the mechanics of consolidated tax returns.

(a) Consolidated tax returns may be filed by an affiliated group of corporations headed by a common parent and inter-connected by at least 95% stock ownership (Internal Revenue Code, § 141). In such a consolidated return the affiliated group is treated, for tax purposes, as a single enterprise, so that the losses sustained by any one or more affiliates are deducted from the profits realized by the other affiliates. Only if the group as a whole realizes a net profit is a tax payable thereon.

A consolidated return can be filed only by the parent corporation of the group; and it requires the consent of all affiliates. Treas. Reg. 104, § 23.12(b) and § 23.16(a), 26 C. F. R. (1949), § 23.12(b) and § 23.16(a).

(b) Plaintiff, as stated, owned all of respondent's stock. Although this Court's decision of March 15, 1943, had rendered the stock economically worthless, the stock was still legally valid because respondent's reorganization was not yet consummated. Plaintiff continued to own the stock until April 30, 1944, on which date plaintiff surrendered it to respondent's reorganization committee (R. 260). This legal stock ownership made it possible for plaintiff to file consolidated tax returns for itself and respondent, covering the year 1943 and the first four months of 1944 (see *infra*, pp. 57-58).

During this period respondent had realized very substantial profits from its war-time railroad operations. Ordi-

* The text of the statutes and regulations cited is set forth in the Appendix of this brief.

narily respondent would have had to pay a huge tax—more than $17,000,000—on its profits (R. 262). But there was an alternative to the payment of this tax: If plaintiff filed consolidated tax returns, plaintiff's tax credit arising from its stock loss could be offset against respondent's profits, and no tax would be payable. This possibility of offsetting plaintiff's loss against respondent's profits existed not only in the year 1943, in which plaintiff's stock loss had occurred; but plaintiff's tax credit could also be "carried back" to 1942 and "carried forward" to 1944 (Internal Revenue Code, § 122(b)).

(c) The opportunities offered by the tax laws were utilized. Under circumstances to be detailed below, respondent caused plaintiff to file consolidated returns for 1943 and the first four months of 1944.* These returns (Pl. Exs. 4-A, 4-B, 5-A, 5-B) claimed plaintiff's stock loss as a complete offset to respondent's earnings; hence they reported no tax as due; and respondent paid no taxes for these periods (R. 266-7).

Nor was this all. Respondent had paid $4,201,821.54 in taxes for 1942 (Pl. Ex. 6; R. 492, 1654-6). But the carry-back of plaintiff's stock loss to 1942 would eliminate all of respondent's tax liability for that year. Accordingly, plaintiff filed a claim with the Government for the refund of these $4,201,821.54 (Pl. Ex. 6; R. 492, 1654).

These documents—the consolidated returns and the refund claim—were each filed after March 15, 1943, the date of the economic severance of plaintiff and respondent, namely:

the 1943 returns on July 15, 1944;
the 1942 refund claim on March 9, 1945;
the 1944 returns on June 15, 1945.

(Pl. Exs. 4-A, 4-B, 5-A, 5-B, 6; R. 491-2.)

* For brevity, the returns for the first four months of 1944 are hereinafter referred to as the "1944 returns".

(d) The Government did at first dispute the propriety of deducting plaintiff's stock loss, principally on the ground that the loss had occurred in 1940 and was therefore inadmissible as a deduction against 1943 income (R. 267, 1423-8). Finally, however, in August 1947, the Government consented to a settlement; plaintiff agreed to the rejection of its refund claim for 1942, while the Government acquiesced in the 1943 and 1944 tax returns showing no tax due (R. 171-5, 262-3).

The District Court found that, but for the use of consolidated returns and the deduction of plaintiff's stock loss, respondent would have had to pay more than $21,000,000 in taxes for the period 1942 to 1944 (R. 261-2, 265). As a result of the settlement, respondent paid only about $4,000,000, so that it realized a net tax saving of more than $17,000,000 (R. 266-7).

All of these savings were retained by respondent. Plaintiff has obtained none.

3. The anomalous nature of respondent's retention of the tax saving and the denial of any tax benefit to plaintiff.

(a) Normally the tax credit arising from a stock loss—such as that sustained by plaintiff—redounds to the benefit of the party who suffered the loss. This is as it should be, since the tax deduction is designed to mitigate the loss.

Normally, this reasonable result obtains also where a parent corporation, by filing consolidated returns, deducts its loss from the earnings of a subsidiary. For the tax saving of the subsidiary redounds automatically—through the payment of dividends or through the increased value of the parent's equity in the subsidiary—to the benefit of the parent which, in an economic sense, owns the assets of the subsidiary. Again this accords with the purpose of the tax law which permits consolidated returns in order to give the parent, as the owner of the group, the benefit of all group losses, both its own and its subsidiaries'.

But this normal and intended result of the operation of the tax laws (more fully discussed *infra*, pp. 50 et seq.) completely failed in the case at bar. At the time the consolidated returns here were filed, plaintiff's stockholdings in respondent had been declared worthless by this Court; the economic relationship between plaintiff and respondent had been severed; and plaintiff derived no benefit whatever from any tax savings flowing to respondent. The purpose of the tax laws was thus perverted: The prosperous respondent obtained a wholly gratuitous deduction for a loss which it had never suffered; while the intended automatic upstream flow of respondent's tax saving to its parent, the plaintiff, was prevented by the economic severance of the parties. Plaintiff's stock loss remained unalleviated by any tax advantage; while respondent obtained an undeserved and unmotivated tax windfall.

(b) Plaintiff nevertheless had the means to cause the tax benefits to go where, in justice and by the spirit of the tax law, they belonged, namely, to plaintiff. For plaintiff had, as a matter of law, a free choice whether or not it would file consolidated returns (R. 1458).* Before filing consolidated returns plaintiff's management could have made suitable arrangements with respondent concerning the ultimate disposition of the resulting tax savings—a type of arrangement both legal and by no means unusual (*infra*, pp. 72 et seq.). If respondent was willing to do equity it was bound to agree that the tax benefits flowing from plaintiff's $75,000,000 loss should belong to plaintiff in order to mitigate that loss. If respondent insisted on its pound of flesh, plaintiff could at least have made sure that it would

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* Under Internal Revenue Code, § 141(a), the filing of consolidated returns is a "privilege" the exercise of which is optional. The fact that plaintiff had filed consolidated returns in earlier years, did not prevent it from filing separate returns for 1943 and 1944; 2 *Montgomery's Federal Taxes, Corporations and Partnerships* (1946-47), 649-650.

receive an appropriate portion of the tax savings. Under no circumstances was respondent in a position to demand that all the tax savings be given to it and that plaintiff get nothing.

And yet this is precisely what was done. Although virtually all of the tax savings were, by the intent of the tax law and by every instinct of reason and equity, intended to mitigate plaintiff's loss; and although none of the savings could have been accomplished without plaintiff's filing consolidated returns and the use of plaintiff's tax credit; nevertheless plaintiff was not allowed to receive one cent. Respondent was permitted to retain for itself the entire $17,000,000.

4. Duality of Management.

This complete and abject surrender of plaintiff's interest to respondent has a simple explanation: The allegiance of plaintiff's management to respondent. In short, during the critical period in which the consolidated returns were filed, plaintiff's officers were actually subordinate employees of respondent; a majority of plaintiff's board of directors were employees of respondent; plaintiff's lawyers were simultaneously lawyers for respondent. All compensation paid to these persons was paid solely by respondent, not one cent by plaintiff. These were the people who were charged with the responsibility of protecting plaintiff's interests in its relation to respondent.

The duality of allegiance of plaintiff's management forms an important basis of our claim; it created the fiduciary relation and respondent's duty to deal fairly with plaintiff. The facts must therefore be stated in somewhat more detail.

(a) *Plaintiff's financial collapse and its dependence on respondent.* This Court's affirmance of respondent's reorganization plan on March 15, 1943 left plaintiff as an

empty corporate shell. Its assets were pledged with creditors; it had no income; it had no funds (Pl. Ex. 47; R. 570, 573, 789-790). Its principal investment, the stock of respondent, was declared worthless. At the same time, its only other substantial asset, a one-half interest in the stock of the Denver Railroad, was eliminated by the latter's reorganization plan (R. 575).* As one of plaintiff's directors put it, plaintiff had become a "corporation without assets", a mere "non-entity" (R. 1130-1).

From the early days of their affiliation, plaintiff and respondent had maintained a joint office in New York, staffed by common employees (R. 643). On June 1, 1943, on the heels of this Court's decision, respondent assumed the whole expense of the New York office and took over plaintiff's officers as "full time employees" of respondent (Pl. Ex. 30, R. 527, 1738). The individuals thus taken over by respondent nevertheless remained the officers of plaintiff, but received their compensation solely from respondent, nothing from plaintiff (Pl. Ex. 23, R. 520, 1721; Pl. Ex. 27, R. 523, 1729-33). On April 30, 1945, at respondent's direction, the New York office was closed (R. 650) and plaintiff's officers and records were quartered at the offices of Whitman Ransom Coulson and Goetz, respondent's New York tax counsel (R. 651-2, 655).

Plaintiff's financial collapse, as will be seen, had its inevitable effect upon plaintiff's officers, directors and lawyers. Even plaintiff's dominant stockholder, finding its economic stake in respondent much larger than that in plaintiff, switched its allegiance to respondent.

(b) *Plaintiff's stockholders (the James Interests).* In 1925, one Arthur Curtiss James, through his personal hold-

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* The Denver's reorganization plan, approved by the I. C. C.'s order of June 14, 1943 (254 I. C. C. 349, 385), was subsequently affirmed by this Court, *Reconstruction Finance Corp.* v. *Denver and R. G. W. R. Co.*, 328 U. S. 495 (1946).

"in connection with the pending tax questions which your company [i.e., respondent] has up with the Federal Government" (Pl. Ex. 32-A, R. 528, 1744). Respondent agreed to reimburse Whitman Ransom for these retainer payments "as one of our disbursements in connection with the pending tax matters" (R. 1746, 1288). Thus *respondent* paid Curry in order that, as *plaintiff's* president, he might help *respondent* in its tax matters. Respondent also paid Curry a small pension (R. 653). Curry remained with the Whitman Ransom firm until the latter part of 1948 (R. 656).

During the time when Curry should have safeguarded plaintiff's interest against encroachments by respondent, he was thus an officer and director of respondent and his livelihood depended on respondent.

John F. Wienken was plaintiff's only other officer, to wit, its secretary; and he remained such until May 1, 1945 (R. 1719). He was also a director of plaintiff until April 25, 1946 (R. 1720). Although adorned with these weighty titles, Wienken was actually a stenographer (R. 648) employed by both plaintiff and respondent in the joint New York office. Since June 1, 1943, his $2,875 annual salary was paid solely by *respondent* (R. 1735, 1738).

Mary C. Valouch became the secretary and a director of plaintiff on May 1, 1945, upon Wienken's resignation and the closing of the New York office (R. 1719, 1720). For many years before that date, Valouch had been a clerk in the employ of *respondent* (R. 530); she handled the Western Pacific tax matters and did secretarial work (R. 647). Since June 1, 1943 she received her salary—less than $3,000 annually—solely from *respondent* (R. 1735, 1738). Upon the closing of the New York office and her appointment as secretary and a director of plaintiff, she moved—together with Curry—to the Whitman Ransom firm and became its employee (R. 530, 652).

Each of the three officers of plaintiff—Curry as president, and Wienken, succeeded by Valouch, as Secretary—was thus during the critical period in the employ and pay

of respondent and subject to the inevitable tug of loyalty to his paymaster. By the very nature of their employment they were nothing but dummies and figureheads.

(d) *Plaintiff's directors.* Nine persons were; during all or part of the critical period from 1944 to 1945, directors of plaintiff: Curry, Wienken, Valouch (from May 1, 1945), Schumacher, Sheehan (from February 15, 1944), Hatton, Osborn, Wood and Campbell (until May 1, 1945) (Pl. Ex. 22, R. 1720).

Three of these—Curry, Wienken and Valouch—have been discussed and their financial dependence on respondent shown.

Thomas M. Schumacher was the real "boss" of the New York office before and during the critical period (R. 639, 736). Since 1927 he had been the chief executive officer and a director of both plaintiff and respondent (R. 735); and in 1935 the bankruptcy court appointed him as one of the two reorganization trustees of *respondent* (R. 735). On February 1, 1942—before the critical period of the consolidated returns here involved—Schumacher resigned as plaintiff's president because of plaintiff's inability to pay his $15,000 salary (R. 743). Nevertheless, in his capacity as trustee for *respondent* (R. 738-9), Schumacher continued "in command of the New York office" (R. 736) until December 31, 1944, when respondent emerged from the reorganization and Schumacher retired (R. 1724) with a $12,000 pension from *respondent* (Pl. Ex. 34-C, R. 532). Although no longer an officer of plaintiff, Schumacher continued as a member of its board of directors until his death in early 1948. Throughout the critical period Schumacher was paid only by *respondent*, not by plaintiff (R. 645).

Catherine Sheehan was the telephone operator, receptionist and filing clerk in the joint New York office (R. 647, 1138). Her $2,000 salary was paid solely by *respondent* (R. 1138-9, 1738). She was elected to plaintiff's board

in order to fill a quorum (R. 1139), never took part in the discussions of the board and, in casting her vote, simply followed the majority (R. 1140).

William W. Hatton was a minor officer of the Denver Railroad (R. 1134), charged with "purely clerical" duties at a salary of $4,500 (R. 1137). Schumacher, bankruptcy trustee of *respondent*, was his "superior and chief" (R. 1135). Hatton—like Sheehan—was elected to plaintiff's board in order to fill a quorum (R. 1137-8); he never participated in board discussions and simply voted with the majority (R. 1136).

A. Perry Osborn was not only a director of plaintiff since 1937 (R. 988), but also a director and member of the executive committee of *respondent* to November 20, 1944 (R. 992).

Willis D. Wood was a long time friend of Arthur Curtiss James, at whose request he had joined plaintiff's board (R. 1123). During the period 1943-45, Wood and his family owned substantial amounts of *respondent's* securities (Int. Ex. 11, R. 2138-2141), but none of plaintiff's, except qualifying shares (Pl. Ex. 17, R. 501, 1717). Since this Court's decision of March 15, 1943, he considered plaintiff a "nonentity", so that "there was no action necessary on my part, and hence I did not give it the attention that I did in former years" (R. 1130-1).

H. Brua Campbell, an attorney, was a partner of the New York law firm of Pierce & Greer (R. 532-3), who, as will presently be stated more fully, were attorneys for both plaintiff and respondent during the critical period 1944 and 1945, but received their compensation solely from *respondent*, nothing from plaintiff.

A clear majority of plaintiff's directors—Curry, Wienken, Valouch, Schumacher, Sheehan, Osborn and Campbell—thus owed their allegiance to respondent. All of those just named (except Osborn) received their pay solely from respondent, nothing from plaintiff. And even the two remaining directors (Wood and Hatton) were likewise by interest and allegiance oriented to respondent.

(e) *Plaintiff's lawyers.* Two New York law firms acted for plaintiff during the critical period *: Its general counsel, Pierce & Greer; and the firm of Whitman Ransom Coulson and Goetz, as tax lawyers.

Pierce & Greer. This firm, composed of *H. Brua Campbell* and *Frank C. Nicodemus* (R. 532-3), acted not only as general counsel for plaintiff (R. 533), but simultaneously as attorneys for *respondent* and its trustees (R. 533-6, 793). Their representation of respondent continued throughout 1945 (R. 1119-21, 2150). Since June 1, 1943 they received no compensation from plaintiff (R. 1723). They did receive an annual retainer from *respondent's* trustees and additional fees from *respondent* (R. 534-8, 1730-1, 1738).

Respondent and its bankruptcy trustees never made any bones about their conception of the duties of the Pierce & Greer firm in tax matters: They looked to the firm "to cooperate with Mr. Matthew, general counsel for the Trustees [of *respondent*], in protecting the trust estate [i.e., *respondent*] in the preparation of the final return" (Pl. Ex. 39-A, R. 543-4).

Much later, on October 10, 1946 (simultaneously with the commencement of this action), Nicodemus became a director of plaintiff.

Whitman Ransom Coulson and Goetz. In March 1943 this firm was retained, by the trustees for *respondent*, as tax counsel for the Western Pacific group, including both plaintiff and respondent (Pl. Exs. 39-A to 39-F, R. 543-548; R. 556). The firm continued as tax counsel for plaintiff until at least 1947 (R. 1438-41); and they still are tax counsel for respondent (R. 1438).

The partners in charge of the tax work were *Robert E. Coulson* and *James K. Polk* (R. 1399). Coulson was, since

* A California attorney, Judge Marcus C. Sloss, was retained by plaintiff in 1934 solely to represent its interests as a stockholder and unsecured creditor in the reorganization proceedings of respondent, by opposing the I. C. C.'s plan of reorganization (R. 1603, 1611). He had nothing to do with plaintiff's taxes (R. 1603-4).

October 1943, a member of *respondent's* Reorganization Committee (Pl. Ex. 10, R. 496, 1674, 1675-6) and since December 28, 1944, a member of *respondent's* board of directors (R. 548).

The firm's compensation for its tax work was paid exclusively by *respondent* (R. 548-557); nothing was paid by plaintiff (R. 1721). But the firm was tied to respondent by even more profound considerations.

For nearly twenty years the firm had been personal counsel to Arthur Curtiss James and general counsel to the various corporations created by him (R. 536, 962); Coulson was an officer and director of these corporations (R. 964). As attorney for the A. C. James Company, Coulson took an active part in all steps of respondent's reorganization (R. 963). By reason of their large financial stake in defendant, the James Interests, represented by Coulson's firm, were vitally interested in *respondent's* welfare, including its taxes (R. 965); while, since the Supreme Court's decision of March 15, 1943, their interest in plaintiff was negligible; so that, as we have shown, the James Interests cast their lot with respondent and abandoned plaintiff (*supra*, pp. 11-12).

It is therefore understandable—although hardly excusable—that Polk, while attorney for both plaintiff and respondent, thought "my responsibility was to them [respondent] and not to the corporation [plaintiff]" (R. 1431). This distorted view of a lawyer's duty to his client accorded with Coulson's ante-litem expression that his firm was dealing with the tax matters "in behalf of The Western Pacific Railroad Company [i.e., respondent]" (R. 529) and that plaintiff was "without financial stake" in the consolidated returns (R. 1744). Indeed, even after this action and the New York stockholders' suit had notified Coulson of plaintiff's "financial stake", he persisted in taking sides with one client, respondent, against the other client, plaintiff. For on December 11, 1946—while he and his firm were still actively representing plaintiff in the tax matter (R. 1438-41)—Coulson assured counsel for respondent that

his interest was "solely in protecting the operating company" [i.e., respondent] in connection with this and the New York litigation (Int. Ex. 9, R. 717, 2133-4).

To summarize: Plaintiff's entire personnel—its principal stockholders, its officers, its directors and its lawyers—was infected with dual allegiance which was bound to prompt them, in any conflict of interest between plaintiff and respondent, to give their first and foremost loyalty to respondent. We proceed to show how the conduct of these persons in handling the tax transactions was actually influenced by their divided loyalties.

5. Duality in action in the handling of the consolidated returns.

The handling of plaintiff's tax matters for 1943 and 1944 confronted plaintiff with a number of grave questions: Should plaintiff make the tax credit arising from its stock loss available to respondent by filing consolidated returns? Would plaintiff derive any benefit from so doing? If not, was plaintiff entitled in fairness to any such benefits? Should plaintiff secure a fair share of the tax savings by insisting on an agreement with respondent giving it a fair share?

Important as these questions were, plaintiff was not permitted to pose, let alone to answer, them. Without so much as asking plaintiff, *respondent* made the decision that plaintiff was to file consolidated returns and make its tax credit available to respondent (R. 1448-1450, 1278). Plaintiff's role was confined to the mechanical, unquestioning and uninformed execution of respondent's decisions.

(a) *The returns for 1943.* The thought of utilizing plaintiff's stock loss as a tax deduction in consolidated returns was first suggested in Polk's letter of May 20, 1943, addressed to Curry as vice-president of *respondent* (Pl. Ex. 50, R. 521, 1757, 1760-1). The letter did not mention that plaintiff might have to be consulted.

By December 1943, Coulson and Polk were prepared to recommend definitely the adoption of Polk's suggestion (R.

1409-10). They made their recommendation—but only to *respondent*. Early in January, 1944, Polk traveled to the west coast where respondent's principal office was located, and there advised the trustees and officers of *respondent* that the use of plaintiff's stock loss in a consolidated return would eliminate all 1943 taxes (R. 1267-8, 1410-11, 1448).

Respondent, although quite unconcerned about plaintiff's concurrence in the plan, was concerned about the legal soundness of Polk's advice and therefore requested a formal opinion of the Whitman Ransom firm (R. 1268, 1411). On January 11, 1944 Coulson sent this opinion from New York to *respondent* (Pl. Ex. 54, R. 605)—with not even a copy to plaintiff (R. 665). The opinion assumed as a matter of course, that plaintiff would join in consolidated returns and would bestow upon respondent the tax benefits flowing from plaintiff's stock loss.

Respondent was satisfied with this opinion. Without bothering to ask for plaintiff's permission, respondent simply decided * to use plaintiff's tax credit to eliminate its own taxes (R. 1448). Respondent at once acted pursuant to this decision. It reversed, in January, 1944, tax accruals of about $7,500,000 theretofore placed on its books for 1943 (R. 873, 1770). In March 1944 it advised the bankruptcy court that no taxes would be payable for 1943 (Pl. Ex. 58, R. 619, 1772). And in May, 1944—still before the 1943 returns were filed—respondent stated in its report to stockholders that plaintiff "can and will" file consolidated returns in which plaintiff's stock loss "will result in elimination" of respondent's tax liability (Pl. Ex. 20-B, R. 512).

Who, then, decided on behalf of plaintiff that it "will" file such consolidated returns? Its board of directors did not; the 1943 tax matters were never presented to plaintiff's board, either for discussion or decision (R. 1018). Nor did its then two officers, its president Curry, and its secretary Wienken. The latter had nothing at all to do

* Respondent's decision (R. 1448) was made by Elsey, its president (R. 1251), and by DeGraff, its general auditor (R. 1408).

with taxes; and Curry was a mere "figurehead", a "signing officer", and completely ignorant of tax matters ("tax matters were wholly Greek to me. I didn't understand them at all * * *", R. 808).*

The method by which respondent caused plaintiff to file the consolidated returns for 1943 was simple. After *respondent* had resolved that plaintiff would file the consolidated returns utilizing its stock loss (R. 1448, 1278), such returns were prepared by Valouch (then a full time employee of *respondent*, but neither an officer or director of plaintiff), with the help of an accountant recommended by Polk (R. 1402), and under the supervision and consultation of Polk (R. 662-3). The completed returns were given by Valouch to Curry for his signature (R. 664). At Curry's question, Valouch assured him that Polk had approved the returns (R. 664). Thereupon Curry, without questioning Polk or his firm as to why plaintiff should endow respondent with the stupendous gift of this tax saving; without his asking or even thinking whether it would not be fair for plaintiff to receive the tax savings or at least a part thereof, as an offset against its huge loss; without giving any thought to the wisdom of retaining independent counsel to ascertain and protect plaintiff's rights against respondent; and without bothering to consult plaintiff's directors—Mr. Curry, the "signing officer", did just that: He signed (R. 664).

(b) *The returns for 1944.* The story for the 1944 returns is much the same as for the preceding year. Plaintiff's board was not consulted; it never considered or decided on the filing of consolidated returns (R. 1018). What happened was that on December 20, 1944 Coulson advised *respondent*—but not plaintiff—by telegram that "the only course open is to proceed as indicated in conversations

* Curry "supervised" the preparation of the returns (R. 830) only in the sense that he was the "office manager" (R. 639) and instructed the employees of the New York office as to their duties (R. 649). He never prepared a tax return (R. 659), tax matters being handled by Valouch (R. 659; Pl. Ex. 29, R. 527, 1737).

with you, including report on the consolidated basis up to May 1 [1944]" (Pl. Ex. 62, R. 623). Thereupon the decision to file consolidated returns for the first four months of 1944 was made by *respondent*—not by plaintiff (R. 1449-50). The returns were then prepared in Polk's office and brought to Curry for his signature (R. 666). At that time Curry had moved to the Whitman Ransom suite with instructions from Coulson to "put himself at Polk's disposal" (R. 1498); and this meant that, under his retainer, he, as plaintiff's president, was to perform such services as respondent would require to achieve and safeguard the tax savings for itself. Hence when Curry was told that Polk wanted him to sign the returns, he obliged—again without asking plaintiff's board of directors (R. 666).

(c) *The refund claim for 1942* was prepared with even less ceremony than the tax returns. Polk himself decided that plaintiff should file such a claim (R. 1450). He prepared the claim; placed it before "the proper signing officer", i.e., Curry, with the request for his signature (R. 1450); and Curry signed, again, of course, without benefit of consultation or approval by plaintiff's board of directors (R. 666-7).

(d) *Curry's preoccupation with respondent's interests.* That Curry, in signing, was preoccupied with respondent's interests, not plaintiff's, is indisputably established by his own contemporaneous statements. Plaintiff was confronted in February, 1945, with a possible forfeiture of its charter for non-payment of Delaware franchise taxes. Curry, in discussing the problem, gave serious consideration to it—but only with an eye to respondent's tax savings and their possible jeopardy; and without any thought to the interests of plaintiff and its stockholders. This is clearly stated in a letter from Curry, as plaintiff's president, to Nicodemus, copy to Polk (Int. Ex. 5, R. 705, 2125-7):

> "If we default and our charter is voided, the question arises what would be the effect on the consolidated income and excess-profits tax returns filed by the Cor-

poration, as parent, for the years 1942, 1943 and 1944. As you know, a very large deduction was taken in 1943, which wiped out any tax liability for that year and will also have an effect upon the 1942 and 1944 consolidated returns. I understand the total tax saving to The Western Pacific Railroad Company [i.e., respondent] will amount to about 15 million dollars. Therefore, I feel the payment or non-payment of these franchise taxes must be determined particularly from the Federal income tax angle.

"I would suggest that before arriving at a decision in this matter you confer with the firm of Whitman, Ransom, Coulson & Goetz, our tax counsel, who are aware of this situation and are considering the consequences which the non-payment of these franchise taxes would have from an income tax viewpoint."

The same thought had long before been expressed by Coulson and Polk.* Coulson therefore decided that plaintiff's franchise tax must be paid; and the A. C. James Company—departing in this instance from its policy of making no further advances to plaintiff (R. 575-6)—loaned plaintiff the funds to pay its franchise tax (R. 713).

(e) *The tax settlement with the Government.* The proceedings culminating in the 1947 settlement of the tax dispute with the Government further illustrate the extent to which respondent managed plaintiff's tax affairs with complete disregard of plaintiff.

In 1945 and the early part of 1946, an Internal Revenue agent audited the tax returns for 1942-1944 (R. 1419). For his discussions with the Government Polk needed a power of attorney from plaintiff (R. 1424). Polk drafted

* On May 26, 1943, Polk advised Nicodemus that plaintiff's "dissolution should be deferred * * * as tax aspects warranted" (Pl. Ex. 52, R. 601). On June 26, 1943, Coulson asked Polk whether "it would be embarrassing in the Western Pacific situation" if plaintiff's charter were cancelled for failure to pay its Delaware franchise tax; Polk replied "it is essential, to protect the possible use of the net loss carry-back, that the holding company [i.e., plaintiff] continue until the consummation of the reorganization" (Pl. Ex. 54, R. 592, 600).

such an instrument (Pl. Ex. 65, R. 626, 1784). Among other things it authorized Polk and two of his partners to "execute closing agreements", i.e., to settle any tax dispute. At Polk's request, Curry, then lodged in Coulson's office, signed this power of attorney—again, of course, without consulting plaintiff's board and without the board's knowledge or approval (R. 667-8, 1025-6). Significantly, Curry felt that the signing of the power of attorney was one of his duties under his retainer agreement with the Whitman Ransom firm (R. 906) under which the latter paid him $3,000 annually, for the account of respondent.

Armed with this power of attorney, Polk entered upon his discussions with the Government (R. 1424-5). At a conference in Washington on February 11, 1947 Polk suggested the possibility of a settlement (R. 1427-8). When the Government representative asked Polk to put his offer in writing, Polk replied that he would get authorization to do so (R. 1427). Polk promptly proceeded to procure such authorization—but only from *respondent*, not from plaintiff (R. 1429-31). He immediately telephoned Coulson, who at the time was in San Francisco, and outlined to him the proposed offer (R. 1429-30). Coulson at once consulted *respondent's* president Elsey, who, in turn, canvassed *respondent's* directors (R. 1282-4). After a few hours Elsey advised Polk by telephone that his proposed settlement offer was approved by *respondent* (R. 1430). Polk at once reduced his offer to writing and, in *plaintiff's* name, submitted it to the Government (R. 171, 1430). The thought that plaintiff might have to be consulted occurred, they say, to no one (R. 1431). Until two months later plaintiff's directors and officers had no information whatever of what was being done in their names (R. 668-9).

This patent disregard of plaintiff's rights was also manifested in the terms of Polk's settlement offer. At the time the offer was made (February 11, 1947), the present action was already pending and respondent had filed its Answer asserting certain technical defenses, such as the statute of limitations (R. 28-29). But these technical de-

fenses would obviously have been unavailable as to any moneys which might come directly into plaintiff's possession and as to which, therefore, plaintiff would not have to sue respondent. The 1942 tax savings were of that character. The refund claim for 1942 (R. 1654) was, and had to be, filed by plaintiff; if the claim had been allowed by the Government, the $4,201,821.54 taxes for 1942 would have been paid by the Government to plaintiff.* The refund claim was therefore particularly valuable to plaintiff since the 1942 tax moneys, if collected by plaintiff from the Government, were not subject to respondent's technical defenses. Polk's settlement proposal provided that plaintiff was to surrender its refund claim for 1942, whereas respondent was to be freed of any tax liability for 1943 and the first four months of 1944 (R. 171-3). The proposed settlement was thus to be accomplished wholly at plaintiff's expense.

Not until two months later, after a conference with respondent on April 2, 1947, did it occur to Polk to notify plaintiff of the settlement offer which he had made in its name, and to request the approval of plaintiff's board (Pl. Ex. 68, R. 669, 1788, 1460-1). The board members, alerted by our New York shareholders' action to their possible personal liability, appointed a three-man committee to consider the settlement offer. On May 5, 1947 Curry, on behalf of the Committee, notified Polk that they were "prepared to recommend" to plaintiff's board the sending to Polk of a "letter of general approval", but demanded a stipulation by respondent which would assure to plaintiff its day in court, free of the technical defenses asserted in respondent's Answer (Pl. Ex. 69, R. 676, 1794). In effect, this letter instructed Polk not to proceed with the settlement until such a stipulation between plaintiff and respondent were made.

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* Treas. Reg. 104, § 23.16(a), 26 C.F.R. (1949), §23.16(a), provides that, with respect to consolidated returns, the Government deals only with the parent corporation of an affiliated group, and that refunds will be made directly to the parent.

These instructions from his client and principal made no impression on Polk. Without waiting for the stipulation or for plaintiff's "letter of general approval", without, indeed, further asking or even notifying plaintiff (R. 681, 1027-8), Polk, on May 19, 1947, again acting as plaintiff's attorney in fact, renewed his settlement offer to the Government in the identical terms of his previous offer (Pl. Ex. 71; R. 679, 1799). On August 13, 1947 the Government accepted Polk's offer (R. 174, 1437).* In this fashion the settlement thus became an accomplished fact.

(f) *Respondent's $10,100,000 reserve for this litigation.* At the time the consolidated returns herein were filed in 1944 and 1945, respondent anticipated a tax controversy with the Government and therefore created a $10,100,000 tax reserve, which it invested in United States Treasury Savings Notes (R. 616-7).

After the tax settlement with the Government in 1947, respondent continued this $10,100,000 tax reserve as a reserve against the outcome of this litigation (R. 517-8, 617).

The Decision of the District Court.

The District Court's decision (R. 258) found that the duality of control, contended for by us, was sustained "by a preponderance of the evidence" (R. 272). It nevertheless dismissed the action upon two grounds:

In the first place, the District Court thought that the Government should not have permitted respondent to "escape" the payment of its taxes through the use of plaintiff's tax credit. The 1947 tax settlement improperly deprived the Government of taxes due to it. Equity should not compound this injustice by distributing respondent's illegal gains to plaintiff; "as between the parties, no per-

* Respondent tendered evidence that, on August 13, 1947, plaintiff's board resolved not to withdraw Polk's offer (R. 1644-5). The resolution was academic since on the same day the Government accepted Polk's offer. The trial court rejected the proffered evidence as irrelevant (R. 1647).

suasion of conscience or equity impels me to do otherwise than to leave the parties where they are" (R. 270-1, 276).

The Court of Appeals rejected this reasoning (R. 2227-8, fn. 12); and it is, as we shall show, indeed untenable.

As its second ground for dismissal, the District Court advanced this reasoning: The taxes "saved" by respondent were actually earnings which it did not pay to the Government. Plaintiff's demand for all or part of respondent's tax savings is therefore actually a demand for a share in respondent's earnings. Plaintiff cannot make such a demand; for plaintiff's stock interest in respondent was wiped out by the latter's reorganization; plaintiff thus forfeited all future interest in respondent's earnings; and plaintiff's demand here alleged was but "a circuitous way of obtaining something in the nature of equity or value for its ownership [of respondent's stock], rejected in the reorganization plan" (R. 272-4).

The Court of Appeals did not adopt this reasoning; and, as we shall show, it is as untenable as the District Court's first ground of decision.

The Decision of the Court of Appeals.

The Court of Appeals, by a bench consisting of one circuit judge and two district judges, affirmed the decision of the District Court, but on wholly different grounds (R. 2214). One judge dissented.

The majority opinion of the Court of Appeals agreed with our contention that plaintiff and respondent had interlocking managements (R. 2233). But it thought that this duality of control was "not important" (R. 2235). The "mere fact of officers and directors in common", it held, created no fiduciary relation, unless "one corporation dominated the other" (R. 2222); and the Court found the record "barren of evidence" to support our contention that respondent dominated plaintiff (R. 2235). Hence respondent was under no obligation to deal fairly with plaintiff in the tax transaction.

But even if domination and a fiduciary relationship requiring fair dealing be assumed (R. 2223, 2232), the majority of the Court of Appeals held that respondent had not breached its duty to deal fairly with plaintiff (R. 2235). It rejected our contention that it was the purpose of the tax laws to confer a tax benefit on plaintiff (R. 2229-2232); on the contrary, it held that the tax savings here were "an advantage which the tax laws give the subsidiary" (R. 2234). The Court further held that the transaction was fair because it was "open and above board" (R. 2234); because the practice of filing consolidated returns had prevailed in the earlier years of the Western Pacific group (R. 2225, 2233); and because plaintiff had no income of its own against which to offset its tax loss (R. 2232-3). It characterized plaintiff's claim as an attempt to "require tribute" (R. 2235) for its cooperation in filing consolidated returns; and it held that that would have been inequitable because plaintiff and its officers were under a "positive duty" to respondent to file the consolidated returns (R. 2233-5).

Judge Fee dissented (R. 2239), mainly on the grounds that plaintiff's tax credit was its property, which it was under no duty to surrender to respondent; and that the majority's decision was based on facts not found by the District Court and unsupported by the weight of the evidence.

We moved for a rehearing of the case en banc pursuant to 28 U. S. C., § 46(c). The two judges who had rendered the majority opinion (i.e., a circuit judge and a district judge) struck the motion as unauthorized in law (R. 2260); Judge Fee again dissented and suggested a rehearing en banc (R. 2261). Thereafter, upon renewal of the petition, it was denied by the full Court of Appeals sitting en banc (R. 2288) on the ground that the denial by the two judges was authoritative and binding (R. 2296). Denman, Ch. J., dissented (R. 2296, 2313).

Assignment of Errors.

1. The Court of Appeals, without determining or applying any applicable local law, held that the interlock between the managements of plaintiff and respondent (R. 2223) imposed no fiduciary duty on respondent to deal fairly with plaintiff in the tax transaction, unless respondent actually dominated plaintiff's affairs (R. 2222-3). This was error. The managerial interlock alone, regardless of domination, subjected respondent to the fiduciary duty of dealing fairly with the plaintiff; and that is clearly the law of the three jurisdictions (New York, Delaware, California) having contacts with this case.

2. The Court of Appeals held that the record is barren of evidence to support our contention that plaintiff was dominated by respondent (R. 2235). This was error. It was not the Court's function to make such a finding; and its finding was contrary to that of the District Court (R. 264, 272) and to the weight of the evidence.

3. The Court of Appeals held that, even if respondent dominated plaintiff, nevertheless respondent did not breach its duty to deal fairly with plaintiff in the tax transaction (R. 2235). This was error. The tax credit arising from plaintiff's stock loss was plaintiff's property. Respondent utilized plaintiff's tax credit for itself, without allowing plaintiff any share in the resulting benefits. That was not fair dealing by respondent.

4. The Court of Appeals held that respondent did not act unfairly in using plaintiff's tax credit for itself because the tax laws which made respondent's tax savings possible were designed for respondent's rather than plaintiff's benefit (R. 2229-2232, 2234). This was error. By recognizing plaintiff's stock loss as a tax credit, the statute intended to mitigate the loss suffered by plaintiff, not to enrich respondent which had sustained no loss whatever.

5. The Court of Appeals held that respondent did not act unfairly in using plaintiff's tax credit for itself because the practice of filing consolidated returns had prevailed in previous years and plaintiff had profited therefrom (R. 2225, 2233). This was error. A practice prevailing while plaintiff and respondent were actually affiliated constituted no precedent for a period when the affiliation had ended. Moreover, the Court's finding that in earlier years the companies contributing a tax loss had received no compensation for doing so was beyond the province of the Court to make and was contrary to the evidence.

6. The Court of Appeals held that respondent did not act unfairly in using plaintiff's tax credit for itself because the entire transaction was "open and above board" (R. 2226-7, 2234). This was error. Lack of secrecy does not excuse a breach of duty.

7. The Court of Appeals held that respondent did not act unfairly in using plaintiff's tax credit for itself because plaintiff, having no taxable income of its own, could not use it for itself (R. 2232-3). This was error. Plaintiff's tax credit was its property. It had value precisely because respondent could use it. Moreover, there were possibilities of plaintiff's using the tax credit for itself.

8. The Court of Appeals held that respondent did not act unfairly in using plaintiff's tax credit for itself because plaintiff, as the owner of all of respondent's capital stock, was under an affirmative duty to make its tax credit available to respondent through the mechanics of consolidated returns (R. 2233-5). This was error. Under the tax laws, plaintiff had the right to refuse the filing of consolidated returns. The naked ownership of respondent's stock did not make plaintiff a fiduciary, since the stock did not carry control of respondent, the latter being in the hands of its bankruptcy trustees. Even if plaintiff had been a fiduciary of respondent, it was under no duty to surrender the tax credit, which was plaintiff's property, to respondent.

9. The Court of Appeals made findings of fact where the District Court had made none or had made contrary findings. This was error. The Court of Appeals exceeded its functions; its findings were contrary to the evidence.

10. The Court of Appeals, sitting en banc, held that it had neither power nor duty to consider the application for rehearing on its merits. This was error. The statute, 28 U. S. C., § 46(c), entrusts "a majority of the circuit judges of the circuit" with the decision whether or not a hearing or rehearing en banc shall be ordered. The Court below should not have entrusted this decision to one circuit judge and one district judge and should not have held itself bound by their determination.

Summary of Argument.

We propose to show:

1. Respondent was under the fiduciary duty to deal fairly with plaintiff because of the duality of their managements (Point I, *infra*).

We shall show under this pointhead that, contrary to the decision below, the interlock between plaintiff's and respondent's managements was enough to subject respondent to the fiduciary duty of dealing fairly with plaintiff in the tax transaction. That duty did not depend upon a finding that respondent actually dominated plaintiff; but if domination be deemed essential, it was found as a fact by the District Court and is amply supported by the evidence. Nor was respondent's duty to deal fairly any less stringent because, as the Court below thought, plaintiff had created the managerial interlock, or because respondent had acted openly and without secrecy, or because the dual officers were not actuated by evil motives. The fiduciary duty to deal fairly applies to tax transactions no less than to transactions of a more common or stereotyped nature.

2. Respondent breached its fiduciary duty to deal fairly with plaintiff by taking all, and allowing plaintiff none of the tax benefits produced by the use of plaintiff's tax credit (Point II, *infra*).

We shall show under this pointhead that the transaction between plaintiff and respondent bore none of the earmarks of an arm's length bargain, and hence was unfair to plaintiff. Respondent should have allowed plaintiff all or at least a substantial share of its tax savings. The tax laws permitted the use of plaintiff's stock loss as a tax credit in consolidated returns in order for plaintiff, the parent, to obtain mitigation of the economic impact of its loss, not to confer a benefit upon the prosperous respondent; allowing respondent to retain all of the tax savings produced by plaintiff's tax credit is therefore a perversion of the purpose of the tax laws. Moreover, plaintiff's tax credit was a valuable asset; it was plaintiff's property; plaintiff might have used it for its own benefit; respondent's use of that property for itself without letting plaintiff share in the resulting benefits was unfair.

We shall further show that the fairness of the transaction cannot be sustained on the ground advanced by the Court below that plaintiff owed respondent a "positive duty" to file consolidated returns. Plaintiff was under no such duty; it was not a fiduciary of respondent merely because of its stock ownership, absent control or domination; and if plaintiff be a fiduciary of respondent, it was nevertheless under no obligation to surrender its own property to respondent. We shall also show that the so-called practice of the Western Pacific group of filing consolidated returns in earlier years, when the members of the group were affiliated, created no precedent for what should have been done during a later period in which the economic unity between plaintiff and respondent was at an end; in fact, there was no practice at all relevant to the issue herein.

Fairness, we contend and shall show, required respondent, at the time of the consolidated returns, to agree with plaintiff that the latter was to receive all or an appropriate share of the benefits to be produced by the use of its tax credit. Such an agreement would have been both legal and well supported by precedent. Since plaintiff's dual management, with its allegiance riveted on respondent, failed to secure such an agreement as part of the tax transaction, this Court may do equity and allow plaintiff to recover what was its due in the first place.

3. The Court of Appeals made numerous findings of fact where the District Court had made none or had made contrary findings (Point III, *infra*).

We shall show under this pointhead that the Court of Appeals found numerous facts, important to its conclusions, without any basis in the findings of the District Court and, indeed, contrary to the evidence. This procedure ran counter to the mandate of Rule 52 F.R.C.P.

4. The grounds upon which the District Court dismissed the action were erroneous (Point IV, infra).

We shall show under this pointhead that neither of the two grounds advanced by the District Court justified a dismissal of the action. The District Court thought that plaintiff cannot recover because the tax savings were contrary to law, and equity should not lend its hand in providing for the distribution of illegal gains. But the filing of the consolidated returns was proper vis-a-vis the Government; and the Government settled the tax controversy by a compromise which cannot be collaterally reviewed in this action.

The District Court also thought that a recovery by plaintiff would allow it to share in respondent's income, contrary to respondent's reorganization plan. But that reorganization plan merely eliminated plaintiff's stock-

holdings in respondent; it gave respondent no right to use plaintiff's tax credit. Hence if respondent used plaintiff's tax credit for itself, it must share the resulting benefits with plaintiff and cannot find shelter behind its reorganization plan.

POINT I

Respondent was under the fiduciary duty to deal fairly with plaintiff because of the duality of their managements.

The parties, engaging in the tax transactions we have described, did not deal at arm's length. That was prevented by the duality of their personnel. We contend that, acting in this position, respondent was required by law to treat plaintiff with the highest degree of fairness; that respondent's duties to plaintiff were those of a fiduciary to his *cestui;* and that the dealings between the parties are subject to close and jealous judicial scrutiny.

Under this pointhead we shall demonstrate the existence and scope of respondent's duties; under the next, their violation by respondent.

1. The interlock between the managements of plaintiff and respondent imposed upon respondent a fiduciary duty of dealing fairly with plaintiff in their tax transaction (the "duality rule"); the duty existed regardless of actual domination of plaintiff by respondent.

(a) Throughout the critical period during which the consolidated returns and the refund claim were filed (July 15, 1944 to June 15, 1945), the management of plaintiff was shot through with divided allegiance to respondent. The rule is deeply imbedded in our law that the existence of interlocking managements between two corporations will create a fiduciary relation in dealings between them.

Geddes v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 599 (1921), contains the classical and most frequently cited formulation of the doctrine:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation; and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness; * * * This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality and, we now add, in the soundest business policy. Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 588; Thomas v. Brownville, Ft. K. & P. R. Co., 109 U. S. 522; Wardwell v. Union P. R. Co., 103 U. S. 651, 658; Corsicana Nat. Bank v. Johnson, 251 U. S. 68."

And similarly in *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300, 308 (1937):

> "Common management of corporations through officers or directors * * * gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry."

The rule is of universal application. It has been recognized by the Court below, *Geddes* v. *Anaconda Copper Mining Co.*, 245 Fed. 225, 235-6 (C. C. A. 9, 1917), rev'd on other grounds 254 U. S. 590, in holding

> "that upon principle contracts between corporations having a common director should be regarded very much as are contracts between individual directors and their corporations, and that while such contracts are not prohibited, and are not prima facie void or fraudulent, they are voidable, and that the burden rests upon those who seek to sustain them to show clearly and satisfactorily that they are entirely fair and free from wrong."

The law is the same in Delaware, where plaintiff is organized:

Keenan v. *Eshleman*, 23 Del. Ch. 234, 243-4, 2 Atl. 2d 904 (S. Ct., 1938);

Kennedy v. *Emerald Coal & Coke Co.*, 42 Atl. 2d 398, 402 (S. Ct., Del., 1944);

in California, where respondent is incorporated:

Goodell v. *Verdugo Cañon Water Co.*, 138 Cal. 308, 71 Pac. 354 (1903);

Sausalito Bay Land Co. v. *Sausalito Imp. Co.*, 166 Cal. 302, 306, 136 Pac. 57 (1913);

Title Ins. & Tr. Co. v. *California Development Co.*, 171 Cal. 173, 205-6, 152 Pac. 542 (1915);

in New York, where plaintiff's dual officers functioned and the tax returns were filed;

Chelrob v. *Barrett*, 293 N. Y. 442, 460-2, 57 N. E. 2d 825 (1944);

Globe Woolen Co. v. *Utica G. & E. Co.*, 224 N. Y. 483, 489-90, 121 N. E. 378 (1918, Cardozo, J.);

Marian v. *Mariani*, 276 App. Div. 205, 93 N. Y. S. 2d 370 (1st Dept., 1949);

and in other jurisdictions throughout the land;

Mayflower Hotel Stockholders Protective Committee v. *Mayflower Hotel Corp.*, 173 F. 2d 416, 418-423 (App. D. C., 1949, with numerous references).

The rule rests on "the ancient precept against serving two masters", *Pepper* v. *Litton*, 308 U. S. 295, 311 (1939), a principle as old as Holy Writ, "infallible and hallowed", *Hexander* v. *Theleman*, 69 F. 2d 610, 613 (C. C. A. 10, 1934); *San Diego* v. *San Diego & L. A. R. Co.*, 44 Cal. 106, 113 (1872).

Just as there is danger that a director, in dealing with his corporation, will favor his personal interests, so in transactions between interlocking corporations "the danger to be avoided is that a director or group of directors, common to two corporations, may, for reasons of self-interest, favor one of the entities in its dealings with the other"; *Mayflower Hotel* case, *supra*, 173 F. 2d, at 420. Hence courts impose "the most careful scrutiny of transactions between the corporations represented by common directors, to the end that in the absence of arm's length bargaining, the scales may not, even through mistake or inadvertence, be unfairly tipped to one side or the other"; *Chelrob* v. *Barrett*, *supra*, 293 N.Y., at 461.

Hence we contend that the mere fact of the duality of the parties' personnel subjected respondent, in its dealings with plaintiff, to the strict duty to treat plaintiff with the highest degree of fairness and loyalty.

(b) Although the Court below conceded "There obviously existed an interlocking management" (R. 2223), it nonetheless rejected the duality rule: "The mere fact of officers and directors in common does not create such a fiduciary relationship" (R. 2222). Duality, the Court thought, merely invites an inquiry "to ascertain if domination exists" (R. 2222); and only if domination is found, will unfairness or overreaching raise a "presumption of constructive fraud" (R. 2222-3).

The Court below did not cite any authorities for its rule thus formulated; and we believe there are none.

To begin with, the scope of the duality rule is clearly a question of state law. Contrary to the mandate of *Klaxon Co.* v. *Stentor El. Mfg. Corp.*, 313 U. S. 487, 496 (1941), the Court below did not determine which state's law was to govern pursuant to the conflict of laws principles of California.

But we need not be detained by the conflict of laws problem. The case has contacts with only three jurisdictions: Delaware, where plaintiff is organized, California, where

respondent is organized, and, most important, New York, where plaintiff's dual management was located and where the tax returns were filed. Each of these States, as we have shown, accepts the duality rule as formulated by this Court in the *Geddes* case, *supra* (254 U. S., at 599); each holds that duality alone, regardless of domination, requires that searching scrutiny of inter-corporate transactions which will result in relief unless complete fairness is demonstrated.

Thus the *Chelrob* case, *supra* (293 N. Y. 442), and the *Marian* case, *supra* (276 App. Div. 205), involved the sale of property by one corporation to another. The sales price was found to be less than the value of the property sold. There was no finding that the purchaser dominated the seller; but the corporations had interlocking managements; and that was held enough to permit the seller to recover the difference between the price received and the fair price. The Court below, we submit, erred therefore in holding that respondent's duty to deal fairly with plaintiff depended on a finding of domination. It further erred, as we now proceed to show, in holding that domination of plaintiff by respondent was not established (R. 2235).

2. The District Court found, contrary to the Court of Appeals, and the evidence demonstrates, that the conduct of plaintiff's tax affairs was dominated by respondent.

The Court of Appeals found the record "barren of evidence to support the contention that Corporation was dominated by the subsidiary" (R. 2235). This finding of the Court of Appeals is contrary to that of the District Court, and contrary to the evidence.

The findings of the District Court are unambiguous:

> "It was there [in the supplementary complaint] further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated re-

turns for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control'" (R. 264).

"* * * there is a preponderance of the evidence in favor of the plaintiff's contention of 'duality of control'" (R. 272).

This finding that respondent "controlled" plaintiff in the tax transaction could be set aside only if it was "clearly erroneous"; Rule 52(a) F. R. C. P. Far from being erroneous, the finding is supported by the overwhelming weight of the evidence. We cite only a few manifestations of respondent's control.

The decision to use plaintiff's stock loss in consolidated returns was made by respondent, not by plaintiff (R. 1448-1450, 1278). Plaintiff's board of directors was never consulted (R. 1018). Plaintiff's president Curry merely "learned" in January, 1944 that plaintiff's stock loss was to be so used (R. 874-6); but nobody bothered to ask him. Even if plaintiff's directors or officers had been asked, such consultation would have been a mere formality; plaintiff could have neither objected nor demanded conditions since it was being kept alive for the very purpose of preserving its tax credit for the benefit of respondent (Int. Ex. 5, R. 705, 2125-7; R. 713).

Respondent argues that Curry, as plaintiff's president, had a volition about signing the returns. But who was Curry to refuse his signature? He was a mere "figurehead", a "signing officer" (R. 651, 646-7, 1450). His livelihood depended on respondent, not plaintiff; for it was respondent, not plaintiff, that paid his salary (R. 645, 1738). Curry had no understanding whatever of taxes (R. 808). Hence, when the returns were placed before him, he merely asked whether they were approved by tax counsel, i.e., Mr. Polk; and when he was told they were, he signed without further ado (R. 664).

Without so much as mentioning any of these facts, the Court below denies domination because the tax returns

were prepared "under the supervision of Corporation's president" (R. 2226)!

As further support of its finding that plaintiff was free of domination, the Court below says that the returns were prepared "under the guidance of the independent tax experts" (R. 2226). Independent indeed! These tax experts were Messrs. Whitman, Ransom, Coulson & Goetz. This law firm was indeed retained as tax experts—by the trustees for *respondent*, Mr. Schumacher and Mr. Ehrman (Pl. Ex. 39-D, R. 546); Curry was just "told" of their retainer (R. 660). This firm was indeed paid for its tax services—by *respondent*, not by plaintiff (R. 548-557; Pl. Ex. 23, R. 1721). So "independent" was that firm that its partner Polk felt his responsibility was due to his one client, the respondent, and not to his other client, the plaintiff (R. 1431).

But, says the Court below, these tax experts had been "employed upon the suggestion of the General Counsel for Corporation" (R. 2226), i.e., Mr. Nicodemus (R. 2225-6). That is a singularly incomplete description of Mr. Nicodemus' functions. The Court omits mentioning that Mr. Nicodemus and his firm (Pierce & Greer) were also the attorneys for *respondent* and for *respondent's* trustees (R. 533-6, 793); that they received their pay from *respondent*, but no pay whatever from plaintiff (R. 534-8, 1723, 1730-1, 1738); and that it was their job to cooperate with counsel for the trustees of *respondent* in protecting the *respondent's* estate in the preparation of the final returns (Pl. Ex. 39-A, R. 543-4).

We submit that the District Court's finding of domination, far from being "clearly erroneous", was clearly right; that the domination of plaintiff by respondent in the conduct of the tax transaction was fully established; and that consequently respondent was subject to all the fiduciary duties which follow from the exercise of domination and control.

Southern Pacific Co. v. *Bogert*, 250 U. S. 483, 492 (1919);
Kavanaugh v. *Kavanaugh Knitting Co.*, 226 N. Y. 185, 194-5, 123 N. E. 148 (1919);
Title Ins. & Tr. Co. v. *California Development Co.*, 171 Cal. 173, 205-6, 152 Pac. 542 (1915).

3. Plaintiff did not create the managerial interlock with respondent; even if it had, respondent's fiduciary duties would have been the same.

The Court of Appeals, conceding that there existed an "interlocking management" between plaintiff and respondent, held: "But this situation was not of the subsidiary's [respondent's] making. On the contrary, it was created by Corporation [plaintiff], whose stockholders elected its Board of Directors, who appointed its officers" (2223). Although the Court does not spell out the consequences flowing from this finding, it may be assumed that it was thought to lessen, if not to eliminate, respondent's fiduciary obligations.

Actually, however, plaintiff had, during the critical period, no say in the selection of respondent's management. During respondent's reorganization, its trustees, directors and officers were appointed by the bankruptcy court. And after respondent emerged from reorganization in December, 1944, its management was selected by its new stockholders, not by plaintiff.

In any event, it is immaterial who created the duality. There is nothing invidious about interlocking managements as such. Indeed, "business convenience many times requires interlocking directorates"; 3 *Fletcher Cyc. Corp.* (Perm. Ed., 1947), § 961, p. 433. But once duality is created —no matter by whom or how innocently—it subjects the entities to fiduciary standards in their dealings with each other; *In re James Estate*, 86 N. Y. S. 2d 78, 84 (Surr. Ct., 1948). Even though a parent corporation, for business con-

venience, has created duality, nevertheless it is held protected from unfair treatment in transactions with its own subsidiary. *Potter* v. *Sanitary Co. of America,* 22 Del. Ch. 110, 194 Atl. 87 (1937); *Banco Kentucky Co.'s Receiver* v. *National Bank of Kentucky's Receiver,* 281 Ky. 784, 798-9, 137 S. W. 2d 357 (1939).

In *Chelrob* v. *Barrett, supra* (293 N. Y. 442), the duality had certainly been created by the corporation which subsequently sought and obtained relief from the action of the dual management. There, as here, the stockholders of the parent (Queens Company) elected its board of directors; those directors elected its officers; and since Queens owned all the voting stock of the subsidiary (Nassau Company), Queens was also responsible for the selection of Nassau's directors and officers. Queens thus had "created" the interlock; nevertheless, in an action by Queens against Nassau, based upon the unfairness of a contract between the two companies, Queens was permitted to recover.

The Court below, we submit, erred in holding that the managerial interlock between plaintiff and respondent had been created by plaintiff (the District Court had made no such finding); and it erred in ascribing any legal significance to the fact thus found by it.

4. The absence of secrecy did not relieve respondent from the duty to deal fairly with plaintiff.

The Court of Appeals held that "the entire transaction was open and above board. Many persons having an interest in Corporation [plaintiff], including stockholders and counsel, were fully aware of the situation. They chose not to act" (R. 2234). The implication seems to be, either that the lack of secrecy relieved respondent from the duty to deal fairly with plaintiff, or that respondent's duty to deal fairly was fulfilled by respondent's acting "openly".

Again the Court does not reveal upon which local law it predicates this holding. Again the holding is contrary to the laws of all the jurisdictions with which this case has contacts.

Just as a larceny is no less a crime because committed in broad daylight, so a fiduciary cannot escape accountability because his breach of duty was open and notorious. Lack of secrecy is no excuse for a breach of duty. "The publicity alone of an illegal and unauthorized act of the directors of a corporation does not make it legal or valid", *Goodell* v. *Verdugo Cañon Water Co., supra* (138 Cal., at 314); *Blum* v. *Fleishhacker*, 21 F. Supp. 527, 533 (D. C., N. D. Cal., 1937), mod. and aff'd 109 F. 2d 543, cert. den. 311 U. S. 665. In *Marian* v. *Mariani, supra* (276 App. Div. 205), the court, speaking of a transaction between interlocking companies, found that "The sale was made openly and in good faith"; nevertheless the inadequacy of the sales price received by one of the corporations was held to justify it in recovering a fair price from the other. Like facts and rulings were involved in *Chelrob* v. *Barrett, supra* (293 N. Y. 442).

We submit that the Court of Appeals erred in ascribing any legal significance to the alleged lack of secrecy in the transaction.

And it was equally error for the Court below to find (without any such finding by the District Court *) that the transaction was known to plaintiff's stockholders and counsel. In fact, plaintiff's largest stockholder (the James Interests) and plaintiff's counsel were just as dual as

* The Court of Appeals (R. 2226) quotes a remark of the District Judge made by him in the course of the trial (R. 970); but such a remark, made before the conclusion of the trial, cannot take the place of a finding. The Court of Appeals (R. 2227, fn. 11) also quotes what it considers an admission by counsel for petitioners; but counsel, faced with a barrage of simultaneous questions from the bench, answered the last and merely admitted—indeed proclaimed—that the consolidated returns were filed so that respondent would not have to pay any income tax (R. 971); he did not admit that the transaction was "open" and known to plaintiff's stockholders.

plaintiff's officers; and we find no evidence in the record that plaintiff's other stockholders were notified or had knowledge of the tax transaction.

5. The alleged good faith of the dual officers did not relieve respondent from the duty to deal fairly with plaintiff.

Respondent has argued that the dual personnel was honest and free from evil motive. But judicial scrutiny of the fairness of a transaction between interlocking corporations will not be forestalled by a showing that the common officers acted honestly and in good faith.

Chelrob v. *Barrett, supra,* 293 N. Y., at 460-2;
Marian v. *Mariani, supra,* 276 App. Div. 205, 93 N. Y. S. 2d 370 (1st Dept., 1949);
Overfield v. *Pennroad Corp.,* 42 F. Supp. 586, 610 (D. C., E. D. Pa., 1941), rev'd on other grounds 146 F. 2d 889;
Blum v. *Fleishhacker,* 21 F. Supp. 527, 533 (D. C., N. D. Cal., 1937), mod. and aff'd 109 F. 2d 543, cert. den. 311 U. S. 665.

In each of these cases the courts paid tribute to the good faith and honesty of the dual actors as well as to their independence and freedom from domination; they simultaneously imposed the fiduciary duty to deal fairly and found its breach.

Indeed, the rule could not be otherwise. Duality works in an insidious fashion. Even if it does not corrupt the honesty of the dual agent, it may insensibly dampen the exertion of his best skill and ingenuity. Thus respondent here asserts that dual tax counsel never had any thought of plaintiff's right to the tax savings. (R. 1433, 1473-5). Assuming these protestations, they merely emphasize the deadly effect of divided allegiance. For the evidence shows

that tax counsel had at hand all the information which would lead him to the realization of plaintiff's rights.* His failure to realize them may well have been due to a lack of wholehearted devotion to plaintiff's cause. To say whether it was or not, would involve that "calculus of probabilities [which] is beyond the science of the chancery", *Meinhard* v. *Salmon*, 249 N. Y. 458, 465, 164 N. E. 545 (1928). Hence the rigid rule of prophylaxis which, in the presence of duality, requires absolute fairness, regardless of subjective honesty and good faith.

6. The fiduciary rule is applicable to tax transactions between fiduciary and *cestui*.

Fiduciaries who mishandle a company's tax affairs or derive private tax advantages from their management of the company's tax business, are subject to the same accountability as in other transactions with their *cestuis*.

Shreveport Bank cases;†

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* As we shall later show, the problem of an inter-company adjustment of tax savings was not uncommon. It arose, just during the critical period, under the S.E.C.'s Rule U-45(b)(6) 17 C.F.R. (1949), § 250.45(b)(6), and was treated in several S.E.C. decisions. In 1943, Polk was familiar with Rule U-45(b)(6) and refered to it in giving advice concerning the tax allocation of the Western Pacific group (R. 1466-7). Copies of the S.E.C. decisions, discussed below, were received by Polk's firm at the time they were released between June, 1943 and January, 1945 (R. 1467-8).

† *Leslie* v. *Commercial Nat. Bank in Shreveport*, 28 F. Supp. 927, 933 (D. C., W. D. La., 1939);
Commercial Nat. Bank in Shreveport v. *Parsons*, 144 F. 2d 231, 236-7 (C. C. A. 5, 1944);
Commercial Nat. Bank in Shreveport v. *Connolly*, 176 F. 2d 1004 (C. A. 5, 1949);
Connolly v. *Commercial Nat. Bank in Shreveport*, 189 F. 2d 608 (C. A. 5, 1951).

Other reported opinions in the *Shreveport* case are listed at 189 F. 2d 609, fn. 1 and 2.

Truncale v. *Universal Pictures Co.*, 76 F. Supp. 465 (D. C., S. D. N. Y., 1948);
Mahler v. *Oishei* (N. Y. Co. Index No. 28485, N. Y. Sup. Ct., Nov. 12, 1947), reviewed 61 Harvard L. Rev. 1058 (1948).

Thus, in the *Shreveport Bank* cases, *supra*, the "old bank" had transferred certain real estate to the "new bank" as collateral security for claims of the new bank, creating a pledgor-pledgee relation. The two banks had interlocking boards. Under the applicable tax laws of Louisiana, a corporation owning real estate was entitled to certain tax deductions. The new bank, as the technical legal owner of the aforesaid real estate, claimed and procured such tax savings. But the courts held that the real estate belonged equitably to the old bank; that the new bank was the fiduciary of the old; and that it must, therefore, account for all private tax savings which it procured in the conduct of its fiduciary activities:

> "The dominant officers of the new bank were the directors of the old, and they were doubly bound to treat the latter fairly." (144 F. 2d, at 236)
>
> "There can be little question but that the relation of the new Bank to the old and the administration of the property and estate intrusted to the former, was one requiring the utmost good faith and constituted it an agent, trustee or fiduciary. * * * It could not profit therefrom in any manner * * *.
>
> "* * * the new Bank * * * should not be allowed to take credit for the taxes paid under the circumstances of this case." (28 F. Supp., at 933)

The Court below would distinguish these cases as involving an actual "trust" relation (R. 2220-1); but there was no "trust" in the technical sense, just a relation of pledgor and pledgee. Certainly the directorial interlock furnished an important foundation for the finding of the fiduciary relationship (141 F. 2d, at 236). And certainly the fiduciary principle was applied to a tax transaction

just as it would have been had the transaction been of a more common or stereotyped nature.

In the *Truncale* case, *supra* (76 F. Supp. 465), the directors of a corporation had exercised options to buy the corporation's stock at prices far below its market value. The difference between the market value and the purchase price constituted taxable income to the directors and, at the same time, a tax-deductible expense to the corporation. The directors, in violation of their fiduciary duties, caused the corporation to waive its right to this tax deduction; the corporation's waiver enabled the directors to save substantial amounts of their private taxes. The directors were held accountable to the corporation for their tax savings, although the amount of their savings far exceeded the tax detriment which the corporation had sustained by reason of its waiver.

The present case likewise involves a tax transaction between plaintiff and respondent. In order to achieve the tax saving, plaintiff and respondent had to agree to join in the consolidated returns. Plaintiff which alone could file them elected to do so; respondent gave its consent. By filing the returns, plaintiff made its tax credit arising from its stock loss available to reduce respondent's taxes; plaintiff surrendered thereby, *pro tanto*, its privilege to use its tax credit as a reduction of its own future taxes. Moreover, by filing the consolidated returns, plaintiff subjected itself to joint and several liability for any taxes or tax deficiencies which the Government might assess on respondent's income (Treas. Reg. 104, § 23.15(d)). In short, by joining in consolidated returns, the parties engaged in a transaction which required mutual contributions and affected their mutual rights and relations.

We submit that, in the light of the duality of plaintiff's management and the dominant part which respondent played in the tax transactions, respondent was under the fiduciary obligation to treat plaintiff with the highest degree of fairness. We proceed to show that respondent breached this obligation.

POINT II

Respondent breached its fiduciary duty to deal fairly with plaintiff by taking all, and allowing plaintiff none of the tax benefits produced by the use of plaintiff's tax credit.

The requirements of "fairness", however general the connotations of that term may be, are well understood. "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain", *Pepper* v. *Litton, supra*, 308 U. S., at 306-7. Or, in the words of Judge Learned Hand, the test is "whether the proposition submitted would have commended itself to an independent corporation", *Ewen* v. *Peoria & E. R. Co.*, 78 F. Supp. 312, 316 (D. C., S. D. N. Y., 1948), cert. den. 336 U. S. 919.

We are thus brought to the question whether the tax transaction between these parties carried "the earmarks of an arm's length bargain". The answer is simple. The filing of the consolidated returns here conferred great advantage—a $17,000,000 tax saving—on respondent, the fiduciary. It conferred no advantage on plaintiff, the cestui. The transaction was thus unilaterally advantageous to the fiduciary. No such transaction could possibly have "commended itself to an independent corporation". If respondent wished to have the use of plaintiff's tax credit, fairness required it to allow plaintiff at least a substantial share in the tax savings to be produced by plaintiff's tax credit. An independent management of plaintiff, competent and well advised, would have insisted on an agreement to that effect; and respondent, if it was willing to act fairly, would have given it.

We propose to show under this pointhead:

1. The purpose of the tax laws, in allowing the use of plaintiff's stock loss as a tax credit in consolidated returns, was to benefit plaintiff, not respondent (A, *infra*).

2. Plaintiff's tax credit was a valuable asset which, in fairness, plaintiff could not be expected to surrender to respondent without receiving an adequate share of the resulting tax benefits (B, *infra*).

3. Plaintiff was under no legal duty to surrender its tax credit to respondent through the filing of consolidated returns (C, *infra*).

4. The Western Pacific group's so-called previous practice constituted no precedent for a period when the affiliation between plaintiff and respondent had ended and was, in fact, non-existent (D, *infra*).

5. An agreement between plaintiff and respondent allowing plaintiff at least a substantial share of the tax savings would have been altogether proper, as evidenced by contemporaneous precedents (E, *infra*).

A

The purpose of the tax laws was to benefit plaintiff, not respondent.

The fairness of a transaction allocating tax benefits between two private parties could in considerable measure depend upon the purpose of the tax law which creates the benefit. Thus if the enjoyment of the $17,000,000 tax saving by respondent, and the denial of any share therein to plaintiff, accorded with the purpose and philosophy of the tax law, then there is much to be said for the fairness of the transaction as between the parties. If, however, respondent's enjoyment of the tax saving was a mere wind-

fall to it, made possible by the letter of the tax statute, but unsupported by its underlying purpose, and if plaintiff's enjoyment of those savings would more nearly fulfill the statutory purpose; then an agreement allowing plaintiff all or a substantial share would indeed be fair.

The Court below apparently recognized that much; but it held that the applicable tax laws were intended to give an advantage to respondent rather than to plaintiff (R. 2229-2232, 2234). In this, we submit, the Court of Appeals erred.

1. *The purpose of § 23(g)(4) of the Internal Revenue Code, in recognizing a stock loss as a tax credit, is to confer a tax benefit on the corporation which has suffered the loss.*

Prior to 1938 a loss resulting from the worthlessness of stock held by a taxpayer was fully deductible for tax purposes. In 1938 the Code was amended to make such losses "capital losses", deductible only from capital gains (Revenue Act of 1938, § 23(g), 52 Stat. 461). In 1942, however, § 23(g)(4)* was added to the Code providing that a loss sustained through the worthlessness of the stock of an affiliate constitutes an ordinary loss, unrestrictedly available as a tax deduction from any kind of income (Revenue Act of 1942, § 123, 56 Stat. 820).

Respondent's stock held by plaintiff became worthless in 1943; and under § 23(g)(4), plaintiff could use this stock loss as a tax deduction against any kind of income.

As stated by the District Court (R. 268), the legislative history of § 23(g)(4) throws no light upon its purpose and philosophy. That purpose, however, would seem to be self-evident: The new section was designed to mitigate the economic impact of such a stock loss. Accordingly the authorities, more fully discussed below, recognize that, realistically, the tax saving resulting from a stock loss should be viewed as a partial offset to such loss; *Matter*

* See Appendix.

of Consolidated Electric & Gas Co., 15 S. E. C. 161, 164 (1943).

Since in this case the loss was sustained by plaintiff, the tax credit arising therefrom was likewise designed for plaintiff, in order to offset its loss.

Plaintiff's management failed to take any step to effectuate this purpose. Its sole interest was to make plaintiff's tax credit available to respondent. This objective was accomplished through the filing of consolidated tax returns, with the result that plaintiff's tax credit was not used to mitigate plaintiff's loss, but to confer upon respondent what the District Court called an "amazing and undeserved" tax benefit (R. 276).

This diversion of the tax credit from plaintiff to respondent was not only contrary to the purpose of § 23(g)(4); it was also, as we now proceed to show, contrary to the purpose of consolidated returns.

2. *The purpose of the consolidated return statute, in permitting the losses of one affiliate to be offset against the profits of another affiliate, is to benefit the common owner of the group, i.e., the parent corporation.*

Consolidated tax returns are permitted by § 141 of the Internal Revenue Code* and are governed by regulations issued by the Commissioner of Internal Revenue. These returns may be filed by an "affiliated group of corporations" interconnected by at least 95% stock ownership. The privilege of filing consolidated returns is designed for the protection and benefit of the common owner, or parent, of the affiliated roup. Without consolidated returns, the investor, that is, the parent company, investing in two subsidiaries, one profitable, and the other a losing proposition, would have to pay a tax on the income from its good investment, without being able to deduct its loss from the bad one. The rationale of consolidated returns

* See Appendix.

"is the recognition of this common owner's right to set off against his gains in the one [corporation] his losses in the other [corporation] * * *";

Duke Power Co. v. *Commissioner*, 44 F. 2d 543, 545 (C. C. A. 4, 1930), cert. den. 282 U. S. 903.

The underlying principle has been well stated by the District Court (R. 269):

"* * * the philosophy of the consolidated return is to disregard the corporate entity and to tax as a single business or economic unit what really is a business unit * * *. It treats an affiliated group of corporations as one business enterprise, the various affiliates being considered as if they were branch offices of the main business establishment. The income from all units is considered as a single income and the losses of all units are treated as a single loss. (Citing authorities)."

An authoritative statement of the purpose of the consolidated returns statute is found in the *Report of the Senate Finance Committee*, 70th Cong., 1st Sess., S. R. 960, p. 14 (1928), from which, because of its importance, we quote at some length:

"The permission to file consolidated returns by affiliated corporations merely recognizes *the business entity* as distinguished from the legal corporate entity of the business enterprise. Unless the affiliated group as a whole in the conduct of its business enterprise shows net profits, the individuals conducting the business have realized no gain. The failure to recognize *the entire business enterprise* means drawing technical legal distinctions, as contrasted with the recognition of actual facts. The mere fact that by legal fiction several corporations owned by the same stockholders are separate entities should not obscure the fact that *they are in reality one and the same business owned by the same individuals* and operated as a unit. To refuse to recognize this situation and to require for tax purposes the breaking up of *a single business* into its constituent parts is just as unreasonable as to

require a single corporation to report separately for tax purposes the gains from its sales department, from its manufacturing activities, from its investments, and from each and every one of its agencies. It would be just as unreasonable to demand that an individual engaged in two or more businesses treat each business separately for tax purposes.

"Much of the misapprehension about consolidated returns will be removed when it is realized that *it is only when the corporations are really but one corporation that the permission to file consolidated returns is given*, and that no ultimate advantage under the tax laws really results. The present law permits the filing of consolidated returns only where one corporation owns at least 95 per cent of the stock of the other corporation or if at least 95 per cent of the stock of both corporations is owned by the same interest. *The provision embodies the business man's conception of a practical state of facts.*" (Italics added.)

Accord:

Handy & Harman v. *Burnet*, 284 U. S. 136, 140 (1931);

Atlantic City Electric Co. v. *Commissioner*, 288 U. S. 152, 154 (1933);

Alameda Investment Co. v. *McLaughlin*, 28 F. 2d 81, 82 (D. C., N. D. Cal., 1928), aff'd 33 F. 2d 120 (C. C. A. 9, 1929).

Consolidated returns are thus permitted for the benefit of the "common owner" of the affiliated enterprise, that is, the parent corporation and its stockholders. They are not permitted for the benefit of the subsidiaries. If a subsidiary operates profitably it has no ground, in its own person, to seek a reduction of its taxes, even though its parent, or another subsidiary of the parent, has sustained a loss; for such loss cannot affect the financial position of the profitable subsidiary. But otherwise the common parent; in an economic sense, the profits of each member of the group are the profits of the parent, and the losses of each

member of the group are the losses of the parent; the right to offset such losses and profits against each other is therefore the parent's right, created in the interest and for the benefit of the parent. As stated in the *Alameda* case, *supra* (28 F. 2d, at 82), "The benefit of the statute extends to him on whom is the hazard of the several enterprises", that is, the parent.

It is true that consolidated returns may also redound to the advantage of the subsidiary. Thus where a losing parent files a consolidated return for itself and a profitable subsidiary, the latter's taxes may be reduced. But this tax advantage is not allowed for the subsidiary's sake. It is allowed for the parent's sake which, normally, gets the full benefit of the subsidiary's tax savings by the automatic operation of economic factors—either through the increased value of the parent's stock in the subsidiary or through the declaration of dividends.

It follows, we submit, that plaintiff, as the parent, rather than respondent, as the subsidiary, was the intended beneficiary of the consolidated returns statute.

3. *The Court below erred in holding that the tax laws were not designed for plaintiff's benefit.*

The Court of Appeals rejected our analysis of the purpose of the tax laws (R. 2229-2232). It held that the tax saving here accomplished was "an advantage which the tax laws give the subsidiary" (2234). In reaching this conclusion, the Court below failed to discuss or even to mention any of the legislative materials and other authorities we have cited. It rested its conclusion on a fragmentary analysis of two provisions of the tax law: The provision giving the subsidiary the right to refuse to join in consolidated returns (R. 2230); and the provisions permitting consolidated returns for a period of affiliation less than the taxable year, even though such affiliation had ceased at the time of filing such returns (R. 2230-1).

Neither of these provisions justifies the Court's conclusions therefrom.

(a) *In requiring the subsidiary's consent to the filing of consolidated returns, the tax laws do not indicate a purpose of conferring a tax benefit on the subsidiary.*

The right of the parent, which alone can file consolidated returns, to refuse to do so is not comparable to the right of the subsidiary to refuse to do so. Giving this right to the parent was in furtherance of the purpose and intent that the parent would and should enjoy the benefits. Congress viewed the parent and its stockholders as the owners of one business consisting of a group of affiliates (*supra*, pp. 52-53). The law therefore gives the parent the *sole* right to file consolidated returns for the group (Treas. Reg. 104, § 23.12(a)) on the assumption that, as the common owner, it would and should determine, in its own self-interest, whether or not to file such returns. As stated in *Duke Power Co.* v. *Commissioner* (*supra*):

> "It [Congress] assumed that if there was that degree of affiliation which the law required, there was a dominant control, and it gave to that dominant control the right to make the choice" (44 F. 2d, at 545).

Hence, concluded that Court, if the parent were to "decide that its best interests require filing by it of a separate tax return, no provision of the law denies it this privilege" (p. 545).

The subsidiary's consent was not required for any such reason. Congress obviously did not view the subsidiary as the owner of the group. Therefore, the subsidiary's right to refuse to join is not, like the parent's, given in recognition of its position as the common owner. The principal grounds of requiring the subsidiary's consent were these: (1) To assure uniform action by the entire affiliated group (otherwise the group might play fast and loose by having the parent file a consolidated return and the subsidiary a separate return); and (2) To assure that the subsidiary

is legally bound by the parent's election to file a consolidated return (otherwise the subsidiary might, for instance, deny that it is jointly and severally liable for the taxes payable under the parent's consolidated return, as provided in Treas. Reg. 104, § 23.15(a)).

In the normal situation of economic unity between parent and subsidiary—and that is the situation contemplated by the statute—the subsidiary will be in no position to veto the parent's decision to file a consolidated return, since the "dominant control" of the parent will enable it to guide the subsidiary. The requirement of the subsidiary's consent does not, therefore, as the Court below thought (R. 2230), indicate that consolidated returns are intended for the benefit of the subsidiary.

(b) *The fact that consolidated returns may be filed in certain anomalous situations where the economic unity between parent and subsidiary is severed, does not indicate a statutory purpose to benefit the subsidiary rather than the parent.*

The Court of Appeals recognized that, "in the usual case", an affiliated group of corporations entitled to file consolidated returns is an economic unit so that "the tax saving which a subsidiary effects will inure to the parent by way of increasing the value of its stock or by way of dividends" (R. 2230). But, says the Court of Appeals, there are other situations in which consolidated returns may be filed although there is no "economic unity" between parent and subsidiary. Thus, if the affiliation between parent and subsidiary has ended, the parent may nevertheless file a consolidated return for the affiliated period; if such a return results in a tax saving by the subsidiary, there can be no automatic upstream flow of the benefit to the parent. The same is true if the subsidiary is in bankruptcy; if the parent and the trustees of the bankrupt subsidiary join in consolidated returns, the tax savings of the subsidiary will not automatically redound to the benefit of the parent. From these instances, the Court of Appeals

deduces that the tax laws do not "require" economic unity between parent and subsidiary as a precondition of filing consolidated returns and hence that the statutory purpose of permitting consolidated returns is not to confer a benefit upon the parent (R. 2230-1).

The trouble with this argument is that it confuses the *requirements* of the statute with the *purpose* of the statute.

We never contended that the consolidated return statute "requires" economic unity; we do contend that it *contemplates* economic unity; the authorities establish this contention (*supra*, pp. 52-53). It is true enough that all that the statute requires is 95% stock ownership; but the statute makes this requirement on the theory that, by and large, corporations interconnected by 95% stock ownership "are in reality one and the same business", "a single business" (*Senate Report, supra*, pp. 52-53). It is true that in a few anomalous situations the requirements of the statute can be fulfilled, although there is no economic unity; but the purpose of the statute nevertheless remains the same, namely, to grant relief to the owners of an economically unified enterprise.

How, then, did it happen that the purpose of the statute is not precisely reflected in its requirements? The answer lies in the history of the consolidated return statute. Originally, consolidated returns were regulated in strict accordance with their underlying purpose; they could be filed only by a group of affiliated corporations actually constituting an economic unit. See *United States* v. *Cleveland P. & E. R. Co.*, 42 F. 2d 413 (C. C. A. 6, 1930), setting forth the early history of consolidated return law. But the statutory definitions of economic unity proved so vague as to be unworkable. In the interest of administrative convenience (see *Report of Senate Finance Committee, supra*, 70th Cong., 1st Sess., S. R. 960, p. 13), the test of affiliation was therefore simplified: The legal ownership by one corporation of at least 95% of the stock of another corporation was made the sole test of "affiliation". But this change of the requirements of the statute did not

indicate a change of its purpose; the purpose remained the same, namely, to give the owners of the affiliated group the privilege of deducting the losses of one affiliate from the profits of another affiliate, just as if the entire affiliated group were a "single enterprise".

It is true that in those situations where the affiliation has ended prior to the actual filing of the consolidated returns, the "economic unity" then no longer exists. But it does not follow, as the Court below held, that in such situation "any benefits to the subsidiary obviously cannot inure to the parent" (R. 2230). Since only the ex-parent can file consolidated returns, its self-interest will determine whether or not it should file such returns for the affiliated period. The ex-subsidiary, in turn, may prevent the filing by refusing its consent to do so; and it will refuse if its self-interest so dictates. In short, the filing or non-filing of such returns and the sharing of the benefits therefrom could well be the subject of negotiation between the ex-parent and the ex-subsidiary and may well result in the sharing by both corporations. Moreover, the parent, in the very act of terminating the affiliation, can assure itself the benefit of the subsequent filing of consolidated returns. Thus, if the parent were selling its 95% stock interest in a subsidiary to a stranger and at the time of the sale knew that the parent's loss would, in a consolidated return, confer a $17,000,000 tax saving on the subsidiary, could it be doubted that this would be reflected in the price of the stock being sold?

By the same token, the purpose of the tax laws could not be automatically effected by the consolidated returns in the case at bar. Although plaintiff was the parent, its normal and automatic benefiting from the tax saving of its subsidiary, the respondent, could not occur; for the stock certificates of respondent, held by plaintiff, were merely pieces of paper representing neither equity nor right to dividends. Hence, the statutory purpose could be effected only in another fashion, namely, by an agreement among the parties allocating the resulting tax savings.

(c) *The Court of Appeals overlooked that tax savings payments are particularly justified in those situations where, because of the economic severance of the affiliates, the purpose of the tax laws is not automatically effectuated.*

The Court of Appeals advanced one further argument: Granting, says the Court, that in the usual case of an economically unified group the tax savings of the subsidiary redound automatically to the parent (by increasing the value of the parent's equity in the subsidiary), it does not follow that the parent "may receive the benefits direct, regardless of the rights of the subsidiary's preferred stockholders, creditors and minority common stockholders" (R. 2230). In other words: The parent, in consolidated returns, deducts its own loss from the earnings of the subsidiary; the subsidiary's taxes are thereby reduced; this benefits the parent by enhancing its equity in the subsidiary; but the parent cannot receive an actual payment from the subsidiary for making its tax credit available to the subsidiary.

We ask, why not? In the S.E.C. cases discussed below (pp. 75-78), the Commission approved just such payments as fair, under appropriate circumstances. This much, however, is true: In the case of an economically unified group there is ordinarily not much justification for these tax savings payments; for the purpose of the tax laws is fully accomplished by enhancing the parent's equity in the subsidiary; and an actual payment by the subsidiary to the parent will not advance that purpose any further.

But the case is different where, as here, the economic unity of the parent and subsidiary is severed. In that event, the filing of consolidated returns and the resulting tax saving of the subsidiary do not automatically benefit the parent; the parent's loss remains unalleviated by any tax advantage; the subsidiary obtains a tax windfall without economic rhyme or reason; and the purpose of the tax laws fails altogether. That purpose can be more nearly achieved only by the subsidiary's paying all or at least a substantial part of its tax savings to the parent.

While, therefore, in an economically unified group there is ordinarily no need and little justification for a tax saving payment, the need and justification of such a payment is strong where, as here, the economic unity is destroyed.

The Court below referred to "the rights of the subsidiary's preferred stockholders, creditors and minority common stockholders" (R. 2230). But the creditors, the preferred and the minority common stockholders of the subsidiary have no better right than the subsidiary itself to demand that the parent make its tax credit available to the subsidiary. Consolidated returns are not permitted for the benefit of any particular subsidiary, nor for the benefit of the creditors, etc., of that subsidiary; they are permitted for the benefit of the common owner of the affiliated group, i.e., the parent company and its stockholders. If parent and subsidiary are economic strangers, and if the creditors of the subsidiary wish the parent to join with the subsidiary in consolidated returns, they have no more rights in the premises than the subsidiary itself. The Court's reference to the rights of the creditors, etc., of the subsidiary poses, therefore, a false issue.

We submit that an independent management of plaintiff, with all these thoughts in mind, before consenting to consolidated returns and to the use of plaintiff's tax credit by respondent, might well have insisted on an agreement with respondent assuring plaintiff at least a fair share in the dollars to be achieved by their joint action, in accordance with the purpose of the tax laws. And respondent's management, if willing to act fairly, would have acceded to such a demand.

But even if the purpose of the tax laws were not indicative of what fair dealing between these parties required, there were other reasons which made it fair for plaintiff to receive at least a substantial share of the tax savings to be produced by the use of its tax credit.

B

Plaintiff's tax credit was a valuable asset which, in fairness, plaintiff could not be expected to surrender to respondent without receiving an adequate share of the resulting tax benefits.

Plaintiff's tax credit was its property. It was a thing of value. An asset which can produce benefits of $17,000,000 would seem to be valuable indeed. Respondent acted unfairly in causing plaintiff to part with this asset and in using it for itself, without allowing plaintiff a share of the resulting benefits.

The Court of Appeals denied that plaintiff's tax credit was a valuable asset. It thought that plaintiff, having no income of its own, could not utilize its tax credit for itself; hence respondent's use of that tax credit would not "sacrifice" any of plaintiff's interests, but would leave plaintiff "in exactly the same position that it was in before"; it was therefore proper for respondent and its officers to cause plaintiff to file consolidated returns which made plaintiff's tax credit available to respondent; and plaintiff could not demand "tribute" for doing so (R. 2232-3).

The premises as well as the conclusion of the Court below are wholly untenable.

(a) The Court of Appeals erred in holding that plaintiff could not use its tax credit for itself. The value of plaintiff's tax credit must be determined as of the time respondent appropriated it, i.e., July 15, 1944 (the date of the 1943 returns). At that time plaintiff had a real possibility of utilizing its tax credit to its own direct benefit. The fact that plaintiff's tax credit could be carried forward as far as 1945 could have been utilized to attract new capital investments in plaintiff; and plaintiff, with the income produced by such new financing, could have enjoyed the benefit of its tax credit. See *Alprosa Watch Corp.* v. *Commissioner*, 11 T. C. 240 (1948), the facts of which are

set forth in the footnote.* Plaintiff's management, devoted solely to the interests of respondent, entertained no such thoughts; but that does not change the fact that plaintiff's tax credit could have been the instrument of breathing new life into plaintiff. It was therefore an asset of real and substantial value; and the contention that its surrender to respondent cost plaintiff nothing is plainly wrong.

(b) By filing consolidated returns, plaintiff subjected itself to joint and several liability for any taxes or tax deficiencies which might be assessed upon respondent's income. Treas. Reg. 104, § 23.15(d). Fairness certainly did not require plaintiff to make itself gratuitously the surety for the tax obligations of respondent.

(c) Even if it be assumed that plaintiff could under no circumstances have used its tax credit for itself, respondent could. The very fact that plaintiff's tax credit was useful to respondent made it a valuable asset of plaintiff.

Suppose that two corporations with interlocking managements own one patent each; the two patents complement each other; neither can be used without the other. Each patent is worthless to its owner except for the value it has because of its usefulness to the other corporation. The common management causes one corporation to license its patent to the other, without any arrangement for royalties or other consideration. Upon a challenge of this transaction by stockholders of the licensor company, the licensee answers that the transaction is fair because the licensor could

* The taxpayer in the *Alprosa Watch* case was a corporation engaged in the business of manufacturing and selling gloves under the name of "Esspi Glove Corporation". It sustained a substantial loss in its operations. The stockholders of the corporation thereupon sold their stock to a new group. The new stockholders changed the name of the taxpayer to "Alprosa Watch Corporation", moved its business to new quarters and caused the corporation to give up the glove business and to engage in the business of purchasing and selling jewelry. The Tax Court held that the corporation could use the loss sustained in its glove business as a tax credit against the profits made in its jewelry business.

not use its patent for itself and thus, after the transaction, "was in exactly the same position that it was in before". To a court of equity such an argument would, we believe, be nothing short of shocking.

In our case plaintiff and respondent each had an essential ingredient for achieving a tax benefit. Plaintiff had a $75,000,000 loss; respondent had a large taxable income. Both respondent's taxable income and plaintiff's tax credit were necessary elements to achieve the tax saving, just as both patents were necessary to make a useful process. Plaintiff and respondent did join their resources to produce the tax benefit; and the joint effort of the two was indeed successful. But only one, the fiduciary, respondent, retained all the profit while the plaintiff, its cestui, received none.

Can this result possibly be called fair dealing by a fiduciary with its cestui?

Indeed, the recognition of this unfairness is implicit in the opinion below. For the Court below held that "affiliated corporations are usually associated for the very purpose of dealing with each other for profit" (R. 2221). But certainly this purpose of "dealing with each other for profit" must not become a one-way street. The purpose is foiled if one corporation reaps all the profit of the deal and the other none. Such unequal weighting of the scales becomes doubly repugnant to the sense of fairness where it is the dominant corporation which channels all the benefits of the joint transaction to itself and allows none to its ward whose destinies it has undertaken to guide. We submit that, on the very premises proclaimed by the Court below, the unfairness of respondent's dealing with its and plaintiff's tax affairs is palpable and glaring.

The argument of the Court below that plaintiff was, after the transaction, in the same position as before, implies that plaintiff cannot recover because it did not suffer actual injury. The Court does not reveal upon which local law it predicates the necessity of injury. The law, we submit, is well settled that a fiduciary dealing unfairly cannot

2. *Agreements for the allocation of tax savings are well supported by precedent.*

The question whether the tax benefits arising from consolidated returns have been fairly allocated among affiliated companies will rarely reach the cognizance of a court, since ordinarily the affiliation is too close for inter-company controversies. The question has, however, arisen from time to time in the field of public utility holding companies under regulations issued by the Securities and Exchange Commission. Although these regulations are not directly applicable to the present parties, their administration by the S. E. C. discloses the underlying principles of fairness which sanction the present plaintiff's claim.

(a) The S. E. C. regulation most directly pertinent is the Commission's Rule U-45(b)(6), 17 C.F.R. (1949), § 250.45(b)(6),* applicable to affiliated groups of public utility companies, and specifically regulating inter-company tax adjustments. This rule directs, in effect, that ordinarily the consolidated tax payable by an affiliated utility group shall be allocated among the members of the group in the proportion of their respective net incomes, but that deviations from this formula may be permitted by the Commission. As stated by the Commission, "Rule U-45(b)(6) was designed to effect a fair distribution of taxes based on consolidated returns".† To effectuate this purpose, the Commission has approved deviations from its rule and permitted "tax saving payments", i.e., payments by a profitable affiliate to a losing affiliate for the use of the latter's tax credit. The Commission's rulings and opinions are therefore significant on the issue of fairness herein.

* See Appendix.

† *Matter of Cities Service Company* (S. E. C. Holding Company Act Release No. 5535, January 3, 1945, File No. 70-933); see *infra*, p. 76.

Matter of Consolidated Electric & Gas Co., 15 S. E. C. 161 (1943), involved an affiliated group of utility companies including a parent corporation ("Consolidated") and 44 subsidiaries. Parent and subsidiaries filed consolidated tax returns. The parent had sold the assets of nine of the subsidiaries, sustaining a large loss on its investment therein. This loss could be used as a tax deduction by reason of a 1942 amendment of the Internal Revenue Code —the same amendment which qualified the present plaintiff's stock loss as a tax deduction. If the loss sustained by Consolidated was utilized in the consolidated return, the taxes payable by the affiliated group would be reduced by more than $2,000,000. Most of this tax saving would redound to the benefit of the subsidiaries, only a small fraction to the direct benefit of the parent.

In order to prevent the subsidiaries from receiving this undeserved windfall at the expense of their parent, the group members entered into an agreement under which the subsidiaries were to pay to their parent all of the tax savings resulting from the parent's capital loss. Since this arrangement was intrinsically fair, the Commission approved it:

> "To the extent that tax savings may accrue to the parent in connection with such sales, the result is in effect to reduce the amount of loss accruing to Consolidated by virtue of the transaction." (p. 163)
>
> "Under all the circumstances we believe that it is more realistic to view the tax savings as, in effect, partial offsets to the capital loss otherwise suffered by Consolidated in connection with the sales." (p. 164)

Like considerations should control the case at bar. The present plaintiff, like Consolidated, sustained an extraordinary capital loss giving rise to a tax deduction. The tax deduction here, like that in the *Consolidated* case, was designed as "partial offset to the capital loss". Just as it was fair for Consolidated to collect from its subsidiaries the tax savings which they obtained through Consolidated's

loss,* so it would have been fair for plaintiff to obtain a similar arrangement with respondent.

Indeed, the present case is much stronger than *Consolidated*. The Consolidated group—unlike the Western Pacific group—constituted an economic unit. The tax savings of Consolidated's subsidiaries thus enured automatically to the benefit of the parent; and the Commission noted that Consolidated might have secured most of the tax benefits of its subsidiaries through the payment of dividends (15 S. E. C., at 164). The permission for tax saving payments was thus a matter of expediency rather than necessity. By contrast, the economic unity of the Western Pacific group was destroyed. Plaintiff could derive no automatic benefit from the tax saving of respondent; an agreement for the sharing of the tax savings was thus, not merely a matter of expediency, but imperatively required in the interest of fairness, to effectuate the "more realistic" view of the tax savings as partial offsets to plaintiff's capital loss.

Matter of Cities Service Company (S. E. C. Holding Company Act Release No. 5535, January 3, 1945, File No. 70-988) contains an even broader statement of the applicable policies. Cities Service Co. was the parent of an affiliated utility group filing consolidated tax returns; Refining Corporation was a subsidiary. Under the war emergency, the Refining Corporation had built a refinery at a cost of $77,000,000, borrowed in large part from the Reconstruction Finance Corporation. The refinery was subject to rapid obsolescence. Pursuant to special dispensation, Refining Corporation was permitted to amortize its investment, for tax purposes, over a period of five years; in other words, it had in each year a tax deduction equal to 20% of its $77,000,000 investment. If these tax deductions were utilized in consolidated returns, they would enure to the benefit of other affiliates rather than that of Refining

* The tax savings paid to the parent in *Consolidated* were solely those flowing from the use of Consolidated's stock loss. Other tax savings flowing from the consolidated return remained with the subsidiaries.

Corporation. This would be an undeserved advantage to those affiliates who had not, with borrowed funds, made a large investment threatened with early obsolescence. The affiliates therefore agreed to pay to Refining Corporation their tax savings derived from the latter's amortization tax credits; and the S. E. C. approved. We quote the Commission's conclusions in full:

"Conclusions

"Rule U-45 (b) (6) was designed to effect a fair distribution of taxes based on consolidated returns. In appraising a proposed deviation from our rule we think it should be observed that in the ordinary case the fact that one subsidiary contributes a particular income deduction to a consolidated return does not in itself entitle that subsidiary to the benefits of the reduced taxes resulting from the deduction. Where tax reductions are possible from filing a consolidated return, they ordinarily are due to a number of factors contributed by the various members of the consolidating group, including, among others, earnings, and excess profits tax credits, as well as income deductions.

"On the basis of the estimates of the tax liability for 1944 it appears that Refining Corporation will contribute special deductions but that the other subsidiaries will contribute the income necessary to permit full utilization of the deductions. Thus, while a portion of the tax reductions possible from consolidation could not be realized without the special amortization items, the reduction likewise could not be realized in the absence of the income furnished by the other companies.

"Obviously it is difficult to determine the precise weight to be given to these various factors and in this case the problem is made more difficult since we have available the results of only five months' operation of the refinery.

"However, the impact of our rule in this instance and the circumstances surrounding the construction of the refinery as recited above persuade us that we should grant the exception requested if the effect in subsequent years will not cause undue detriment to the other subsidiaries of Cities. We shall therefore permit the

escape an accounting on the ground that the *cestui* suffered no detriment.

In *Young* v. *Higbee Co.*, 324 U. S. 204 (1945), a preferred stockholder of a bankrupt corporation, acting as representative of his class, demanded that the claims of certain creditors be subordinated. The District Court rejected the demand. The stockholder appealed; but while the appeal was pending, he sold his stock, and with it the appeal, to his adversaries. He was held accountable for the moneys received although there was no proof that, but for his surrender, the claim would have prevailed. Detriment to the *cestui* (the preferred stockholders as a class) was thus not held to be a prerequisite for recovery from the unfaithful fiduciary. The rule of this case has been followed in New York and in other jurisdictions; *Clarke* v. *Greenberg*, 296 N. Y. 146, 71 N. E. 2d 443 (1947); *Certain-Teed Products Corp.* v. *Topping*, 171 F. 2d 241 (C. A. 2, 1948).

A similar result was reached in the *Shreveport Bank* cases (*supra*, pp. 45-46), where the fiduciary (the new bank) used for itself a tax credit belonging to the *cestui* (the old bank); although the *cestui* could not have utilized the tax credit, it was permitted to recover the tax savings of the fiduciary ("regardless of whether the principal had suffered injury or not", 28 F. Supp. at 933; 144 F. 2d, at 237). And likewise in *Fleishhacker* v. *Blum*, 109 F. 2d 543, 546 (C. C. A. 9, 1940), cert. den. 311 U. S. 665, a bank officer was held accountable for the breach of his fiduciary duty, "even though the bank has suffered no damage". Accord: *Restatement, Restitution* (1937), § 1, Comment (e), pp. 14-15; § 197, Comment (c), pp. 809-810.

Let us compare our case with a more usual commercial analogy: Suppose that a fiduciary manages two businesses, one belonging to himself, the other to his *cestui*. By combining the purchasing power of the two, he buys merchandise at prices cheaper than each business would have had to pay separately. However, the entire amount of the reduced price is kept by the fiduciary; the *cestui* gets none of the savings. Could it be doubted that the

fiduciary would be held guilty of "overreaching or unfairness"? Would even the "morals of the market place" produce such a result were there strangers dealing at arm's length? Would it be any answer for the fiduciary to say that his *cestui* was undamaged because it was still getting the same old merchandise at the same old price? And would the *cestui's* demand for a fair share of the price saving be condemned as an attempt to "require tribute"?

We submit that in our case, as in the above hypothetical case, any reasonable test of fairness would deny that respondent as the fiduciary can take all and give its *cestui* none of the results of their joint efforts.

C

Plaintiff owed respondent no legal duty to file consolidated returns and thus to make its tax credit available to respondent.

The Court of Appeals held that it would have been improper for plaintiff to "bargain" for a share of respondent's tax savings because plaintiff and its officers were under a "positive duty" to file consolidated returns making plaintiff's tax credit available to respondent (R. 2233-5). Plaintiff, says the Court, "was the sole owner of the subsidiary's capital stock" (R. 2234). Hence plaintiff was "under a duty to deal fairly with the subsidiary". Plaintiff therefore "owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty" (R. 2234). Had the positions of the corporations been reversed, i.e., had respondent sustained a loss and plaintiff realized a profit, then respondent and its officers would have been obliged to file consolidated returns to enable plaintiff to make use of the loss (R. 2233).

This holding, we submit, is erroneous for several reasons.

1. *Plaintiff's ownership of respondent's stock did not impose fiduciary duties on plaintiff.*

The Court below thought that plaintiff, "as the sole owner of the subsidiary's capital stock", was respondent's

fiduciary. But the law is well settled that naked stock ownership creates no fiduciary duty unless the parent corporation dominates or controls the subsidiary:

Southern Pacific Co. v. *Bogert*, 250 U. S. 483, 492 (1919);

Blaustein v. *Pan American P. & T. Co.*, 263 App. Div. 97, 119, 31 N. Y. S. 2d 934, 956 (1st Dept., 1941), aff'd 293 N. Y. 281, 56 N. E. 2d 705 (1944);

Allied Chemical & Dye Corp. v. *Steel & Tube Co.*, 14 Del. Ch. 1, 12-13, 120 Atl. 486 (1923);

Title Ins. & T. Co. v. *California Development Co.*, 171 Cal. 173, 205-6, 152 Pac. 542 (1915);

13 *Fletcher, Corporations* (Perm. Ed., 1943), § 5811, pp. 127-8.

Thus this Court held in the *Southern Pacific* case, *supra* (250 U. S., at 492):

> "It is the fact of control * * * that creates the fiduciary obligation."

And in *Blaustein, supra*, the New York state court held (253 App. Div., at 119):

> "Mere ownership of a majority or all the stock of a corporation does not in and of itself spell domination. Stockholders are not *ipso facto* trustees for each other. [Citing authorities.] The fiduciary role is not assumed, and the obligation will not be imposed, until a majority stockholder usurps the functions of the directors in the management and conduct of the business of the corporation to the detriment of the corporation and the minority. [Citing authorities.]"

The Court below (R. 2234) cited *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 522 (1941); but that case does not stand for any rule different from that of the authorities just cited:

> "But equity will not permit a holding company, *which has dominated and controlled its subsidiaries*, to escape

or reduce its liability to those subsidiaries by reliance upon self-serving contracts which it has imposed on them. A holding company, as well as others *in dominating and controlling positions* (Pepper v. Litton, 308 U. S. 295), has fiduciary duties to security holders of its system which will be strictly enforced."

(312 U. S., at 522; italics ours.)

The *Consolidated Rock Products case*, like our other authorities, thus makes domination and control the decisive pre-condition of a parent company's fiduciary duty to its subsidiary.

The exercise of domination by plaintiff over respondent was plainly impossible. Respondent had been in the hands of its bankruptcy trustees since 1935. The Court of Appeals so held: "After the subsidiary was reorganized it was no longer controlled by Corporation but by the trustees appointed by the bankruptcy court" (R. 2223).

In the absence of domination or control, the mere ownership of respondent's stock did not subject plaintiff to any fiduciary duties.

Of course, once plaintiff and respondent actually entered into a transaction with each other, the managerial interlock imposed upon both the duty to deal fairly with each other. But it certainly does not follow that the managerial interlock (any more than the stock ownership) subjected plaintiff to an obligation to file consolidated returns.

2. *The holding of the Court of Appeals that every affiliated corporation having a deductible loss owes its profitable affiliates a duty to join in consolidated returns has dangerous implications, is contrary to the tax laws and finds no support in fiduciary law.*

The holding of the Court below comes, in effect, to this: If in an affiliated group one member has a profit and the other sustains a loss, then the loss company is obligated, as a matter of law, to join in consolidated returns making its tax credit available to the profit company. That such

was its holding was made quite clear by the Court below; for it held not only that plaintiff, as the owner of respondent's stock, was under a duty to respondent to file consolidated returns; it further held that, if the situation had been reversed, respondent would have been under a similar duty to plaintiff.

The consequences of this holding are far-reaching indeed. Under the tax laws, only the parent can file consolidated returns; the filing of such returns is optional. The Internal Revenue Code, § 141(a), refers to the "*privilege* of making consolidated income and excess-profits-tax returns". The law has heretofore been settled that, if the parent's stockholders "decide that its best interests require filing by it of a separate tax return, no provision of the law denies it this privilege", *Duke Power Co.* v. *Commissioner, supra*, 44 F. 2d, at 545.

All this would have to be changed if the Court below were to be sustained. The parent's "privilege" to file consolidated returns would become a compulsion; the option of the various affiliates to consult their best interest would be abolished; the statutory requirement of their consent would become a mere formality or idle ceremony.

We submit that the tax laws, in creating the consolidated return privilege, did not intend any such result; and it should not be created by judicial fiat.

Nor does the fiduciary duty to deal "fairly", if applicable at all, compel any such result. Despite the rigorous rules of fiduciary dealings, we know of no requirement that the fiduciary must turn its own property over to the cestui for the latter's benefit and advantage. The cestui cannot demand it, and no court would compel the fiduciary to do so, no matter how advantageously the cestui could use this property.

The tax credit herein was plaintiff's property, not respondent's; plaintiff could not be compelled to surrender its property to respondent in consolidated returns. Plain-

tiff was free to use its own property as its best interests dictated. Indeed, the Court below, in a different context, so stated (R. 2230):

> "Any subsidiary in the group, as well as the parent, may prevent the filing of consolidated returns if the filing is detrimental or contrary to the interests of such corporation."

Here, then, the Court of Appeals expressly recognized that the parent, in deciding whether or not to file consolidated returns, may be guided by its own interest rather than by that of its subsidiary. Nevertheless, a few pages later in its opinion, the Court of Appeals stated that plaintiff was obliged to file consolidated returns if that was in the respondent's, the subsidiary's, interest (R. 2234). The two holdings are plainly contradictory; and we submit that the first was right, the second wrong.

Hence, whether or not a member of an affiliated group be deemed a fiduciary of the other members is, we believe, immaterial to the question of whether such member can be required to file consolidated returns. If an affiliated company owns a tax credit, it is its own property; and no law, written or unwritten, compels the loss company to join in consolidated returns and thereby to surrender its tax credit to others.

D

The alleged tax practice of the Western Pacific group in earlier years furnishes no precedent for a period in which the affiliation between plaintiff and respondent had ended.

The Court of Appeals advances another reason for sustaining the fairness of respondent's receiving all the tax savings and plaintiff none. The argument runs (R. 2225, 2233): During the years prior to 1943 plaintiff, respondent and their affiliates had consistently filed consolidated tax returns. The taxes paid by plaintiff pursuant to such

returns were allocated among the various affiliates having taxable income in proportion to the amount of such incomes. Affiliates who contributed a loss and thereby reduced the consolidated tax are said to have received no payment for contributing their loss. Such having been the practice before 1942, the Court says it would have been unfair for plaintiff to demand a change in 1943 and thereafter, when such change would be to plaintiff's advantage.

The argument does not stand analysis.

1. It is factually unsound. During the years from 1918 to 1924, one of the affiliates joining with plaintiff and respondent in consolidated returns did make substantial "tax savings payments" to plaintiff, as is more fully demonstrated in the footnote.*

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* The affiliate was the Utah Fuel Company. The facts appear from a Price, Waterhouse report (Def. Ex. 40, R. 1517, not printed in the record, but filed with the Court below and with this Court). Page references in this footnote refer to said Defendants' Exhibit 40.

In the interest of brevity, we confine ourselves to the taxes for the year 1923, other years being similar. In 1923 the separate income of Utah Fuel Company (including its subsidiaries) was $1,053,957.73 (pp. 6, 13). At the then prevailing 12½% tax rate, the income tax payable by Utah Fuel Company, on a separate basis, would have been $131,744.72.

Utah Fuel Company however joined with plaintiff and the other members of the Western Pacific group in a consolidated tax return. Plaintiff had sustained a substantial loss in 1923 (p. 13). The total consolidated tax amounted therefore to only $71,268.88 (p. 13); and the proportionate share of Utah Fuel Company in the consolidated tax would have been only a fraction of this $71,268.88.

But actually the benefit of this tax reduction was not passed on to Utah Fuel Company. On the contrary, Utah Fuel Company paid the full sum of $131,744.72 (p. 6), i.e., the tax it would have had to pay on a separate basis. It paid

to the Government:	$71,268.88
to plaintiff:	$60,475.84 (p. 6)
Total paid by Utah Fuel Co.:	$131,744.72 (p. 6)

This transaction is thus a clear instance of a "tax savings payment" and refutes the holding of the Court of Appeals that none of the loss companies of the Western Pacific group received payment for the use of its tax credit in consolidated returns.

2. In any case, the tax practice of the Western Pacific group in earlier years is totally irrelevant to the events of 1943 and thereafter. The $593,976.33 tax savings which plaintiff is said to have derived by filing consolidated returns (Def. Ex. 46, R. 1552, 2040), accrued during the period from 1924 to 1935 (R. 2040). During this period, the Western Pacific group was an economic unit; tax savings payments would have been unnecessary and pointless since all tax savings automatically redounded to the benefit of plaintiff, the common parent. Thus, if plaintiff sustained a loss and one of its subsidiaries profited, the tax saving of the subsidiary became automatically the tax saving of the parent, so that the formality of a tax saving payment was superfluous. Conversely, if plaintiff had a profit and one of its subsidiaries a loss, a tax saving payment by the parent to the subsidiary would have been as meaningless as it would be for an individual to shift money from one pocket to another. So long as the Western Pacific group constituted an economic unit, there was no reason or purpose for making tax savings payments.

But the situation was quite different when, on March 15, 1943, the economic unity of plaintiff and respondent was severed. From that time on, the automatic upstream flow of respondent's tax savings was interrupted. The tax savings of respondent were no longer the tax savings of plaintiff. Hence it was at this point, and not before, that an adjustment of tax savings between respondent and plaintiff became important and necessary.

We submit that the alleged absence of tax savings payments during the period before 1943—when such payments would have been unnecessary and meaningless—furnishes no test for the years 1943 and thereafter when the usefulness and significance of such payments first arose.

Nor does it afford any justification for the failure of plaintiff's management to obtain an agreement by respondent assuring plaintiff its fair share of the tax savings. Such an agreement, as we now proceed to show, would have been wholly legal and proper.

E

Agreements for the fair allocation of tax savings among affiliated corporations are permitted and well supported by precedent.

In the Court below respondent argued that an agreement between plaintiff and respondent for the allocation of the tax savings would have been illegal; or that, at least, it would have been contrary to some undefined public policy, allegedly reflected in certain administrative rulings. The opposite is true.

1. *Agreements for the allocation of tax savings are expressly permitted by statute and regulation.*

Under earlier Revenue Acts, the subject of inter-company tax allocations was covered by the statute itself. § 240(a) of the Revenue Act of 1918 provided that a consolidated tax shall be assessed upon the respective affiliated corporations "in such proportions as may be agreed upon among them".* Allocation agreements made under this provision were thus binding not only among the parties, but even on the Commissioner who could collect from each affiliated corporation only such share of the consolidated tax as it had agreed to assume.

Since this statutory scheme made the collection of consolidated taxes unduly difficult, it was abandoned by the 1928 amendment of the Revenue Act which authorized the Commissioner of Internal Revenue to make appropriate regulations governing the subject; Internal Revenue Code,

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* The Revenue Act of 1918, § 240(a), 40 Stat. 1082, provided, in pertinent part:

> "In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated corporations in such proportions as may be agreed upon among them, or in the absence of any such agreement, then on the basis of the net income properly assignable to each. * * *"

§ 141(b). Pursuant to this authorization, the Commissioner promulgated Treas. Reg. 104, § 23.15, which provided:

> "(a) Several Liability of Members of Affiliated Group.
>
> "Except as provided in paragraph (b), a common parent corporation and each subsidiary, a member of the affiliated group during any part of a consolidated return period, shall be severally liable for the tax (including any deficiency in respect thereof) computed upon the consolidated net income of the group.
>
> * * * * * * *
>
> "(d) Effect of Inter-company Agreements.
>
> "Any agreement entered into by one or more members of the affiliated group with any other members of such group or with any other person shall in no case have the effect of reducing the liability prescribed under this section."

This regulation thus had a threefold effect: Each group member became severally liable to the Government for the entire tax; this liability to the Government could not be impaired by an inter-company agreement; but as between the members of the group the validity of inter-company agreements for the allocation of tax burdens or tax benefits was recognized. Unquestionably, therefore, an agreement between plaintiff and respondent, allowing plaintiff a share in the tax savings of respondent, would, as a matter of tax law, have been wholly legal.*

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* Respondent has argued that such an agreement would amount to an improper "merchandising of tax advantages", condemned by cases such as *Gregory* v. *Helvering*, 293 U. S. 465 (1935), and *Higgins* v. *Smith*, 308 U. S. 473 (1940). But the rule of these cases applies only to schemes designed for the evasion of taxes due the Government. Once a tax saving has been legitimately achieved, the Government is not concerned with agreements for the inter-company allocation of the resulting benefits.

fiduciary duties to plaintiff, occupies no different position. As was held by this Court in *Barney v. Saunders*, 16 How. (57 U. S.) 535, 543 (1853):

> "It is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the cestui que trust for all the gain which he has made. * * * They [the fiduciaries] cannot be allowed to aver that the profits made on the trust funds should be put in their own pockets because they were unlawful gains, for fear that the conscience of the cestui que trust should be defiled by a participation in them. To indulge trustees in such an obliquity of conscience, would be holding out immunity from misconduct and an inducement to speculate with the trust funds, and put them in peril."

We submit that the District Court's first ground for dismissing the action cannot stand.

B

Plaintiff's claim is not inconsistent with respondent's reorganization plan.

The District Court's reasoning runs: A "saving" in taxes actually means earnings not paid out to the Government. Plaintiff's claim is therefore a demand for a share of respondent's earnings; and the assertion by plaintiff of such a claim "is a circuitous way of obtaining something in the nature of equity or value for its ownership [of respondent's stock], rejected in the reorganization plan" (R. 372-4).

1. The fallacy of this reasoning lies in the confusion of what plaintiff is entitled to get by virtue of its stock ownership in respondent; and what it is entitled to get by virtue of respondent's use of plaintiff's tax credit.

It is perfectly true that respondent's reorganization plan, giving effect to the "absolute priority rule", *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106 (1939), precluded plaintiff from any share in respondent's assets or earnings

based upon plaintiff's ownership of stock in respondent. That stock was wiped out by respondent's reorganization plan; and plaintiff was left, at this point, without right or interest in respondent's assets and earnings.

But after this was done—indeed, because it was done—plaintiff had a tax credit. The tax credit belonged to plaintiff; it did not belong to respondent. Respondent's reorganization plan, and the orders approving and confirming it, may be searched from A to Z; no breath of a suggestion will be found that plaintiff's tax credit must be made available to respondent.*

Plaintiff did make its tax credit available to respondent; defendant caused it to do so. This was a new transaction not contemplated by the reorganization plan. Plaintiff's claim stems from this new transaction; for, as we say, plaintiff was in fairness entitled to the benefits from respondent's use of plaintiff's tax credit. By no stretch of argument may plaintiff's claim be viewed as based on its previous stock ownership in respondent.

Indeed, this is graphically demonstrated by the sequence of events. The consolidated returns and the refund claim were filed between July 15, 1944 and June 15, 1945. Prior to any of these dates—on April 30, 1944—plaintiff had surrendered its stock in respondent to the reorganization committee. Plaintiff was therefore no longer a stockholder of respondent at the time the tax returns and the refund claim were filed. Whatever rights plaintiff has in connection with these events, they cannot stem from its stock ownership in respondent which, at that time, was nonexistent. It follows that plaintiff's present claim, based upon the use of its tax credit by respondent, does not contravene the provisions of the reorganization plan eliminating plaintiff's stock interest in respondent.

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* The plan could contain no such suggestion. It was formulated in 1939 and approved in 1940 (R. 259). But the statutory amendment, which made the tax credit possible—Internal Revenue Code, § 23(g)(4)—was not enacted until October 21, 1942 (56 Stat. 820).

2. Respondent has argued *ad misericordiam* that plaintiff's claim would undermine the financial position of respondent. But actually it would leave respondent where the bankruptcy courts intended to place it and where respondent itself and its security holders counted on being placed. When this Court passed on respondent's reorganization plan, the junior interests demanded consideration because of respondent's "unexpectedly large earnings"; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, at 508 (1943). In answer this Court referred to the "effect of taxation" which was "more likely to affect net earnings" (*ibid.*). Respondent's new capitalization was thus based on the assumption that it would have to pay the full taxes on its income; and of this fact respondent gave warning to the world by setting aside a $10,100,000 tax reserve. Respondent has now succeeded in avoiding these taxes. Its security holders thereby obtained a windfall which this Court never contemplated giving them. But the windfall came from the use of plaintiff's tax credit. To say, under these circumstances, that plaintiff's claim to a fair share in this windfall would deplete the assets of respondent or circumvent its reorganization plan is little less than a parody on the facts.

CONCLUSION

It is respectfully submitted that the judgments of the Court of Appeals and of the District Court should be reversed and that this Court should grant judgment for plaintiff in the amount of respondent's tax savings or, at least, of such part thereof as to this Court may appear fair in the circumstances of this case.

Dated: New York, N. Y., November 22, 1952.

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on the brief.

declaration to become effective, but in order that we may have an opportunity to examine the future effects of the amended contract and take any action which may appear necessary or appropriate following such examination, our order will be subject to the condition that the proposed amendment to the contract regarding allocation of Federal income and excess profits tax liability shall cease to be effective upon order of the Commission after notice and opportunity for hearing.

"An appropriate order will issue."

This decision clearly shows that the S. E. C. was concerned with the same problem here presented, namely, "a fair distribution of taxes based on consolidated returns." The problem was further similar to ours in that the five-year amortization of the investment was tantamount to an investment loss spread over five years. The S. E. C. held that the tax credit arising from such a loss is designed to mitigate the loss; hence it found fair an agreement among the affiliates effectuating that purpose by a tax saving payment to the Refining Corporation, particularly since the latter needed that payment to discharge its loan obligation to the Reconstruction Finance Corporation. Nor was the arrangement inconsistent with the underlying purpose of the consolidated return statute to benefit the common parent of the group; for the Cities Service group was an economic unit; hence, whichever affiliate might obtain the tax saving in the first place, it was bound to enure ultimately to the benefit of Cities Service, the common parent; and Cities Service, in its own interest, wished to channel the payment to the Refining Corporation.

In the present case the retention of the tax savings by respondent would defeat not only the purpose of the tax law to alleviate plaintiff's investment loss. It would also defeat the purpose of the consolidated return statute to confer a tax benefit on the parent company. Both purposes would be achieved if plaintiff were permitted a share in respondent's tax savings. We submit that fairness required

respondent to make an agreement with plaintiff allowing plaintiff such a share; and since plaintiff's dual management failed to seek or make it, a court of equity will see that equity be done by awarding judgment to plaintiff for its fair share of the tax savings.

(b) The Court below drew different inferences from the S. E. C. decisions just cited (R. 2231-2). It found in these decisions "a decided viewpoint that the tax savings from consolidated returns shall not be paid over to the parent if this would in any way endanger the position of the creditors of the subsidiary". And it also read those decisions as holding that "a company whose loss was utilized for the benefit of the group does not have a right to compensation from those who benefited" (2231).

There are several difficulties with the conclusions thus reached by the Court below. In the first place, they are based upon an abbreviated excerpt from the S. E. C.'s decision in the *Cities Service* case (R. 2231-2) which does not give the slightest inkling of the Commission's actual holding in that case. The Commission did hold in *Cities Service* that, *"in the ordinary case"*, the contribution of a loss by one subsidiary does not "in itself" entitle that subsidiary to compensation. But the Commission also held that in an extraordinary case a different arrangement would be fair; it held that the facts in *Cities Service* presented such an extraordinary situation; and hence it authorized an agreement by which the subsidiary which had contributed the tax deduction received a share of its affiliates' tax savings thus produced. That was the gist of the S. E. C.'s decision; and it was wholly overlooked by the Court below.

We did and do cite the S. E. C. decisions to demonstrate that agreements between affiliated corporations, allowing the loss company a share of the tax savings produced by its loss, have been made in the past; that such agreements, under appropriate circumstances, are "fair"; and that they have found administrative sanction. Each of the S. E. C. decisions cited by us involved such an agreement; and in

each the agreement was approved by the Commission. The Court below completely overlooked this aspect of the S. E. C. decisions.

We fail to find in the S. E. C. decisions any of the broad rules which the Court below purported to distill from them (R. 2231). But even if those rules were to be accepted, they would not be relevant here. Assume, *arguendo*, the Court's postulate (R. 2231) that a subsidiary's tax savings from consolidated returns must not be paid over to the parent if this would endanger the creditors of the subsidiary. There is nothing in this record to indicate that a recovery by plaintiff herein would endanger the creditors of respondent; on the contrary, respondent has a $10,100,000 reserve available for that very purpose. Or assume, *arguendo*, the Court's postulate (R. 2231) that an affiliate whose loss was utilized for the benefit of the group does not, ipso facto, have a "right" to compensation from those who benefited. The question here is whether it would have been "fair" for plaintiff, under the particular facts of this case, to obtain a share of the tax savings to be produced by the use of plaintiff's tax credit. That is the determinative question here; and the S. E. C. decisions clearly show that, under circumstances much less stringent than those at bar, an agreement of this type may be "fair", as well as legal and proper.

We turn back to the test of a "fair" transaction as one which "would have commended itself to an independent corporation". In the light of our discussions under this point head, we submit that plaintiff, had it been an "independent corporation", under a management wholeheartedly devoted to its sole interest, would have found literally nothing to commend to plaintiff this transaction by which plaintiff conferred a $17,000,000 tax benefit on respondent, without itself receiving any benefit whatever. Corporations are not organized to distribute largesse to strangers. An independent management of plaintiff, faced with the propo-

sition of filing consolidated returns, would have considered that plaintiff's tax credit was allowed by law in order to mitigate its ruinous stock loss, not to give a tax windfall to the prosperous respondent; that plaintiff might have opportunities to use the tax credit for its own benefit; that, by joining in consolidated returns, plaintiff would subject itself to liability for any tax deficiencies of respondent; that respondent, economically a total stranger to plaintiff, was anxious to obtain the benefit of plaintiff's tax credit; and that plaintiff was under no obligation to surrender it to respondent.

Under these circumstances, the proposition that plaintiff surrender its tax credit to respondent without assurance of an adequate share in the resulting savings was utterly unfair to plaintiff. As a condition of joining in consolidated returns, plaintiff was in fairness entitled to demand that respondent agree to allow plaintiff all or at least a substantial share of the tax benefits to be produced by the use of plaintiff's tax credit.

Plaintiff's dual management failed to make that demand. But this very duality of personnel now enables this Court to scrutinize the transaction between the parties and to do equity by permitting plaintiff to recover a fair share of the tax benefits which resulted from the use of plaintiff's tax credit.

POINT III

The Court of Appeals erred in making findings of fact where the District Court had made none or had made contrary findings.

1. The Court of Appeals rested its decision upon numerous findings of fact made by it rather than by the District Court. It is our contention that it was beyond the province of the Court of Appeals to do so. We proceed to list some of the findings of the Court of Appeals which we believe to have been improperly made.

(a) The Court of Appeals found the record "barren of evidence" to support our contention that respondent dominated plaintiff in the tax transaction (R. 2235). We have shown (*supra*, pp. 38-40) that this finding is contrary to one made by the District Court and also contrary to the evidence.

(b) The Court of Appeals found that, in each year from 1916 to 1942, the corporations forming the Western Pacific group had filed consolidated returns; and that in none of those years did the companies contributing a loss receive any payment (or "tribute") for the taxes saved by the use of their loss (R. 2225, 2233). The District Court did not so find; * and the record clearly establishes that in several instances an affiliate contributing a loss was indeed paid therefor (*supra*, p. 70, footnote).

(c) The Court of Appeals found that, since plaintiff had no income, "there was no possible way for it to achieve any tax advantage to offset the loss" (R. 2232). The District Court did not so find; and we have shown that plaintiff did have possibilities of using its tax credit for itself (*supra*, pp. 61-62).

(d) The Court of Appeals found that plaintiff's officers, when they filed consolidated returns, "were conforming with the policy and directions of Corporation" (R. 2229). The District Court did not so find; and the record shows, without contradiction, that plaintiff's board of directors was not consulted about the filing of consolidated returns for the critical years (R. 1018). Who then formulated plaintiff's "policy" and "directions" which the Court of Appeals found?

(e) The Court of Appeals found that the interlock between the management of plaintiff and of respondent had

* The District Court did find that the consolidated taxes were allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income (R. 261). But the District Court did not find that there were no payments to other companies contributing a loss.

been created by plaintiff (R. 2223). The District Court did not so find. The record establishes that respondent's personnel was, during respondent's reorganization, appointed by the bankruptcy court rather than by plaintiff; and after the reorganization, respondent's personnel was appointed by its new stockholders and directors, not by plaintiff. Plaintiff's personnel, in turn, was taken over by respondent's trustees as full-time employees of respondent; and tax counsel, representing both plaintiff and respondent, were retained by respondent's trustees, not by plaintiff.

(f) The Court of Appeals found that "many persons having an interest in Corporation, including stockholders and counsel, were fully aware of the situation" (R. 2234). The District Court did not so find; and we have discovered no evidence in the record that plaintiff's stockholders (other than the James Interests who had cast their lot with respondent) were kept abreast of the "situation".

(g) The Court of Appeals described the firm of Whitman Ransom Coulson & Goetz as "independent tax experts" (R. 2226). The District Court, far from considering this firm as independent, referred to them as "the tax attorneys for defendant" (R. 261, 265); and the uncontradicted evidence shows that the firm was anything but "independent" (*supra*, pp. 17-19, 40).

It is unnecessary to accumulate further instances. Each of the findings of the Court of Appeals which we have listed was important to its decision; each was unsupported by any finding of the District Court; each was contrary to the clear evidence.

2. It was beyond the province of the Court of Appeals to make such findings. Rule 52 F. R. C. P. provides, in pertinent part:

> "Findings by the Court.
>
> "(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its

conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. * * *

"(b) *Amendment.* Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly: * * *"

This Rule requires that findings on disputed facts be made by the District Court, not by the Court of Appeals. It has been so construed in numerous cases:

Kupperman v. *M. & J. Becker, Inc.*, 198 F. 2d 765, 770 (C. A. 2, 1952);
Jacuzzi Bros. v. *Berkeley Pump Co.*, 191 F. 2d 632, 638 (C. A. 9, 1951);
McClure v. *O. Henry T. & A. Co.*, 184 F. 2d 636, 639 (C. A. 7, 1950);
Kistler v. *Gingles*, 171 F. 2d 912, 915-6 (C. A. 8, 1949);
Campbell v. *Campbell*, 170 F. 2d 809, 810 (App. D. C., 1948).

Indeed, the holdings of this Court indicate the same rule:

Kelley v. *Everglades Drainage District*, 319 U. S. 415, 421-2 (1943);
Oil Shares, Inc. v. *Commercial Trust Co.*, 304 U. S. 551 (1938).

The Court of Appeals nevertheless held that district court findings "are not a jurisdictional requirement of appeal which this Court may not waive", inasmuch as findings of fact are merely "intended to aid appellate courts by affording them a clear understanding of the basis of

the decision below" (R. 2236). For this proposition, the Court below cited three cases:

Mayo v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940);

Goodacre v. *Panagopoulos*, 110 F. 2d 716 (App. D. C., 1940);

Hurwitz v. *Hurwitz*, 136 F. 2d 796 (App. D. C., 1943).

But these authorities do not sustain the procedure adopted by the Court below. In the *Mayo* case, *supra*, this Court reversed the lower court because of the insufficiency of the findings of the District Court; it pointed out that "fair compliance with Rule 52(a)" was "of the highest importance to a proper review" (309 U. S., at 316); and it remanded with directions that "any action taken by the court shall be upon findings of fact and conclusions founded upon the evidence, in accordance with Rule 52(a) of the Rules of Civil Procedure" (p. 319). These rulings are no authority for the procedure adopted by the Court below.

In the *Goodacre* case, *supra* (110 F. 2d 716), the District Court had failed to make "separate findings" of fact, but had embodied its findings in a memorandum opinion. The Court of Appeals held that it was not required to reverse "for a mere formal failure to comply with the rule" (p. 718). That was a far cry from holding that the Court of Appeals could make new findings where the District Court had made none.

In the *Hurwitz* case, *supra* (136 F. 2d 796), the issues had been submitted to a jury on special interrogatories which the jury answered in favor of the plaintiff. On appeal the defendant argued that the cause was of an equitable nature and that the trial court should have made independent findings. The Court of Appeals agreed, but held that such findings were "not a jurisdictional requirement of appeal which this court may not waive", and that "their purpose is to aid appellate courts in reviewing the decision below". This conclusion was stated with respect to a record which the Court of Appeals found to be clear;

hence, it held itself entitled to waive the defect; and it affirmed the decision of the District Court.

Whether or not the *Hurwitz* decision was correct when it was made in 1943 need not be debated; it certainly has lost its vitality since the 1946 amendment to the Federal Rules of Civil Procedure. The *Committee Note of 1946 to Rule 52(a)* states:

> "Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review (*Hurwitz* v. *Hurwitz* (App. D. C., 1943), 136 F. 2d 796) but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment."

The *Hurwitz* rule that findings are merely designed to aid the appellate court was thus rejected; and with the elimination of that premise, the conclusion that an appellate court may waive findings must equally fall. The weight to be accorded to the Committee Notes is, of course, well recognized by this Court; *Mississippi Pub. Co.* v. *Murphree*, 326 U. S. 438, 444 (1946).

There are good reasons for entrusting the findings of fact to the District Court alone. The District Court sees and observes the witnesses; the Court of Appeals does not. Errors or inadequacies of findings of the District Court may be corrected upon motion pursuant to Rule 52(b); no such procedural machinery is available in the Court of Appeals. The findings of the District Court are binding as between the parties under the rules of estoppel by judgment; expressions in an opinion of the Court of Appeals have no such effect; 2 *Freeman on Judgments* (5th Ed., 1925), § 718, pp. 1518-9.* We submit, therefore, that the

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*And see *Matter of King*, 183 N. Y. 440, 450 (1906): "* * * * what is decided by the court is settled by its order and judgment and not by its opinion." Also *Doyle* v. *Hamilton Fish Co.*, 234 Fed. 47, 50 (C. C. A. 2, 1916), cert. den. 243 U. S. 649: "* * * it is not proper to decide the scope of the judgment by the opinion rendered * * *."

Court of Appeals erred in making its own findings; and the Court compounded the error by making findings which were contrary to those of the District Court and contrary to the evidence.

POINT IV

The grounds upon which the District Court based its decision were erroneous.

The District Court predicated its decision dismissing the action upon two grounds:

1. It thought that respondent's tax savings improperly deprived the Government of taxes due it and that this injustice should not be compounded by distributing respondent's illegal gain to others (A, *infra*); and

2. It conceived plaintiff's claim as an attempt by plaintiff to secure part of respondent's income in contravention of respondent's reorganization plan (B, *infra*).

Neither of these grounds was adopted by the Court of Appeals; neither, we submit, has merit.

A

Plaintiff's alleged inability to recover because of the injustice of respondent's tax savings.

We submit that this ground of the District Court's decision cannot stand, for several reasons.

1. *The Government was not unjustly deprived of taxes.*

The District Court strongly felt that the use of plaintiff's tax credit in the consolidated returns and the 1947 tax settlement unjustly deprived the Government of taxes due to it. It described the result as a "tax escape" (R. 270, 271), which was "bizarre" (R. 265), "erroneous and unjust" (R. 271), "amazing and undeserved" (R. 276). The grounds

which brought the District Court to this conclusion are not too clearly stated; but it may be gathered that the Court objected to the filing of consolidated returns in a situation where the companies filing the return are no longer "a single business or economic unit" (R. 269-270).

In so holding, the District Court fell in the same error as the Court of Appeals, although with a different conclusion: It confused the *purpose* of the consolidated return law with its *requirements*. It is quite true, as we have shown, that the purpose of consolidated returns is to treat an economically unified group of corporations as a single taxpayer. But the method by which the law seeks to achieve this purpose is the requirement of 95% stock ownership. Once that requirement is met, consolidated returns may be filed even though, because of anomalous circumstances, the economic unity does not actually exist. Thus where a subsidiary has been placed in bankruptcy, the economic unity is destroyed; nevertheless the parent's 95% stock ownership will enable it to file consolidated returns if the subsidiary's trustee consents. As was held in just such a case in *George A. Fuller Co.* v. *Commissioner*, 92 F. 2d 72, 73 (C. C. A. 2, 1937):

> "We are now dealing with the 1932 Act, § 141(d), 26 U. S. C. A. § 141 note, under which affiliation follows merely upon ownership by one or more of the other corporations of at least 95 per centum of the stock of each of the corporations (except the common parent) * * *."

Accord:

> *Trinity Buildings Corp.* v. *Commissioner*, 40 B. T. A. 1315, 1319 (1939).

We submit, therefore, that the lack of economic unity between plaintiff and respondent did not prevent the filing of the consolidated returns although, in the absence of an appropriate agreement between the parties, the returns failed to achieve the statutory purpose for which they were permitted.

2. *The Government's tax claim, if any, has been validly and properly settled.*

It is not even necessary for this Court, at this late stage, to determine whether the consolidated returns were properly filed; for the question of respondent's tax liability was settled between the Government and the parties. There is no room for a collateral attack upon this settlement in the present litigation.

Confronted with a substantial tax controversy, the Commissioner of Internal Revenue was certainly within his rights in consenting to a settlement. The District Court's suggestion that he "would not hesitate to set aside the tax settlement" if he had the power (R. 270), appears therefore gratuitous.

It is even more so because of the complete absence of any ground to impugn the legality or propriety of the settlement. The District Court did not find that the settlement was reached through fraud or corruption; and there is not a shred of evidence which would support such finding. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14-15 (1926). This presumption, totally unrebutted here, is the answer to the District Court's unwarranted attack upon the settlement.

3. *Even if the tax settlement had been a wrong against the Government, it would not defeat plaintiff's rights.*

A hypothetical case will serve to make our point. Suppose that the executor of an estate, by improper means, collects an unjust claim of the estate or evades the payment of estate taxes justly due. Will it be suggested that he may retain the fruits of his illegal acts for himself? We believe that he would be accountable to his beneficiary for all profits derived in the course of his conduct as executor and that he cannot escape accountability by invoking his own wrongdoing. The present respondent, by virtue of its

parent in its name will give waivers, give bonds, and execute closing agreements, offers in compromise, and all other documents, and any waiver or bond so given, or agreement, offer in compromise, or any other document so executed, shall be considered as having also been given or executed by each such corporation. Notwithstanding the provisions of this paragraph, however, any notice of deficiency, in respect of the tax for a consolidated return period, will name each corporation which was a member of the affiliated group during any part of such period, and any assessment (whether of the original tax or of a deficiency) will be made in the name of each such corporation (but a failure to include the name of any such corporation will not affect the validity of the notice of deficiency or the assessment as to the other corporations); any notice and demand for payment will name each corporation which was a member of the affiliated group during any part of such period (but a failure to include the name of any such corporation will not affect the validity of the notice and demand as to the other corporations); and any distraint (or warrant in respect thereof), any levy (or notice in respect thereof), any notice of a lien, or any other proceeding to collect the amount of any assessment, after the assessment has been made, will name the corporation from which such collection is to be made. The provisions of this paragraph shall apply whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time. Notwithstanding the provisions of this paragraph, the Commissioner may, if he deems it advisable, deal directly with any member of the group in respect of its liability, in which event such member shall have full authority to act for itself.

(b) * * *

APPENDIX

Text of Statutes and Regulations cited

APPENDIX

Text of Statutes and Regulations cited

Internal Revenue Code

§ 23. *Deductions from gross income.* In computing net income there shall be allowed as deductions: * * *

(g) Capital losses.

(1) Limitation. Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

(2) Securities becoming worthless: If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.

(3) Definition of securities. As used in paragraph (2) of this subsection the term "securities" means (A) shares of stock in a corporation, and (B) rights to subscribe for or to receive such shares.

(4) Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purposes of this paragraph a corporation shall be deemed to be affiliated with the taxpayer only if:

(A) at least 95 per centum of each class of its stock is owned directly by the taxpayer; and

(B) more than 90 per centum of the aggregate of its gross incomes for all taxable years has been from sources other than royalties, rents (except rents derived from rental of properties to employees of the company in the ordinary course of its operating business), dividends, interest (except interest received on deferred purchase price

of operating assets sold), annuities, or gains from sales or exchanges of stocks and securities; and

(C) the taxpayer is a domestic corporation.

§ 122. *Net operating loss deduction.*

(a) Definition of net operating loss. As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) Amount of carry-back and carry-over.

(1) Net operating loss carry-back. If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d), (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(2) Net operating loss carry-over. If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net op-

erating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

§ 141. *Consolidated returns.*

(a) Privilege to file consolidated income and excess-profits-tax returns. An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making consolidated income and excess-profits-tax returns for the taxable year in lieu of separate returns. The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. The making of a consolidated income-tax return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated returns shall include the income of such corporation for such part of the year as it is a member of the affiliated group. In the case of a corporation which is not a member of the affiliated group after March 31, 1942, of the last taxable year of such group which begins before April 1, 1942, such corporation shall not be considered a member of the affiliated group for consolidated income-tax-return purposes for such

year but shall be considered a member of such group for consolidated excess-profits-tax-return purposes for such year, and the consent required in the case of such corporation shall relate only to the consolidated excess-profits-tax regulations.

(b) Regulations. The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making consolidated income- and excess-profits-tax returns and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income- and excess-profits-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. Such regulations shall prescribe the amount of the net operating loss deduction of each member of the group which is attributable to a deduction allowed for a taxable year beginning in 1941 on account of property considered as destroyed or seized under section 127 (relating to war losses), and the allowance of the amount so prescribed as a deduction in computing the net income of the group shall not be limited by the amount of the net income of such member.

(c) Computation and payment of tax. In any case in which consolidated income-tax and excess-profits-tax returns are made or are required to be made, the taxes shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under subsection (b) prescribed prior to the last day prescribed by law for the filing of such returns; except that the tax imposed under section 15 or section 204 shall be increased by 2 per centum of the consolidated corporation surtax net income of the affiliated group of includible corporations. Only one specific exemption of $10,000 provided in section 710(b) (1)

shall be allowed for the entire affiliated group of corporations for the purposes of the tax imposed by Subchapter E of Chapter 2.

(d) Definition of "affiliated group". As used in this section, an "affiliated group" means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

(1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

(2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of at least one of the other includible corporations.

As used in this subsection, the term "stock" does not include nonvoting stock which is limited and preferred as to dividends.

(e) Definition of "includible corporation". As used in this section, the term "includible corporation" means any corporation except—

(1) Corporations exempt under section 101 from the tax imposed by this chapter.

(2) Insurance companies subject to taxation under section 201 or 207.

(3) Foreign corporations.

(4). Corporations entitled to the benefits of section 251, by reason of receiving a large percentage of their income from sources within possessions of the United States.

(5) Corporations organized under the China Trade Act, 1922.

(6) Regulated investment companies subject to tax under Supplement Q.

(7) Any corporation described in section 725(a), or in section 727 (e), (g), or (h) (without regard to the exception in the initial clause of section 727) but not including such a corporation which has made and filed a consent, for the taxable year or any prior taxable year beginning after December 31, 1943, to be treated as an includible corporation. Such consent shall be made and filed at such time and in such manner as may be prescribed by the Commissioner with the approval of the Secretary.

(f) Includible insurance companies. Despite the provisions of paragraph (2) of subsection (e), two or more domestic insurance companies each of which is subject to taxation under the same section of this chapter shall be considered as includible corporations for the purpose of the application of subsection (d) to such insurance companies alone.

(g) Subsidiary formed to comply with foreign law. In the case of a domestic corporation owning or controlling, directly or indirectly, 100 per centum of the capital stock (exclusive of directors' qualifying shares) of a corporation organized under the laws of a contiguous foreign country and maintained solely for the purpose of complying with the laws of such country as to title and operation of property, such foreign corporation may, at the option of the domestic corporation, be treated for the purpose of this chapter and of Subchapter E of Chapter 2 as a domestic corporation.

(h) Suspension of running of statute of limitations. If a notice under section 272(a) in respect of a deficiency for any taxable year is mailed to a corporation, the suspension of the running of the statute of limitations, provided in section 277, shall apply in the case of corporations with

which such corporation made a consolidated return for such taxable year.

(i) Allocation of income and deductions. For allocation of income and deductions of related trades or businesses, see section 45.

Treasury Regulation 104, 26 C. F. R. (1949), § 23

§ 23.12 *Making consolidated return and filing other forms.*

(a) *Consolidated return made by common parent corporation.* A consolidated return shall be made on Form 1120 by the common parent corporation for the affiliated group. Such return shall be filed at the time and in the office of the collector of the district prescribed for the filing of a separate return by such corporation.

(b) *Authorizations and consents.* (1) Each subsidiary must prepare duplicate originals of Form 1122, consenting to these regulations and authorizing the common parent corporation to make a consolidated return on its behalf for the taxable year and authorizing the common parent (or, in the event of its failure, the Commissioner or the collector) to make a consolidated return on its behalf (as long as it remains a member of the affiliated group), for each year thereafter for which, under § 23.11 (a), the making of a consolidated return is required. One of such forms as prepared by each subsidiary shall be attached to the consolidated return, as a part thereof; and the other shall be filed, at or before the time the consolidated return is filed, in the office of the collector for the district prescribed for the filing of a separate return by such subsidiary. No such consent can be withdrawn or revoked at any time after the consolidated return is filed.

(4) A corporation which consents to be treated as an includible corporation for a taxable year beginning after December 31, 1943, shall be treated as an includible corporation for all subsequent years, regardless of whether the affiliated group of which such corporation is a member during such subsequent years is the same as the affiliated group of which such corporation was a member when such consent was filed. No consent to be treated as an includible corporation under section 141(e)(7) can be withdrawn or revoked at any time after the consolidated return is filed for the first taxable year for which the consent is filed.

(b) * * *

§ 23.15 *Liability for tax.*

(a) *Several liability of members of affiliated group.* Except as provided in paragraph (*b*), the common parent corporation and each subsidiary, a member of the affiliated group during any part of a consolidated return period, shall be severally liable for the tax (including any deficiency in respect thereof) computed upon the consolidated net income of the group.

(b) *Liability of a corporation in bankruptcy or receivership.* If, at the time of filing a consolidated return, one or more, but not all, of the members of the affiliated group are in bankruptcy under the laws of the United States or in receivership in any court of the United States or of any State, Territory, or the District of Columbia, then the liability under paragraph (*a*) of each such member of the group with respect to the period covered by such return shall not exceed such portion of the consolidated tax liability for such period as the several corporations included in the consolidated return may, subject to the approval of the Commissioner, agree upon, or, in the absence of such an agreement, an amount equal to its liability for such year computed as if a separate return had been filed.

(c) * * *

(d) *Effect of intercompany agreements.* Any agreement entered into by one or more members of the affiliated group with any other members of such group or with any other person shall in no case have the effect of reducing the liability prescribed under this section.

(e) * * *

§ 23.16 *Common parent corporation agent for subsidiaries.*

(a) *Scope of agency of common parent corporation.* Except as provided in paragraphs (b) and (c) of this section:

(1) The common parent corporation shall be for all purposes, in respect of the tax for the taxable year for which a consolidated return is made or is required, the sole agent, duly authorized to act in its own name in all matters relating to such tax, for each corporation which during any part of such year was a member of the affiliated group. The corporations, other than the common parent, shall not have authority to act for or to represent themselves in any such matter. For example, all correspondence will be carried on directly with the common parent; notices of deficiencies will be mailed only to the common parent, and the mailing to the common parent shall be considered as a mailing to each such corporation; notice and demand for payment of taxes will be given only to the common parent, and such notice and demand shall be considered as a notice and demand to each such corporation; the common parent will file petitions and conduct proceedings before the Board of Tax Appeals, and any such petition shall be considered as having also been filed by each such corporation; the common parent will file claims for refund or credit; refunds will be made directly to and in the name of the common parent and will discharge any liability of the Government in respect thereof to any such corporation; and the common

Securities and Exchange Commission Rule U-45, 17 C. F. R. (1949), § 250.45

§ 250.45 *Loans, extensions of credit, donations and capital contributions to associate companies.*

(a) *General provision.*—No registered holding company or subsidiary company shall, directly or indirectly, lend or in any manner extend its credit to nor indemnify, nor make any donation or capital contribution to, any company in the same holding company system, except pursuant to a declaration notifying the Commission of the proposed transaction, which has become effective in accordance with the procedure specified in Rule U-23, and pursuant to the order of the Commission with respect to such declaration under the applicable provisions of the Act.

(b) *Exceptions.*—The following transactions shall be exempt from the declaration requirements of this rule:

* * * * * *

(6) A loan or extension of credit or an agreement of indemnity arising out of a consolidated tax return filed by a holding company (or other parent company) and its subsidiaries: *Provided,* That the top company in the group assumes primary responsibility for the payment of any tax liability involved, subject to the right to contribution from the several members of the group in an amount not exceeding as to any company that percentage of the sum of the normal tax, surtax, and excess profits tax on a consolidated basis which the sum of the normal tax, surtax and excess profits tax of such company if paid on a separate return basis is of the aggregate amount of normal, surtax and excess profits taxes of the individual companies based upon separate returns. In each instance the amount of excess profits tax shall be computed less the amount of the post-war refund. In computing each company's tax on a separate return basis, allowance shall be made for

loss carry-over and other adjustments as if the company had always filed its tax return on a separate return basis. The amount of post-war refund bonds which the consolidated group will acquire (under section 780 of the Internal Revenue Code) and the liability therefor shall be allocated to the several members of the group in the ratio that the post-war refund bonds each company would acquire on a separate return basis bears to the sum of the post-war refund bonds which all of the companies would acquire on the basis of separate tax returns.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & CO., INC.,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

JULIUS LEVY,
Attorney for Petitioners.

ABRAHAM L. POMERANTZ,
WILLIAM E. HAUDEK,
WEBSTER V. CLARK,
on the Brief.

TABLE OF CONTENTS

PAGE

POINT I—Respondent's retention of the tax benefits was unfair because plaintiff, not respondent, was, under the tax laws, the intended beneficiary of those benefits 5

POINT II—The precedents and the policy considerations which, according to respondent, militate against tax saving payments, apply only to unified groups of corporations and are therefore inapplicable where, as here, the economic unity has been severed 8

1. The alleged past practice of the Western Pacific group 11
2. The alleged general business practice 12
3. The Securities and Exchange Commission 13
4. The Federal Trade Commission 15
5. The Senate Committee on Interstate Commerce 16
6. The Treasury Department 17
7. The Interstate Commerce Commission 18

POINT III—Plaintiff was under no obligation to surrender its tax credit to respondent, without receiving a fair share of the tax savings therefrom 19

POINT IV—The amount of plaintiff's recovery should be determined in accordance with the requirements of fairness 21

POINT V—The alleged "bar of reorganization" affords respondent no defense 23

A. The authorization of the trustees by the bankruptcy court was not a prerequisite of plaintiff's claim; moreover such authorization was given 24

PAGE

B. Respondent expressly assumed the trustees' liability for plaintiff's claim 26

C. Plaintiff was, by express statute, relieved from any requirement to present its claim to the bankruptcy court 30

1. The statute would have authorized plaintiff to sue the reorganization trustees without resort to the bankruptcy court 31

2. Respondent, having assumed the obligation of the trustees, is equally amenable to suit 32

D. Respondent's authorities do not sustain its contention that the recognition of plaintiff's claim would be contrary to the purposes of reorganization proceedings 35

POINT VI—The defenses of limitations, laches and estoppel are without merit 36

1. The Statute of Limitations 36

2. The defense of laches 37

3. The defense of estoppel 37

TABLE OF CASES

PAGE

American Brake Shoe & F. Co. v. Pere Marquette R. Co., 268 Fed. 237 (D. C., E. D. Mich., 1920) 32, 33, 34

Anderson v. Calaveras Central Mining Corp., 13 Cal. App. 2d 338, 57 Pac. 2d 560 (1936) 36

Atlantic City E. Co. v. Commissioner, 288 U. S. 152 (1933) 7

Beckley v. Erie R. Co., 175 F. 2d 64 (C. A. 6, 1949) 35

Beneficial Corp. v. Commissioner, 18 T. C. ....., No. 47 (May 23, 1952) 13

Black v. Richfield Oil Corp., 146 F. 2d 801 (C. C. A. 9, 1944) 35

Bogart v. George K. Porter Co., 193 Cal. 197, 223 Pac. 959 (1924) 36

Bremer v. Chicago & E. I. R. Co., 247 Ill. App. 406 (1927, not otherwise reported) 33

Brinckerhoff v. Bostwick, 88 N. Y. 52 (1882) 4

Byrnes v. Missouri National Bank, 7 F. 2d 978 (C. C. A. 8, 1925) 25

Chicago Deposit Vault Co. v. McNulta, 153 U. S. 554 (1894) 24, 25

Chicago G. W. R. Co. v. Hulbert, 205 Fed. 248 (C. C. A. 8, 1913) 33

Cities Service Company, Matter of, 17 S. E. C. 839 (1944) 13, 15

Colorado & S. R. Co., In re, 84 F. Supp. 134 (D. C. Colo., 1949) 35

Commissioner v. Phipps, 336 U. S. 410 (1949) 7

Comstock v. Group of Institutional Investors, 335 U. S. 211 (1948) 22

PAGE

Consolidated Electric & Gas Co., Matter of, 15 S. E. C. 161 (1943) 13

Consolidated Electric and Gas Co., The Islands Gas and Electric Co., 13 S. E. C. 649 (1943) 13

Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107 (1900) 36

Denver & R. G. R. Co. v. Gunning, 33 Colo. 280, 80 Pac. 727 (1905) 33

Duryee v. Erie R. Co., 175 F. 2d 58 (C. A. 6, 1949) 35

Erie Lumber Co., In re, 150 Fed. 817 (D. C., S. D. Ga., 1906) 25

Ewen v. Peoria & E. R. Co., 78 F. Supp. 312 (S. D. N. Y., 1948), cert. den. 336 U. S. 919 21

Foust v. Munson Steamship Lines, 299 U. S. 77 (1936) 35

Gableman v. Peoria, D. & E. R. Co., 179 U. S. 335 (1900) 31

Gardner v. New Jersey, 329 U. S. 565 (1947) 35

Gray v. Grand Trunk W. R. Co., 156 Fed. 736 (C. C. A. 7, 1907) 33

Hanlon v. Smith, 175 Fed. 192 (C. C., N. D. Iowa, 1909) 33

Hawkins v. St. Louis & S. F. R. Co., 202 S. W. 1060 (Mo. App., 1918, not otherwise reported) 33

Jacobowitz v. Thomson, 141 F. 2d 72 (C. C. A. 2, 1944) 31

James Estate, In re, 86 N. Y. S. 2d 78 (Surr. Ct., 1948) 4

Kalb & Berger Mfg. Co., In re, 165 Fed. 895 (C. C. A. 2, 1908) 26

Kansas City, M. & O. R. Co. v. Latham, 182 S. W. 717 (Tex. Civ. App., 1915, not otherwise reported) 33

Kennison v. Philadelphia & R. C. & I. Co., 38 F. Supp. 980 (D. C., Minn., 1940) 32

PAGE

Koral v. Savory, Inc., 276 N. Y. 215, 11 N. E. 2d 883 (1937) 4

Lassiter v. Norfolk S. R. Co., 163 N. C. 19, 79 S. E. 264 (1913) 33, 34

Lehigh Coal & Nav. Co. v. Central R. Co., 35 N. J. Eq. 426 24

Leiman v. Guttman, 336 U. S. 1 (1949) 25

Los Angeles Lumber Products Co., In re, 46 F. Supp. 77 (D. C., S. D. Cal., 1941) 4

McColgan v. Maier Brewing Co., 134 F. 2d 385 (C. C. A. 9, 1943) 36

McNulta v. Lochridge, 141 U. S. 327 (1891) 32

Myers v. Louisiana & A. R. Co., 7 F. Supp. 97 (D. C., W. D. La., 1934) 3

Northern Finance Corp. v. Byrnes, 5 F. 2d 11 (C. C. A. 8, 1925) 25

Ogden Corp., Matter of, 19 S. E. C. 717 (1945) 14

Pressed Steel Car Co. of New Jersey, In re, 100 F. 2d 147 (C. C. A. 3, 1938), cert. den. 306 U. S. 648 30

Rosaly v. Gonzalez, 106 F. 2d 169 (C. C. A. 1, 1939) 3

Texas & P. R. Co. v. Johnson, 151 U. S. 81 (1894) 31, 32

Thompson v. Texas Mexican R. Co., 328 U. S. 134 (1946) 31, 35

Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434 (1886) 25

United Public Utilities Corp., Matter of, Holding Company Act Release No. 6375, 11 Fed. Reg. 986-7 (1946) 14

PAGE

Vandalia R. Co. v. Keys, 46 Ind. App. 353, 97 N. E. 173 (1910) 33

Vass v. Conron Bros. Co., 59 F. 2d 969 (C. C. A. 2, 1932) 25

Western Pacific R. Co. Reorganization, 233 I. C. C. 409 30

Willcox v. Jones, 177 Fed. 870 (C. C. A. 4, 1910) 32

Ziegler v. Pitney, 139 F. 2d 595 (C. C. A. 2, 1943) 31

TABLE OF STATUTES AND REGULATIONS

Bankruptcy Act
§ 7(b), 11 U. S. C., § 25(b) 19, 20
§ 77(e)(3), 11 U. S. C., § 205(e)(3) 29

Calif. Code of Civil Procedure
§ 337(1) 36
§ 339(1) 36

Income Tax Rulings
I. T. 3637 (1944 Cum. Bull. 358) 17, 18
I. T. 3692 (1944 Cum. Bull. 261) 18
I. T. 4085 (1951-2 Cum. Bull. 68) 18

Internal Revenue Code, 26 U. S. C.
§ 23(g)(4) 5
§ 141 5

Judicial Code (new), § 959, 28 U. S. C. (new), § 959 30

Judicial Code (old), § 66, 28 U. S. C. (old), § 125, enacted by § 3 of the Act of Mar. 3, 1887 (24 Stat. 554), amended in 1888 (25 Stat. 436) and 1911 (36 Stat. 1104) 30, 33, 35, 36

Public Utility Holding Company Act of 1935 ..... 13, 15, 16
§ 12; 15 U. S. C., §79-1 16

PAGE

Securities and Exchange Commission, Rule U-45(b)(6), 17 C. F. R. (1949), § 250.45(b)(6) 14, 15

Treasury Department Rulings
T. D. 5086 (1941-2 Cum. Bull. 46-47) 18

TABLE OF AUTHORITIES

6 Collier on Bankruptcy (14th Ed., 1947), § 10.06, pp 3462-3 ..... 29, 32

Federal Trade Commission, Summary Report to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., on Economic, Financial and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, Sen. Doc. No. 92, Parts 72-A and 73-A, 70th Cong., 1st Sess. 15

House Ways and Means Committee Report, 73d Cong., 2d Sess., H. Rep. 704, p. 17 (1934) 7

Securities and Exchange Commission, Release No. 53, Accounting Series, November 16, 1945, 61 Pub. Util. Rep. (NS) 193 14

Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., Hearings on S. 1725, p. 255 17

Senate Finance Committee, Memorandum on the 1918 Revenue Act 5

Senate Finance Committee Report, 70th Cong., 1st Sess., S. R. 960, p. 14 (1928) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 160

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE & Co., INC.,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

In reply to respondents' brief ("RB" hereinafter) we propose to show that:

1. Respondents' arguments on the merits are without substance (Points I-IV, *infra*);

2. The alleged defense of bankruptcy bar is contrary to respondent's assumption agreement, to an express statute and to an unbroken line of authorities (Point V, *infra*); and

3. The defenses of statute of limitations, laches and estoppel are unfounded (Point VI, *infra*).

Respondents' brief is replete with factual inaccuracies. We do not propose to pursue them beyond listing a few in the footnote * and answering a few others in the context of this brief. The correctness of the facts set forth in our main brief ("MB" hereinafter) has nowhere been specifically challenged by respondent.

On the merits we believe that the case cannot be disposed of by broad generalizations such as that plaintiff has "no standing in court" because its claim does not fit the conven-

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* Respondent says that "all duality ceased" on December 31, 1944, when respondent came out of reorganization (RB 17, 37, 79, 101, 106). The fact is that, after that date as before, plaintiff's officers (Curry, Wienken, Valouch) remained in the pay of respondent; so did a majority of plaintiff's directors; and so did plaintiff's tax counsel (our main br., pp. 13-18).

Respondent says that plaintiff's president Curry had "handled" or "managed" "tax matters for the Western Pacific group for many years" (RB 16, 22). But respondent's citation to the record (R. 841-5) shows no more than that Curry, as plaintiff's signing officer, signed the tax returns and other correspondence. The fact is that these tax matters were handled by respondent's employee, Miss Valouch (R. 647, 659, 846; Pl. Ex. 29, R. 527, 1737), who was "the only person in the corporation office over here in New York who has any knowledge of taxes" (Pl. Ex. 38-A, R. 539).

Respondent says that Curry was consulted from time to time in connection with the preparation of the 1943 tax returns (RB 13). The record cited by respondent (R. 1415) does not so state.

Respondent says that plaintiff "did not suffer from lack of information" concerning its rights because in November, 1944 Mr. Nicodemus discussed the possibility of a tax saving claim with certain other lawyers (RB 17). The fact is that Nicodemus was neither an officer nor a director of plaintiff (he did not become a director until the commencement of this action); that he never communicated his ideas to plaintiff (R. 1064); and that, while he was counsel for plaintiff, he was also counsel for respondent and its trustees and drew his pay exclusively from them (MB 17).

Respondent asserts that its corporate existence commenced on January 1, 1945 and that it is therefore wholly different from the pre-reorganization operating company and its trustees (RB 24-25). The fact is that, before as after the reorganization, the operating company was the same legal entity, as is evidenced by the bankruptcy court's "revesting order" of November 27, 1944 (Pl. Ex. 14, R. 499, 1711, 37, 42, 62-63), and that respondent, upon emerging from reorganization, assumed the obligations of its reorganization trustees (Pl. Ex. 14, R. 45-46, 78).

tional categories of "tort", "contract" or "statutory right" (RB 72). The case, as we see it, turns on two questions:

1. Was the relation between the parties such as to subject respondent to the fiduciary duty of dealing fairly with plaintiff?

2. If so, did fairness permit respondent to take all, and give plaintiff none of the tax savings which respondent derived from the use of plaintiff's tax credit?

The affirmative answer to the first question—respondent's duty to deal fairly with plaintiff in the tax transaction—does not seem to be seriously disputed. Respondent cannot and does not deny the existence of duality; the record incontrovertibly establishes, and both Courts below found it. Nor does respondent deny the well established fiduciary consequences normally flowing from duality. Instead it seeks, by eroding exceptions, to whittle away this doctrine in its application to this case.

Thus respondent claims (RB 5, 21, 80, 106) that plaintiff cannot complain of the duality which it allegedly created; but the argument is factually and legally without merit (MB 41-42, 82-83), and the authorities cited by respondent (RB 80) do not sustain it.*

Respondent also says that the dual officers acted honestly and openly (RB 21); but good motives and lack of secrecy are no defense; the objective tests of fairness must still be met (MB 42-45).

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* Neither *Rosaly* v. *Gonzalez*, 106 F. 2d 169, 172 (C. C. A. 1, 1939), nor *Myers* v. *Louisiana & A. R. Co.*, 7 F. Supp. 97, 99 (D. C., W. D. La., 1934), deals with interlocking managements, let alone with duality created by one of the parties. The cases pronounce the hornbook rule that "When appealing to a court of equity * * * the plaintiff should not himself be responsible for the condition of which he complains". We do not "complain" of the duality; we merely invoke the rule that, whatever the origin of dual managements, dual corporations must act fairly when dealing with each other.

Respondent further makes the curious argument (RB 80-81) that Curry and the other officers of plaintiff were not "dual" because their rival employers were respondent's reorganization trustees, "officers of the reorganization court", who "had no personal interest in the reorganization". But the laws of psychology are not suspended by the titles conferred by a bankruptcy court. Whether or not the dual actor is cast in some official role, there is the same attempt simultaneously to serve two masters; there is the same divided allegiance; and consequently there is a lack of independence and arm's length bargaining. The authorities therefore, taking a realistic view, apply the duality rule to receivers, trustees and other court-appointed officers no less than to regular corporate officers and directors. *Koral* v. *Savory, Inc.*, 276 N. Y. 215, 220, 11 N. E. 2d 883 (1937); *Brinckerhoff* v. *Bostwick*, 88 N. Y. 52, 60 (1882); *In re James's Estate*, 86 N. Y. S. 2d 78, 84 (Surr. Ct., 1948); *In re Los Angeles Lumber Products Co.*, 46 F. Supp. 77, 88 (D. C., S. D. Cal., 1941).

Finally, in lieu of the duality rule with its requirement of fair dealing, respondent argues that plaintiff, as respondent's parent, owed fiduciary duties to respondent (RB 76-79). But this attempted reversal of roles must fail because respondent cannot and does not show, in addition to mere stock ownership, any control by plaintiff of respondent or its trustees—a well established prerequisite for the imposition of fiduciary obligations on a stockholder (see MB 65-67).

We turn therefore to respondent's arguments as they bear on the second question herein: Whether respondent breached its duty to deal fairly with plaintiff by taking all, and allowing plaintiff none of the benefits produced by the use of plaintiff's tax credit.

POINT I

Respondent's retention of the tax benefits was unfair because plaintiff, not respondent, was, under the tax laws, the intended beneficiary of those benefits.

The tax laws primarily involved herein are §§ 23(g)(4) and 141 of the Internal Revenue Code.

With respect to the purpose of § 23(g)(4) respondent does not dispute or answer the conclusion that its purpose, in recognizing plaintiff's stock loss as a tax credit against ordinary income, was to mitigate the economic impact of that loss and hence to benefit plaintiff which alone suffered the loss.

Respondent does, however, attempt to dispute our contention that the purpose of § 141 in permitting consolidated returns was to benefit the parent as the ultimate owner of the group. However, by its own concession respondent has sustained the validity of our contention. Thus respondent, in describing the purpose of consolidated returns, states that

> "they permit a business organized by subsidiaries to pay no more tax than a business organized by departments where the losses of one department freely offset the profits of another". (RB 28, 51-52)

Or, as stated in the Memorandum of the Senate Finance Committee on the 1918 Revenue Act, quoted by respondent (RB 51, fn. 20):

> "Where a corporation does business through subsidiary corporations, such subsidiaries represent in effect merely different departments of the business. It is just as illogical to tax these subsidiaries separately as it would be to levy a separate tax upon the profits earned by different departments of a single corporation."

As plainly as words can state it, the language of the above and respondent's concession must mean that the subsidiaries' losses and profits are to be consolidated with the parent's for the same reason a department's losses and profits are. The profits and losses of subsidiaries, like those of departments, are viewed as being in fact the profits and losses of the single economic entity under the common ownership of the parent and its stockholders. Necessarily any benefits resulting from this consolidation of earnings and losses must likewise be intended for the common owner, the parent, and not for its subsidiaries or its departments. Respondent's own concession demonstrates the complete illogic of any contention that the intended beneficiary of consolidated returns was itself, the subsidiary, rather than plaintiff, the parent.

As significant as respondent's concession are its omissions. Nowhere in its brief is there a single precedent stating that consolidated returns were intended not for the benefit of the parent but for the benefit of its subsidiary or departments. Nowhere in its brief is any attempt to justify or support the reasoning by which the Court below reached this unprecedented conclusion (see our main brief, pp. 54-58). Instead, respondent merely shrugs off the whole idea that the parent, as the common owner, was the intended beneficiary of consolidated returns.

This analysis, says respondent, is "a singularly unsophisticated view of holding company systems" (RB 52, 60-62). Since consolidated returns can be filed with 5% of the equity and voting stock of the subsidiary in the hands of the public, along with non-voting preferred stock, notes and bonds of the subsidiary, it follows, says respondent, that such systems, filing consolidated returns, are not "single ownerships" (RB 52), and that any intended "economic unity" between subsidiary and parent is, in

matters related to consolidated returns, "a false factor demonstrably of no significance" (RB 60).*

But our position, however unsophisticated, happens to be that of this Court; *Atlantic City E. Co.* v. *Commissioner*, 288 U. S. 152, 154 (1933):

> "The requirement of consolidated returns was 'based upon the principle of levying the tax according to the true net income and invested capital of *a single business enterprise*, even though the business is operated through more than one corporation.' Treasury Regulations No. 45, Art. 631." (Italics added)

It happens also to be the view of Congress. Thus the *Report of the Senate Finance Committee*, 70th Cong., 1st Sess., S. R. 960, p. 14 (1928):

> "* * * it is only when the corporations are but really one corporation that the permission to file consolidated returns is given, * * *."

And similarly the *Report of the House Ways and Means Committee*, 73d Cong., 2d Sess., H. Rep. 704, p. 17 (1934):

> "For all practical purposes the various subsidiaries, though technically distinct entities, are actually branches or departments of one enterprise."

The "economic unity" of the affiliated group, stemming from the parent's common ownership, is thus the cornerstone of consolidated returns. It furnishes the justification for the privilege of the parent, as the common owner of the group, to offset group losses against group profits. It entitles the parent, in accordance with the purpose of the

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* Respondent's citation (RB 62) of *Commissioner* v. *Phipps*, 336 U. S. 410, 421, fn. 15 (1949), is inapposite. The case did not involve consolidated returns at all; nor did it discuss the nature and extent of a parent's interest in the assets and income of its subsidiary. The portion of the opinion quoted by respondent merely holds that, upon the tax-free liquidation of a subsidiary, the existence of a surplus or deficit in the accounts of the subsidiary does not determine the amount of the profit or loss which the parent realizes as the effect of the tax-free transaction.

statute, to enjoy the benefits flowing from its exercise of this privilege since the tax savings of all group members are actually the tax savings of the parent and redound to the parent's benefit by enhancing its equity in its subsidiaries.*

Nothing respondent has shown militates against these conclusions. There is no justification in the tax laws for respondent, the subsidiary, and not plaintiff, the parent, to retain the tax savings flowing from plaintiff's loss in consolidated returns.

We turn now to respondent's other arguments to ascertain what can possibly render fair respondent's retention of tax benefits which the tax laws intended for plaintiff.

POINT II

The precedents and the policy considerations which, according to respondent, militate against tax saving payments, apply only to unified groups of corporations and are therefore inapplicable where, as here, the economic unity has been severed.

Respondent argues (RB 41 et seq.) that, since the inception of the consolidated return statute, huge numbers of such returns have been filed. In all these cases, according to respondent, the inter-company allocation of the consolidated tax has "always" (RB 42) been determined according to one formula: The tax was distributed among

* The Court below concedes that this is true in the usual case" (R. 2230). But respondent says (RB 62) that this automatic upstream flow of the subsidiary's tax savings to the parent will not take place if the subsidiary's bonds are in default, its debenture interest not paid, preferred stock in arrears or general creditors unsatisfied. But even in these unusual cases any tax savings of the subsidiary will reduce these senior charges and thus improve the value of the parent's equity stock in the subsidiary, unless and until an approved reorganization plan of the subsidiary cuts off the parent's interest in the assets and earnings of the subsidiary—which is the case at bar.

the group members in proportion to their respective taxable incomes; but no "tax saving payments" were made to the loss companies who contributed a tax credit. This formula, says respondent, is intrinsically fair; it has been followed by the Western Pacific group; it has been approved by many administrative agencies; its abandonment would create great uncertainties in the law, would engraft on an already elaborate tax system an equally elaborate system of tax saving payments, and would upset thousands of consolidated return transactions now considered closed.

All of these arguments, we submit, have one fundamental error in common: Respondent's refusal to recognize the fact that plaintiff's economic severance herein differentiates this case from the usual cases of consolidated returns.

We have never contended, as respondent suggests (RB 24), that every use of a loss in a consolidated return gives a right to compensation. On the contrary, we have said (MB 60) and say it again: In the normal case of an economically unified affiliated group, there is ordinarily no need and no justification for a tax saving payment. For if in such a unified group the parent sustains a loss and its subsidiary has profits, the subsidiary's tax saving through consolidated returns automatically benefits the parent; the purpose of the tax laws is thereby achieved; and with that purpose achieved, there are, as a rule, no equitable reasons for a tax saving payment. Conversely, if the parent has a profit and the subsidiary a loss, a tax saving payment by the parent to the subsidiary would be contrary to the purpose of the consolidated return statute; for that statute is designed for the parent's benefit, not the subsidiary's. Hence, in such situations it is ordinarily but fair to leave the tax savings in whichever pocket they fall.

But it is otherwise in the extraordinary and anomalous case where, as here, consolidated returns are filed by corporations whose economic unity has been wholly severed.* If in that case the subsidiary obtains for itself tax savings by using the parent's tax loss, the purpose of the tax laws is perverted: The parent, which suffered the loss and for whose benefit the consolidated returns are designed, receives no tax benefit whatever; while the profitable subsidiary obtains a tax windfall without rhyme, reason or justification. In this unusual case, the purpose of the tax laws is more nearly achieved if the parent obtains from the subsidiary all or at least a substantial part of its tax saving, in order to mitigate the parent's loss. And it is for this reason, we say, that fairness required the respondent here to make such a tax saving payment to plaintiff.

Respondent's brief thus poses a false issue. It devotes itself to a demonstration of the obvious, namely, that in the normal situation of an economically unified consolidated return group there is ordinarily no equitable justification for a tax saving payment. With that proposition we agree. But the question here is whether such payments are fair in the unusual and rare case where the economic unity is severed. To answer yes involves none of the dire consequences which respondent conjures up *in terrorem*. Our position would not, as respondent says, "upset thousands

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* Respondent quibbles about whether this Court's decision of March 15, 1943 or the District Court's order of confirmation in November 1943 brought about this severance (RB 59-60); in any event, the economic unity was certainly severed by the time the consolidated returns were filed in 1944 and 1945. Equally inappropriate is respondent's attempt to establish that the economic unity had ended long before this Court's decision. Prior to this Court's decision affirming the plan, the Circuit Court of Appeals had reversed the plan because of the Commission's and the District Court's failure to justify the elimination of plaintiff's stock interest in respondent (Pl. Ex. 64, R. 626, 1781); until this Court reversed on March 15, 1943, the severance of the economic unity had not become an established fact. And all of this is affirmatively stated and recognized in Polk's letter to the Internal Revenue Department dated May 31, 1946 (Pl. Ex. 64, R. 626, 1779).

of consolidated return transactions now considered closed" (RB 38, 63); for virtually all of those transactions involved economically unified groups in which the purposes of the tax law were effectuated without tax saving payments. Our position would not "engraft upon an already elaborate tax system an equally elaborate system of tax saving payments" (RB 30, 55); for such payments could be called for only in the exceptional and rare case of economic severance. Our position would not "give to any party to the returns a right to demand a price for his consent" (RB 70, 29, 56); for the right to seek a tax saving payment exists only in the extraordinary case where, in the absence of such a payment, the purpose of the consolidated return law would be frustrated and the intended beneficiary denied its rightful tax benefits.

And, finally, our position is not contrary to the precedents cited by respondent; for those precedents, as we now proceed to show, relate only to the normal situation of an economically unified consolidated return group; and, moreover, they do not establish a rigid and unyielding allocation formula such as that proposed by respondent.

1. The alleged past practice of the Western Pacific group.

Respondent's brief claims not less than 15 times * that, during the 25 years up to 1943, the Western Pacific group had followed the practice of filing consolidated returns with no tax saving payments whatever. But the repetitiousness of the statement does not render it true. The fact is, as we have demonstrated (MB 70), that Utah Fuel Company, one of the affiliates joining with plaintiff and respondent in consolidated returns, did make substantial tax saving payments to plaintiff. As stated by respondent's own experts, Messrs Price, Waterhouse & Co.:

> "According to a letter dated June 26, 1928, from The Western Pacific Railroad Corporation to Utah

* RB 2, 3, 22, 25, 31, 42, 57-8, 59, 63, 65, 76, 79, 81, 83, 108-9.

> Fuel Company, the net benefit which accrued to that company for the years 1922 to 1926, inclusive, resulting from the Treasury Department's agreeing that it was affiliated with The Western Pacific Railroad Corporation, was to accrue to The Western Pacific Railroad Corporation. * * * With respect to the tax for the year 1923, Utah Fuel Company paid over to The Western Pacific Railroad Corporation the amount of $60,475.84 representing the excess of the tax previously paid by the Utah Fuel Group, $131,744.72, over the amount computed as allocable to that group, $71,268.88."
>
> (Def. Ex. 40, at p. 6)

Respondent says (RB 57, fn. 27) that this was not a payment for tax savings; but respondent prudently refrains from telling what it thinks the payment was for. Respondent also says (*ibid.*) that plaintiff, in turn, made certain other payments to Utah Fuel; but that does not change the fact that the $60,475.84 was a tax saving payment by an affiliate to plaintiff. The alleged practice of the Western Pacific group thus did not exist (see MB 70).

But even if it did, what is its relevance? Despite our challenge (MB 71), respondent does not even attempt to show why a practice followed prior to the economic severance should furnish a precedent for the period when the economic unity had ended.

2. The alleged general business practice.

Respondent offered proof at the trial that its allocation formula, which excludes tax saving payments, reflects the customary practice of affiliated groups filing consolidated returns (RB 42). The offer of proof was properly rejected as irrelevant (R. 1383), since respondent's proposed evidence did not relate to situations of economic severance.*

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*Respondent, though making no argument that the Court below committed any error in rejecting this evidence, nonetheless strews its substance all over its brief as if, despite the absence of cross-examination and rebuttal evidence, it had established the facts.

Any alleged practice of economically unified consolidated return groups is without significance to the issues at bar which turn upon the economic severance of plaintiff and respondent.

It may, however, be added that the alleged practice is by no means as general as respondent contends. Respondent's own authorities disclose that, before the enactment of the Public Utility Holding Company Act of 1935, a number of utility systems (such as Cities Service Company, North American Co., New England Power Association and others) made tax saving payments on a substantial scale (see RB, App. 5-8). The S. E. C. has since permitted tax saving payments in the very same field of public utilities. That this practice still persists in other businesses is evidenced by the recent case of *Beneficial Corp.* v. *Commissioner*, 18 T. C. ....., No. 47 (May 23, 1952) and by the Missouri-Pacific order (RB, App. 30-36). Moreover, had such proof been held relevant in the trial court, additional examples of tax saving payments by other substantial business groups could have been adduced.

3. The Securities and Exchange Commission.

Respondent contends that the S. E. C.'s Rule U-45(b)(6) (see MB, App. 103) "does not permit 'tax saving' payments for losses in consolidated returns" (RB 43). Nothing could be further from the truth. The Rule merely provides that tax saving payments shall not be made without the approval of the Commission. Such approval has been granted by the Commission in a number of instances of which we cite only the following:

Matter of Consolidated Electric and Gas Co., 15 S. E. C. 161 (1943);

Matter of Cities Service Company, 17 S. E. C. 839 (1944);

Matter of Consolidated Electric and Gas Co., The Islands Gas and Electric Co., 13 S. E. C. 649 (1943);

Matter of Ogden Corp., 19 S. E. C. 717 (1945);
Matter of United Public Utilities Corp., Holding Company Act Release No. 6375, 11 Fed. Reg. 9867 (1946).

Respondent attempts (RB 44-46) to distinguish these cases on the theory that the tax saving payments there were authorized in order to compensate the loss companies for the disadvantages to them arising from their joining in consolidated returns. But in the first two of the cases just cited there was no such disadvantage whatever; and in the third, the tax saving payment far exceeded the amount of the recipient's disadvantage. Whatever the grounds of the decisions, they make it plain that respondent's allocation formula, far from embodying an absolute and rigid rule, will yield to exceptions wherever equitable considerations justify a tax saving payment.

Respondent also quotes (RB 42, App. 15) a footnote appearing in an accounting release of the S. E. C.* which states:

> "If one of the included companies operated at a loss, the consolidated tax is of course reduced, but no part of the 'saving' is *ordinarily* paid over to the loss company by the other members of the group." (Italics added)

The Commission's use of the word "ordinarily" makes it plain that its formula is subject to exceptions on grounds of equity and fairness.

The Commission's Rule U-45(b)(6) was of course designed for the ordinary case of economically unified consolidated return groups. It was not designed for the anomalous situation of economic severance. In the presence of economic severance, the purpose of the tax laws makes it fair for a profitable subsidiary to allow to its parent all or a substantial part of the tax saving derived from

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* Release No. 53, Accounting Series, November 16, 1945, 61 Pub. Util. Rep. (NS) 193, 222, fn. 36.

the use of the parent's loss. The Commission has clearly stated that the purpose of its Rule U-45(b)(6) is "to effect a fair distribution of taxes based on consolidated returns"; *Matter of Cities Service Co., supra*, 17 S. E. C. 839, 843.

4. The Federal Trade Commission.

Respondent invokes (RB 47-8) a report of the Federal Trade Commission * as supporting its allocation formula and condemning tax saving payments. The F. T. C.'s investigation, which led to the enactment of the Public Utility Holding Company Act of 1935, dealt solely with electric and gas utility systems. In its report, the F. T. C. found that these systems made wide use of tax saving payments from the operating companies to their parents. The F. T. C. disapproved this practice because it increased the expenses of the operating companies and hence the rates charged to the public. But all the illustrative examples cited by the Commission were instances of economically unified holding company systems (RB, App. 5-9), in which the tax benefits of consolidated returns automatically redounded to the parent through dividends or increased equity values, without any need for tax saving payments. The F. T. C.'s disapproval of the practice does not, therefore, reach the present case in which the economic unity was severed so that, in the absence of a tax saving payment, the parent got no benefit and the subsidiary an undeserved tax windfall.

Pursuant to its conclusions, the F. T. C. recommended to Congress the adoption of an "amendment to the Federal income-tax law to prevent collection of anticipated income taxes from operating subsidiaries by holding companies

* Federal Trade Commission, Summary Report to the Senate of the United States, pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., on Economic, Financial and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, Sen. Doc. No. 92, Parts 72-A and 73-A, 70th Cong., 1st Sess. Excerpts from the report are set forth in the appendix of respondent's brief, at pp. 5-9.

and nonpayment to the Government" (Report, quoted RB, App. 9). This recommendation, if adopted by Congress, would have established a rigid rule forbidding tax saving payments. Congress, however, rejected the recommendation, presumably because it considered such a rigid prohibition unwise. Although the practice of tax saving payments was forcefully called to the attention of Congress, and although Congress must have realized its prevalence outside the utility field, it did not see fit to alter the tax laws which permitted the practice. Only in the field of public utilities, Congress delegated the subject for regulation to the Securities and Exchange Commission (Public Utility Holding Company Act, § 12; 15 U. S. C., § 79-1). The S. E. C., in turn, as we have seen, far from promulgating an absolute bar of tax saving payments, permitted them subject to the approval of the Commission where it finds them fair and reasonable.

We submit, therefore, that the F. T. C.'s report is no authority for denying a tax saving payment where, as here, the peculiar circumstances of the case render the payment fair.

5. The Senate Committee on Interstate Commerce.

Closely related to the F. T. C. report just mentioned is a colloquy, cited by respondent (RB 52-54), which occurred in the course of hearings before the Senate Committee on Interstate Commerce, when that Committee considered the bill which ultimately became the Public Utility Holding Company Act of 1935. The Chairman of the Committee, Senator Wheeler, referred to the tax saving payments listed in the F. T. C.'s report, and apparently disapproved of them. Since, however, those payments were made by members of economically unified groups, Senator Wheeler's attitude has no bearing on the present case.

Moreover, Senator Wheeler recognized that the practice of tax saving payments was in accordance with law:

> "Senator Hastings: How did the income-tax people ever let them get away with a thing like that?
>
> "The Chairman: Congress, as a matter of fact, permitted it to be done under the consolidated return."
>
> (Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., Hearings on S. 1725, p. 255.)

Respondent derives from the statements of Senator Wheeler that "Congress has indicated a preference as to who should receive the benefits of 'tax savings' from consolidated returns" (RB 53). But Senator Wheeler did not and could not speak for the Congress. On the contrary, as we have shown, Congress rejected any statutory condemnation of tax saving payments and authorized the S. E. C. to permit such payments, subject to the Committee's approval of their fairness.

f. The Treasury Department.

Respondent asserts that "The rulings of the Treasury Department * * * provide for a pro rata allocation of the consolidated tax without tax saving payments" (RB 46). The opposite is true, as we have shown (MB 72-73): The Treasury Department is concerned only with the collection of the taxes due the Government; it is wholly indifferent to the method of the inter-company allocation of consolidated taxes. One of the very rulings cited by respondent (RB, App. 20, 24) so holds:

> "The [Internal Revenue] Bureau is not concerned with arrangements made between affiliated companies as to the payment of the [consolidated] tax."
>
> I. T. 3637 (1944 Cum. Bull. 258).

But, says respondent (RB 46), the Internal Revenue Bureau uses a strict allocation formula in ascertaining the

amount of earnings and profits available for dividends,* and in allocating consolidated excess profits tax to provide deductions from normal tax net income.** These allocations, however, are necessary in order to determine the amount of tax due the Government. It is understandable that the Government does not want the amount of its tax receipts to depend on private agreements made among the taxpayer corporations. But once the amount of tax due is determined, the Government is wholly unconcerned with any internal arrangements by which the members of a consolidated return group allocate or shift the tax burden.

7. The Interstate Commerce Commission.

Respondent admits (RB 48) that the I. C. C. has not dealt with the problem of the allocation of consolidated taxes. The two I. C. C. decisions cited by respondent (RB 48, fn. 14) have nothing to do with the issues at bar.

Respondent also says (RB 49) that the National Association of Railroad and Utilities Commissioners "has disapproved the treatment of a 'tax saving' as an expense". What the Association actually ruled was this: Utility companies sometimes include among their expenses not only the taxes actually paid by them, but also additional amounts of taxes which would have been payable had certain statutory deductions not been available. The Association, quite properly, condemned the companies' practice of entering on their books an expense which they actually had not incurred (RB, App. 17-20). The Association's ruling on a bookkeeping practice thus had nothing whatever to do with the problem here presented, namely, whether and under what circumstances a tax saving payment by one affiliate to another may be fair and proper.

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* I. T. 3637 (1944 Cum. Bull. 258); I. T. 3692 (1944 Cum. Bull. 261); I. T. 4085 (1951-2 Cum. Bull. 68).

** T. D. 5086 (1941-2 Cum. Bull. 46-47).

These then are respondent's "precedents". None of them holds that the subsidiary, to the exclusion of the parent, is entitled to tax savings flowing from the parent's loss and consolidated returns. None of them stands for the proposition that taxes must be allowed to rest where they fall, even if, measured by the purposes of the tax laws and fairness, they fall in the wrong pocket. Indeed, fairly read, all of the precedents permit tax savings to be treated like any other business incident. They should be apportioned, allocated and paid in accordance with the same flexible principles of fairness and equity which would govern any other kind of business transaction.

POINT III

Plaintiff was under no obligation to surrender its tax credit to respondent, without receiving a fair share of the tax savings therefrom.

Respondent predicates plaintiff's alleged duty to give its tax credit to respondent essentially upon two grounds: (1) Plaintiff, as respondent's parent, owed it a fiduciary duty of good management, and good management, it is said, required plaintiff to surrender its own tax credit to respondent; and (2) since respondent, as the debtor in reorganization was duty-bound to preserve its assets for its creditors, plaintiff, as its stockholder, owed it the statutory duty (§ 7(b) of the Bankruptcy Act, 11 U. S. C. § 25(b)) of preserving the bankrupt estate, and such preservation again obligated plaintiff to surrender its tax credit to respondent (RB 32-33, 65).*

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* § 7(b) of the Bankruptcy Act provides:

"Where the bankrupt is a corporation, * * * its stockholders * * * shall perform the duties imposed on the bankrupt by this Act."

This provision is part of § 7 which is entitled "Duties of Bankrupts" and lists such duties of the bankrupt as the attendance at creditors' meetings, compliance with the orders of the court, the giving of information to the trustee, the filing of financial statements and inventories, etc.

The first of these grounds—plaintiff's alleged fiduciary duty to respondent—has been answered in our main brief (65-69); and since respondent does not reply to what is there said, it need not be repeated here.

Respondent's second ground is as untenable as its first.

To begin with, plaintiff was no longer a stockholder of respondent at the time the consolidated returns were filed. Plaintiff had surrendered its stock in respondent to respondent's Reorganization Committee on May 1, 1944 (R. 260, 493), with the approval of the bankruptcy court (Def. Ex. 23, R. 1192, 1930). The consolidated returns were filed thereafter, on July 15, 1944 and June 15, 1945 (MB 7). Plaintiff, having thus been divested of its stock in respondent by order and authority of the bankruptcy court, was necessarily also relieved of any duties incumbent on it by reason of its stock ownership. Therefore, at the time plaintiff filed the consolidated returns, § 7(b) of the Bankruptcy Act was no longer applicable to it; hence respondent's bankruptcy imposed no duty on plaintiff to preserve respondent's assets. Moreover, since the 1944 returns and the 1942 refund claim were filed in 1945, after respondent's emergence from bankruptcy in December 1944, any argument based on previous bankruptcy relations is irrelevant.

But assuming that plaintiff was under an obligation to preserve respondent's assets for its creditors, can it possibly be held that this required plaintiff to confer on respondent tax savings which by the very purpose of the tax laws creating them were designed for plaintiff, not for respondent? Certainly plaintiff was under no duty to deny to itself what it was entitled to, and to confer upon respondent an undeserved and unmotivated tax advantage. Nor was it duty-bound to make a gift of its tax credit to respondent any more so than of any other of its property. If plaintiff had been the owner, say, of a patent complementary to one owned by respondent, no one would argue that respondent's bankruptcy imposed an obligation on plaintiff to give respondent the free use of plaintiff's patent. Any demand by plaintiff to share in the profits result-

tions" of the trustees;* and that term includes expenses of administration, *In re Pressed Steel Car Co. of New Jersey*, 100 F. 2d 147, 150 (C. C. A. 3, 1938), cert. den. 306 U. S. 648.

We submit, therefore, that plaintiff's claim for the 1943 tax savings was clearly covered by respondent's assumption agreement of December 14, 1944, and hence was not barred by the revesting order.

C. Plaintiff was, by express statute, relieved from any requirement to present its claim to the bankruptcy court.

Respondent contends that plaintiff's claim is an "expense of administration"; as such, it could be approved only by the bankruptcy court; since that court is now closed and no other court has jurisdiction, the claim is barred (RB 90, 95-96).

Respondent's contention that the bankruptcy court had exclusive jurisdiction to pass on plaintiff's claim is contrary, however, to § 66 of the (old) Judicial Code, 28 U. S. C. § 125 (old),** which provides:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

This statute applies to the reorganization trustees of a railroad appointed under § 77 of the Bankruptcy Act;

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* Reorganization Plan, subdivision Q; *Western Pacific R. Co. Reorganization*, 233 I. C. C. 409, 452-3.

** The statute was enacted by § 3 of the Act of March 3, 1887 (24 Stat. 554), amended in 1888 (25 Stat. 436) and 1911 (36 Stat. 1104). Since September 1, 1948, the section has been replaced by § 959 of the (new) Judicial Code, 28 U. S. C. § 959 (new).

Thompson v. *Texas Mexican R. Co.*, 328 U. S. 134, 138 (1946); *Jacobowitz* v. *Thomson*, 141 F. 2d 72, 75 (C. C. A. 2, 1944); *Ziegler* v. *Pitney*, 139 F. 2d 595, 596 (C. C. A. 2, 1943).

We shall demonstrate that the statute would have authorized plaintiff to sue respondent's reorganization trustees without resort to the bankruptcy court, even though the claim was an "expense of administration"; and that respondent, having assumed the obligations of the trustees, is equally amenable to suit.

1. *The statute would have authorized plaintiff to sue the reorganization trustees without resort to the bankruptcy court.*

> "This act [i.e., Judicial Code, § 66] abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts * * *. He ceased to be compelled to litigate * * * in any other forum * * * than he would be entitled to if the property or business were not being administered by the Federal court."
>
> *Gableman* v. *Peoria, D. & E. R. Co.*, 179 U. S. 335, 338 (1900).

> "Necessarily, such suit may be brought in any court of competent jurisdiction and proceed to judgment accordingly."
>
> *Texas & P. R. Co.* v. *Johnson*, 151 U. S. 81, 101 (1894).

The qualifying clause of the statute—that the suit shall be subject to the general equity jurisdiction of the appointing court—does not restrict the plaintiff's right to sue the trustees or receiver outside the bankruptcy court; for "the right to sue without resorting to the appointing court * * * cannot be assumed to have been rendered prac-

tically valueless by this further provision in the same section of the statute which granted it"; *Johnson* case, *supra*, 151 U. S., at 103. The qualifying clause of the statute relates only to "the mode of enforcing such claim when judicially determined and liquidated"; *American Brake Shoe & F. Co.* v. *Pere Marquette R. Co.*, 263 Fed. 237, 240 (D. C., E. D. Mich., 1920), citing authorities; *Kennison* v. *Philadelphia & R. C. & I. Co.*, 38 F. Supp. 980, 983 (D. C., Minn., 1940); see *Willcox* v. *Jones*, 177 Fed. 870, 874-5 (C. C. A. 4, 1910).

Nearly all claims which fall under § 66 constitute "expenses of administration"; certainly "tort claims arising by virtue of the business operations of the debtor" come within that classification, 6 *Collier on Bankruptcy* (14th Ed., 1947), § 10.06, pp. 3462-3. Nevertheless their assertion outside the bankruptcy court is a matter of indisputable statutory right, established by the authorities cited and many others.

In the present case the trustees operated respondent's railroad properties pursuant to an order of the bankruptcy court (Def. Exs. 20, 22, R. 1908, 1923). Their liability arose from a transaction of theirs in carrying on this business, since their or their agents' acts * in causing plaintiff to file consolidated returns and in joining therein were incidents of that business. It follows that plaintiff could have sued the trustees "in any court of competent jurisdiction", without leave from, or resort to, the bankruptcy court.

2. *Respondent, having assumed the obligation of the trustees, is equally amenable to suit.* A plaintiff who is authorized, by statute, to sue a court-appointed trustee

* The statutory language, permitting suit against the receiver "in respect of any act or transaction *of his*", includes the acts and transactions of his agents; *McNulta* v. *Lochridge*, 141 U. S. 327, 331 (1891).

in a forum other than the bankruptcy court appointing him, must *a fortiori* have the same freedom when suing a private corporation which has assumed the obligations of the trustee. It is unthinkable that a bankruptcy court, which is unable to shield its own officers from suits in another forum under § 66, should have power to prevent like suits against the debtor which has emerged from reorganization and assumed the liabilities of the trustees. It is equally unthinkable that the bankruptcy court's jurisdiction, which was non-exclusive during the reorganization, should become exclusive when the reorganization ends.

The courts unanimously agree with our position:

Chicago G. W. R. Co. v. *Hulbert,* 205 Fed. 248, 250-1 (C. C. A. 8, 1913);

American Brake Shoe & F. Co. v. *Pere Marquette R. Co.,* 263 Fed. 237, 240 (D. C., E. D. Mich., 1920);

Gray v. *Grand Trunk W. R. Co.,* 156 Fed. 736 (C. C. A. 7, 1907);

Hanlon v. *Smith,* 175 Fed. 192 (C. C., N. D. Iowa, 1909);

Lassiter v. *Norfolk S. R. Co.,* 163 N. C. 19, 21-22, 79 S. E. 264 (1913);

Denver & R. G. R. Co. v. *Gunning,* 33 Colo. 280, 292-3, 80 Pac. 727 (1905);

Hawkins v. *St. Louis & S. F. R. Co.,* 202 S. W. 1060, 1063-4 (Mo. App., 1918, not otherwise reported);

Bremer v. *Chicago & E. I. R. Co.,* 247 Ill. App. 406, 413 (1927, not otherwise reported);

Vandalia R. Co. v. *Keys,* 46 Ind. App. 353, 366-7, 97 N. E. 173 (1910);

Kansas City, M. & O. R. Co. v. *Latham,* 182 S. W. 717, 720 (Tex. Civ. App., 1915, not otherwise reported).

In each of these cases the receiver or trustee of a railroad had, in the conduct of the railroad's business, incurred liability to the plaintiff; upon consummation of the receivership (mostly by foreclosure sale), the reorganized railroad assumed the liabilities of the receiver; the plaintiff sued the reorganized railroad without leave from the bankruptcy court and without having his claim approved by the bankruptcy court. In each case the action was sustained.*

> "* * * the terms of the statute just quoted [i.e., Judicial Code, § 66] are now as fairly applicable to said petitioner [i.e., the reorganized railroad] as they would have been to the receivers whom they have succeeded, if the latter had not been discharged and they, instead of petitioner, had been sued in respect of the alleged negligence of their servants in the suit which is the subject of this controversy. This suit was properly brought in the State court, and the latter has full jurisdiction to determine all of the issues involved therein without interference by this court [i.e., the bankruptcy court]. Texas & Pacific Railway Co. v. Johnson, 151 U. S. 81; [citing numerous additional authorities]."

American Brake Shoe case, *supra*, 263 Fed., at 240.

> "Inasmuch as an action can be brought in the State court against the receivers in the Federal court, without obtaining permission of that court (U. S. Compiled Statutes, 721(3), Act 3 March 1887, ch. 373, sec. 3), *a fortiori* an action can be brought in the State court against the purchaser, after confirmation of the sale and delivery of the property to such purchaser, without permission of the Federal court."

Lassiter case, *supra*, 163 N. C., at 21-22.

These cases are on all fours with that at bar. Plaintiff may therefore maintain this action against respondent without previous approval of its claim by the bankruptcy court.

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* Respondent contends (RB 105-6) that any judgment herein would have to be presented to the bankruptcy court for proof and

D. Respondent's authorities do not sustain its contention that the recognition of plaintiff's claim would be contrary to the purposes of reorganization proceedings.

Respondent prefaces its arguments with certain generalizations of doubtful accuracy. It asserts that "the reorganization court must consider and act upon all possible claims which might be asserted against the reorganized company" (RB 90). This is true of provable claims; it is not true of trustees' liabilities under § 66 of the (old) Judicial Code. Neither of respondent's authorities—*Gardner* v. *New Jersey*, 329 U. S. 565 (1947), and *Foust* v. *Munson Steamship Lines*, 299 U. S. 77 (1936)—dealt with a claim such as that at bar arising from the transactions of the debtor's reorganization trustees.

Respondent also proclaims that "the reorganization must put an end to all claims" (RB 90). This is simply not so where, as here, outstanding claims are provided for by what respondent itself (RB 96) describes as the "conventional" device of an assumption agreement.

Respondent cites (RB 90, fn. 46) a long line of cases allegedly supporting its contention that the reorganization must put an end to all claims against the debtor. But respondent's authorities hold nothing of the kind. None of them involved an assumption agreement such as was here made by respondent. Indeed, in *Duryee* v. *Erie R. Co.*, 175 F. 2d 58 (C. A. 6, 1949), and in several others,* the liabilities asserted were not those of a receiver or trustee, but had arisen prior to reorganization (175 F. 2d

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allowance, which cannot be done because the bankruptcy court is closed. But respondent's authority, *Thompson* v. *Texas Mexican R. Co.*, *supra*, 328 U. S., at 141, involved a going reorganization in which the bankruptcy court had custody of the debtor's assets. The present respondent has emerged from the tutelage of the bankruptcy court so that submission to that court is not "necessary to the ends of justice" (§ 66, *supra*).

* *Beckley* v. *Erie R. Co.*, 175 F. 2d 64 (C. A. 6, 1949); *Black* v. *Richfield Oil Corp.*, 146 F. 2d 801 (C. C. A. 9, 1944); *In re Colorado & S. R. Co.*, 84 F. Supp. 134 (D. C. Colo., 1949).

at 59) and were therefore provable claims, not within the purview of § 66. And in *McColgan* v. *Maier Brewing Co.*, 134 F. 2d 385 (C. C. A. 9, 1943), a claim for the payment of state franchise taxes, accrued against a corporation's receiver but not presented to the bankruptcy court, was rejected because, upon the discharge of the receiver, "the property [was] *unconditionally* turned back to the corporation" (134 F. 2d, at 387; italics added). In the reorganization of the present respondent, its property was not returned to it "unconditionally"; it was returned subject to respondent's agreement to assume the obligations of its trustees. No analogy leads, therefore, from respondent's authorities to the case at bar.

It is therefore submitted that the defense of bankruptcy bar is without merit and should be rejected.

POINT VI

The defenses of limitations, laches and estoppel are without merit.

1. *The Statute of Limitations* is said to bar plaintiff's claim to the 1943 tax savings, because the 1943 returns were filed on July 15, 1944, more than two years before the commencement of this action on October 10, 1946 (Calif. Code Civ. Proc., § 339(*1*)). However, the cause of action, if it accrued on July 15, 1944, was directed against the trustees. Respondent's liability for that claim rests on its assumption agreement of December 14, 1944 (Pl. Ex. 15, R. 499, 1711). On that date—less than two years before the commencement of this action—a new statutory period began to run with respect to plaintiff's cause of action against respondent. *Bogart* v. *George K. Porter Co.*, 193 Cal. 197, 202, 223 Pac. 959 (1924); *Anderson* v. *Calaveras Central Mining Corp.*, 13 Cal. App. 2d 338, 345, 57 Pac. 2d 560 (1936); *Daniels* v. *Johnson*, 129 Cal. 415, 61 Pac. 1107 (1900). Since the assumption agreement was a written contract within the purview of Calif. Code Civ. Proc., § 337(1), the statutory period for plaintiff's claim,

ing from the use of its patent would hardly be called the exaction of "tribute" or an attempt to capitalize on "nuisance values". No better ground exists for respondent's contention that plaintiff was obligated, because of respondent's bankruptcy, to give its tax credit to respondent without sharing in the resulting benefits.

We can see no merit in respondent's effort to demonstrate that only plaintiff, not respondent, was under a fiduciary duty to deal fairly. If it be assumed that plaintiff was under such a duty, respondent certainly owed plaintiff at least the same obligation. The result would still be the duty to deal fairly; and that is all we contend for.

POINT IV

The amount of plaintiff's recovery should be determined in accordance with the requirements of fairness.

We have urged that the standard by which to measure the transactions complained of herein is that of fairness. We believe that respondent's treatment of plaintiff—its denial to plaintiff of any and its retention of all benefit from the tax transaction—was clearly unfair. Nevertheless respondent urges, in effect, that even if this result be unfair, the courts are powerless to balance the scales. In the absence of traditional standards, such as market value, fairness, says respondent, is too vague a standard—so vague that respondent can keep its unfair gain (RB 26). But the power of the court to redress unfairness is not thus to be straitjacketed. It has been applied to so amorphous a problem as the fair division of income and expenses between two jointly operated railroads feeding traffic to each other, where both companies were managed by one of them; *Ewen* v. *Peoria & E. R. Co.*, 78 F. Supp. 312 (S. D. N. Y., 1948), cert. den. 336 U. S. 919. In the case

at bar, the determination of the requirements of fairness is, as we shall presently show, much less complex.

Respondent seeks to obscure the problem by suggesting that the Court is called upon to "make a retrospective bargain" between plaintiff and respondent (RB 82). But the courtroom is not the market place. Once a transaction between fiduciary and cestui is recognized as unfair, the consequences follow as a matter of law. The superior negotiating skill of one party, the economic weakness of the other, may fashion the terms of a deal between parties transacting at arm's length. But these factors are of no account in the judicial award of what is fair; objective standards control.

It is our primary contention that, in fairness, plaintiff is entitled to the full amount of the tax savings produced by the consolidated returns. That follows from the purpose of the tax laws to confer a tax benefit on plaintiff, not on respondent. The amount of those savings, $17,201,739 (R. 267), is amply supported by the evidence (Pl. Ex. 80, R. 924, 1825-6). Both the District Court and the Court of Appeals have found that these tax savings were produced by respondent's use of plaintiff's stock loss (R. 262, 2217-8), in spite of respondent's vigorous arguments to the contrary. Although respondent now renews its attacks upon the amount of the tax savings (RB 109), this Court will not upset the concurrent findings of fact of the two Courts below, *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 213-4 (1948).

We submit that the inquiry as to fairness can and should stop at this point. But if instead some significance is attached to respondent's having contributed to the achievement of the savings, then, as we have shown in our main brief, at least equal significance must be given to plaintiff's contributions. Therefore, the resulting tax savings were at least the product of the joint contributions of both plaintiff and respondent engaged in a tax savings venture; and fairness would dictate that the usual joint venture yardstick of equality should apply.

POINT V

The alleged "bar of reorganization" affords respondent no defense.

Respondent asserts (RB 89 et seq.) that plaintiff's claim, however meritorious, is barred by certain orders and proceedings in respondent's reorganization. Under this heading, respondent actually advances four separate arguments:

1. The consolidated returns were filed while respondent was in the hands of its reorganization trustees; the liability could therefore be only that of the trustees; but the trustees did not have the necessary authority from the bankruptcy court to incur such liability (RB 91-93).

2. Even if the trustees incurred a valid liability to plaintiff, that liability was not assumed by respondent because respondent reacquired its assets free and clear of all rights of any person (RB 93-95, 96-99).

3. Even if plaintiff had a valid claim, it was an expense of the reorganization; the bankruptcy court had exclusive jurisdiction to pass on that claim; plaintiff did not present it to the bankruptcy court; and that court is now closed (RB 95-96, 105-6).

4. The purpose of reorganization is to put an end to all claims so that the reorganized company shall not be hampered by holdover obligations. The recognition now of a liability herein would be contrary to that purpose (RB 90).

We shall discuss these arguments in turn.

A. The authorization of the trustees by the bankruptcy court was not a prerequisite of plaintiff's claim; moreover such authorization was given.

Respondent argues (RB 91-93) that a reorganization trustee cannot validly incur any liability without approval of the bankruptcy court. Here the bankruptcy court authorized the trustees to incur "all necessary expenses of operating the railroads and conducting the business of the debtor", but directed that "any extraordinary expense" was to be subject to the prior approval of the court (Def. Ex. 20, R. 1182, 1910; Def. Ex. 22, R. 1187, 1929). The liability to plaintiff, it is said, was an "extraordinary expense" and did not have prior court approval; hence it is unenforceable.

The argument is untenable for several reasons:

1. The consolidated returns for 1944 and the refund claim for 1942 were both filed in 1945 (MB 7), long after respondent had emerged from reorganization on December 29, 1944 (R. 499). The trustees had, therefore, nothing to do with these transactions, so that the rule requiring court approval of their liabilities could not come into play.

2. The rule was also inapplicable to the returns for 1943. The doctrine that reorganization trustees cannot incur liabilities without court approval is limited to *express contract obligations;* see *Chicago Deposit Vault Co.* v. *McNulta,* 153 U. S. 554, 562 (1894).* A trustee who in the conduct of the debtor's business violates the anti-trust laws, or engages in unfair competition, or appropriates the property of another, cannot escape liability by saying that his incurring any of these liabilities was an "extraordinary ex-

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* This Court, quoting from *Lehigh Coal & Nav. Co.* v. *Central R. Co.*, 35 N. J. Eq. 426, held:

"'* * * * he [the receiver] has no authority to bind the trust *by contract* without the authority of the court. Until his contracts are approved and ratified by the court the court is at liberty to deal with them as to it shall appear just, and may either modify them or disregard them entirely * * *.'

"This states the correct rule upon the subject * * *."

(153 U. S., at 562; italics added.)

pense" not authorized by the court. Each of the authorities cited by respondent (RB 92, 93) involved express contract obligations arising, e.g., from a lease,* from a loan of money,** from the purchase of goods,*** or from a retainer agreement.† The present claim is based on a breach of fiduciary duty and is therefore non-contractual.

3. The present claim is not an "extraordinary expense". The filing of tax returns is an ordinary and necessary incident of running a railroad. Respondent itself proclaims that "the tax transactions were conducted in the ordinary course of business" (RB 20). The mere fact that the expense is large does not render it "extraordinary."

4. If court approval were deemed necessary, it is found in the bankruptcy court's order of March 3, 1944 (Def. Ex. 12, R. 1087, 1895). By this order the court, having been notified of the trustees' intention to file consolidated returns for 1943 and to use plaintiff's stock loss (R. 1271-2; Def. Ex. 34, R. 1272, 2025), authorized the creation of a tax reserve in connection with these returns. While the bankruptcy court did not pass on the propriety of the proposed tax transactions, it certainly cannot be argued that what the trustees did was beyond the scope of their authority. It follows that they and the estate administered by them became liable for the consequences of their conduct; *Vass* v. *Conron Bros. Co.*, 59 F. 2d 969, 970 (C. C. A. 2, 1932).

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* *Chicago Deposit Vault Co.* v. *McNulta*, 153 U. S. 554 (1894).

** *Union Trust Co.* v. *Illinois Midland R. Co.*, 117 U. S. 434, 476-7 (1886); *Northern Finance Corp.* v. *Byrnes*, 5 F. 2d 11 (C. C. A. 8, 1925); *Byrnes* v. *Missouri National Bank*, 7 F. 2d 978 (C. C. A. 8, 1925).

*** *In re Erie Lumber Co.*, 150 Fed. 817 (D. C., S. D. Ga., 1906).

† *Leiman* v. *Guttman*, 336 U. S. 1 (1949).

5. But even if it were assumed, *arguendo*, that the trustees exceeded their authority, they would still have incurred personal liability; *In re Kalb & Berger Mfg. Co.*, 165 Fed. 895, 896 (C. C. A. 2, 1908). Such liability was covered by respondent's assumption agreement, to be presently discussed, since, as respondent admits, that agreement was couched in broad language "in order to give the trustees full protection against personal liabilities" (RB 97). We submit that an obligation of the trustees for the 1943 tax savings is indisputable.

B. Respondent expressly assumed the trustees' liability for plaintiff's claim.

Respondent's argument runs (RB 93-95, 96-99): Plaintiff's claim arose while respondent was in the hands of its reorganization trustees. By its revesting order of November 27, 1944 (Pl. Ex. 14, R. 36, 499, 1711), the bankruptcy court directed the trustees to transfer the properties to respondent free and clear of the claims of any person (R. 51-52); this transfer was carried out on December 29, 1944 (R. 499). Although respondent assumed some of the obligations of the trustees, the claim here asserted was not among those assumed.

We note preliminarily that this argument, like the preceeding one, does not apply to the 1944 tax returns and the 1942 refund claim which were filed in 1945, long after the revestment. But the argument is equally unsound as it bears upon plaintiff's claim arising from the 1943 returns; for by a clear and unequivocal contract, approved by the bankruptcy court, respondent assumed the liability for that claim.

1. Respondent (RB 94-95) invokes the following provision of the revesting order:

> "* * * all of the business, assets and property constituting the debtor's estate, of every kind and character, real, personal and mixed, and all of the right,

title and interest therein of T. M. Schumacher and Sidney M. Ehrman, as Trustees herein, shall vest in and be and become the absolute property of The Western Pacific Railroad Company on said date [December 29, 1944], free and clear of all rights, claims, liens and interests of said Trustees, the former stockholders and creditors of the debtor, and of all other persons, firms and corporations whatsoever, *except as is otherwise provided in this order;* and the said Railroad Company shall thereupon be forever released and discharged from all of its debts, obligations and liabilities, *except as herein provided;* * * *."*

(R. 51-52; italics added.)

The transfer of the assets to respondent free and clear of the rights of other persons was thus subject to the proviso: "except as is otherwise provided in this order". And the order did "otherwise provide" by directing respondent to execute an assumption agreement which, as we now proceed to show, encompassed the claim here alleged.

2. Paragraph 8(a) of the revesting order (R. 45-46) prescribed and approved specifically the terms of the assumption agreement to be executed by respondent (R. 76-81). Pursuant to this direction, respondent did execute the assumption agreement on December 14, 1944 (Pl. Ex. 15, R. 76, 499, 1711).

So far as here pertinent, the assumption agreement provides that

"the undersigned [i.e., respondent] does hereby:

* * * * * * *

"2. Assume any and all outstanding current liabilities and obligations incurred by said Trustees and, without limitation thereto, any and all liabilities or obligations of the debtor in possession or said Trustees with respect to claims for personal injury or death, for loss or damage to property and generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or

operation of the debtor's properties by said Trustees, or their conduct of the debtor's business, including liabilities and obligations hereafter arising up to midnight December 31, 1944."

(R. 78, 1712-1713.)

The assumption agreement thus included "any and all liabilities and obligations with respect to claims of any character * * * arising out of the possession, use or operation of the debtor's properties by said Trustees, or their conduct of the debtor's business". The language could not have been broader. It requires no elaboration that plaintiff's claim arose from the trustees' "conduct of the debtor's business", since the filing of tax returns was a necessary incident of the conduct of the debtor's business.

(It should be added that respondent also assumed all federal tax liabilities of the trustees, R. 1716.)

3. Respondent contends, nevertheless, that the assumption agreement did not embrace the present claim (RB 96-99). But its arguments cannot prevail against the clear language of the agreement.

(a) In the first place, respondent says that the agreement applied only to "recognized debts" (RB 97). But the agreement contains no such qualification; on the contrary, it covers claims "heretofore or hereafter asserted". If, for instance, a negligence claim arose against the trustees on the day before the agreement was signed, it did not constitute a recognized debt; still it was clearly assumed by respondent.

(b) Respondent says next (RB 97) that the bankruptcy court had exclusive jurisdiction to approve the claim, and that the assumption agreement did not eliminate the necessity of the bankruptcy court's approval. But this argument has nothing to do with the breadth of the assumption agreement. It does not negate respondent's assumption of liability for the claim here involved. Instead, it contends

that respondent's liability should have been asserted in the bankruptcy forum rather than in an ordinary court of equity. The problem thus raised is one of jurisdiction and will be dealt with later (C, *infra*).

(c) Respondent further says (RB 97-98) that the assumption agreement did not embrace *all* obligations of the trustees because the revesting order described the agreement as covering "certain obligations" of the trustees (R. 46), only those "valid and outstanding" (R. 50). But the obligation here asserted was a valid one; and the word "certain" was justified because respondent did not assume all obligations of the trustees, but only those arising from their conduct of the debtor's business and only those incurred up to December 31, 1944.

(d) Respondent next says that there existed no obligation on the part of the trustees because they could incur no liability without approval of the court (RB 98). That argument has been answered (A, *supra*).

(e) Respondent finally refers (RB 98) to the provision of the Bankruptcy Act, § 77(e)(3), 11 U. S. C., § 205(e)(3), that every plan of reorganization must provide for the payment of all costs of administration.* But the present claim is not a "cost of administration". It is at most an "expense of administration" in the same sense in which tort claims arising from the operation of the debtor's business are expenses of administration,** and hence does not fall within § 77(e)(3). However, the point is academic, since respondent's reorganization plan did expressly provide for respondent's assumption of all "current liabilities and obliga-

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* The Bankruptcy Act, § 77(e), provides, so far as here pertinent:

"* * * the judge shall approve the plan if satisfied that: * * * (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge * * *"

** 6 *Collier on Bankruptcy* (14th Ed., 1947), § 10.06, pp. 3462-3.

based on that agreement, was four years, and had clearly not expired when this action was commenced.

2. *The defense of laches* (RB 108) is far-fetched indeed. Plaintiff was in the hands of officers and counsel who received their pay from respondent; the charge that they unduly delayed the suit comes with poor grace from this respondent. But there was no undue delay; on the contrary, our stockholders' suit in New York and the present action were commenced in July and October 1946, one year after the filing of the 1944 returns and at a time when there was not even an assurance that there would be any tax savings whatever. (The tax settlement with the Government was on August 13, 1947.)

Nor was respondent prejudiced by the alleged delay. The reorganization closed on March 28, 1946 (Def. Ex. 32, R. 1219, 2013). Respondent admits that plaintiff had time until that date to present its claim (RB 95); and by that time, its new securities had been outstanding since January 1945. There is no evidence, and respondent does not even contend, that in the additional three months until the commencement of the stockholders' action, or in the further four months until the institution of this suit, it changed its position to its detriment. On the contrary, it maintained the $10,100,000 tax reserves on its books, thus notifying the world of the insecurity of its position.

3. *The defense of estoppel* (RB 108) is predicated upon the alleged prior consolidated return practice of the Western Pacific group. But this is just giving a new name to the same argument which has been amply rebutted in this and in our main brief.

Dated, New York, N. Y., December 12, 1952.

Respectfully submitted,

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